FEDERAL COMMUNICATIONS COMMISSION REPORTS

DECISIONS AND REPORTS OF THE FEDERAL COMMUNICATIONS COMMISSION OF THE UNITED STATES

Volume 93, Second Series

November 1, 1983–January 31, 1984

REPORTED BY THE COMMISSION

(Digests have been added for convenience, but are not part of the decisions or reports.)

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FEDERAL COMMUNICATIONS COMMISSION

November 1, 1983–January 31, 1984

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*Commissioner Fogarty's term expired June 30, 1983.
**Commissioner Jones resigned May 31, 1983.
***Commissioner Sharp's term expired June 30, 1983
****Commissioner Patrick sworn in December 2, 1983.

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ERRATA

Page 1075, para. 18—The last sentence is revised as follows:

"For example, since subscription TV decoders receive an over-the-air signal, the decoder must include an isolation switch."

Page 1082—The first paragraph of Section 15.606(b) is corrected to read:

—The text of the first paragraph of § 15.606(b) of the adopted rules, Appendix C, is corrected to read as follows:

(b) A transfer switch is not required for a TV Interface Device that, when connected, results in the user no longer having any need to receive standard over-the-air broadcast signals via a separate antenna. A transfer switch is also not required for devices that are intended to be used as accessories to an approved TV Interface Device.

In the former situation, the text of the label required by § 15.622 shall be replaced with the following statement: "

In the latter situation, the text of the label required by § 15.622 shall be replaced with the following statement: "

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TABLE OF ABBREVIATIONS

AM—Amplitude Modulation.
Act—Communications Act of 1934, as amended, 47 U.S.C. 151 et seq.
Amer. B/cing Cos.—American Broadcasting Companies.
Amer. Tel. & Tel.—American Telephone and Telegraph.
Assn—Association.
B/c—Broadcast.
B/cers—Broadcasters.
CATV—Community Antennae Television.
Col. B/cing Sys.—Columbia Broadcasting System.
ComSat Corp.—Communications Satellite Corporation.
Co.—Company.
Corp.—Corporation.
CP—Construction Permit.
FCC—Federal Communications Commission.
FR—Federal Register.
FM—Frequency Modulation.
Inc.—Incorporated.
ITT World Comm.—International Telephone and Telegraph World Communications.
National B/cing Cos.—National Broadcasting Companies.
NPRM—Notice of Proposed Rulemaking.
Rule—Rules and Regulations of the Federal Communications Commission.
Satellite Act—Communications Satellite Act, 47 U.S.C. 701 et seq. (1962).
TV—Television.
UHF—Ultra High Frequency.
VHF—Very High Frequency.

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Affidavit Neef for
Perjury
Oath

Commission amended procedural rules to provide for use of unsworn declarations under penalty of prejury as substitutes for sworn declarations or affidavits. New provision is not applicable to depositions, oaths of office, or oaths required to be taken before specified official, other than a notary public.
–*Amendment of Part 1*

FCC 83-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part 1 of the Commission's Rules to Provide for the Use of Unsworn Declarations under Penalty of Perjury

ORDER

(Adopted: February 10, 1983 Released: February 17, 1983)

BY THE COMMISSION:

1. The Commission, *sua sponte*, has examined its Rules and Regulations requiring verification of documents filed with the Commission through the use of sworn declarations or affidavits.[1] The Commission finds that this requirement is not in agreement with 28 U.S.C. §1746, which provides that:

> Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury . . ..

2. Accordingly, the Federal Communications Commission hereby

[1] *See, e.g.*, 47 C.F.R. §§1.106, 1.223, 1.229, 73.3525, and 73.3584.

amends its rules to permit the use of unsworn declarations under penalty of perjury as permissible substitutes in those instances where the Commission's rules require sworn declarations or affidavits. Unsworn declarations under penalty of perjury, however, may not be used in connection with: (1) depositions, (2) oaths of office, or (3) oaths required to be taken before a specified official other than a notary.

3. Consistent with the amendment described above, Rule 1.721 also is modified to provide for the use of unsworn declarations under penalty of perjury in the format for formal complaints filed pursuant to Section 208 of the Communications Act.

4. The Commission has formulated the amendment described herein pursuant to the statutory provisions of 28 U.S.C. §1746. Therefore, compliance with the notice and comment provisions of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. §§553(b)(B). Further, the notice and comment and effective date provisions do not apply to these amendments to our procedural rules. *See* 5 U.S.C. §§553(b)(B), 553(d).

5. Authority for these rules is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 303(r). Accordingly, IT IS ORDERED That, effective immediately, §1.16, 47 C.F.R. §1.16, is added and §1.721 of the Commission's rules, 47 C.F.R. §1.721, is amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

Anew Section 1.16, 47 C.F.R. §1.16, is added after 47 C.F.R. §1.14, as follows:

"§1.16Unsworn declarations under penalty of perjury in lieu of affidavits.

Any document to be filed with the Federal Communications Commission and which is required by any law, rule or other regulation of the United States to be supported, evidenced, established or proved by a written sworn declaration, verification, certificate, statement, oath or affidavit by the person making the same, may be supported, evidenced, established or proved by the unsworn declaration, certification, verification, or statement in writing of such person, except that, such declaration shall not be used in connection with: (1) a deposition, (2) an oath of office, or (3) an oath required to be taken before a specified official other than a notary public. Such declaration shall be subscribed by the declarant as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)

(Signature)"."

47 C.F.R. §1.721(b) is amended by removing the form of verification contained therein and inserting, in its place, a new form of verification as follows:

"Form of Verification

I declare under penalty of perjury that I am the complainant (or one of the complainants) in the above-entitled matter; that I have read the foregoing complaint; and that the matter and things therein stated are true and correct. Executed on (date).

(Signature)".

Reimbursement Agreement
Settlement

Review Board affirms approval of settlement agreement in broadcast proceeding but sets aside ALJ's approvals of specific reimbursement amounts, in light of 1982 amendment of Section 311(c) of the Communications Act, and dismisses appeal asking Board to reduce a party's reimbursement. Such disputes are no longer in the Commission's purview but rather are a matter for local law determination.
–Bison City TV 49 Limited Partnership
BC Docket No 81–59

FCC 83R–17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BISON CITY TELEVISION 49 LIMITED PARTNERSHIP Buffalo, New York	BC Docket No 81–59 File No. BPCT–791130LC
UNIFIC BROADCASTING COMPANY OF NEW YORK Buffalo, New York	BC Docket No. 81–60 File No. BPCT–791130LD
For a Television Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: March 11, 1983; Released: March 16, 1983.)

BY THE REVIEW BOARD:

1. By Memorandum Opinion and Order, FCC 82M–3951, released December 13, 1982, presiding Administrative Law Judge (ALJ) Walter C. Miller granted a joint request for approval of a settlement agreement in this proceeding, under which Bison City's application was granted, Unific's application was dismissed with prejudice, and the ALJ specifically approved reimbursement to Unific of $143,539.98 in legitimate and prudent expenses for preparing, filing, and prosecuting its application and an "additional conditional reimbursement" of $93,988.09 to Unific in the event that it is "found liable" in that amount to three former applicants under a prior settlement agreement with them. By Memorandum Opinion

and Order, FCC 83M–64, released January 10, 1983, the ALJ denied Bison City's reconsideration petition, which challenged the propriety of the additional conditional reimbursement, but "as a courtesy" clarified how Unific might be "found liable" for the additional reimbursement. Now before the Review Board is an appeal by Bison City, in which it again challenges the additional conditional reimbursement to Unific, as well as the ALJ's clarification. Unific opposes the appeal, and Bison City has replied.

2. In FCC 82M–3951, *supra*, the ALJ analyzed the proffered settlement agreement under the reimbursement standards that obtained prior to amendment of the reimbursement provisions of Section 311(c) of the Communications Act by Congress. See Communications Amendments Act of 1982, P.L. 97–259, 96 Stat. 1087, September 13, 1982. While this was done at the request of the parties, FCC 82M–3951, *supra* at note 1, we recently held in *Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982),[1] a decision released two days after the ALJ's order and of which he could not have been aware, that the Commission is bound by the modified terms of Section 311(c) in these matters. While the parties may stipulate applicable law in their agreements, we are obliged to apply the Communications Act as amended. Under the 1982 amendments, it is no longer appropriate for the Commission to approve specific reimbursement amounts in settlement agreements because the prohibition against excessive reimbursement has been deleted and the new standard for approval focuses only on whether the agreement is consistent with the public interest, convenience, and necessity and whether any party to the agreement filed its broadcast application for the purpose of reaching or carrying out such agreement. *Texas Television, Inc.*, *supra* at 1270.

3. In the instant case, there is no appearance or assertion that Unific's application was filed for an improper purpose, nor any argument that the parties' joint settlement agreement is not consistent with the public interest. All we have is Bison City's belief that Unific's reimbursement under the agreement should be limited to an amount that is smaller than the maximum ($250,000) that the parties themselves specified. As we indicated in paragraph 2, *supra*, such matters are no longer within the Commission's purview. We agree with the ALJ that enforcement—and, we would add, interpretation—of the Bison City-Unific settlement contract has now become a local law matter to be litigated outside of the Commission's processes. FCC 83M–64, *supra* at note 6. For these reasons, we will dismiss Bison City's appeal as moot and set aside the ALJ's specific reimbursement approvals in FCC 82M–3951 and clarification thereof in FCC 83M–64. What remains is our *sua sponte* affirmance, under *Texas Television, Inc.*, *supra*, of the ALJ's grant of the parties' joint

[1] *Review denied*, FCC 83–95, released March 9, 1983.

request for approval of their settlement agreement, as well as the grant of Bison City's application and the dismissal of Unific's application.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Bison City Television 49 Limited Partnership on January 20, 1983 IS DISMISSED as moot;

5. IT IS FURTHER ORDERED, That FCC 82M-3951, released December 13, 1982, IS AFFIRMED, except for the ordering clauses specifically approving reimbursement amounts, which ARE SET ASIDE;

6. IT IS FURTHER ORDERED, That FCC 83M-64, released January 10, 1983, IS SET ASIDE.

7. IT IS FURTHER ORDERED, That the petition for leave to amend and to accept supplement to joint petition for approval of settlement agreement, filed by Bison City Television 49 Limited Partnership on January 26, 1983, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Personal Attack, Broadcaster Obligations Regarding

Application for review denied. In order to establish a personal attack for purposes of the personal attack rule, the complainant must establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an "identified" person or group.
–*Brother Rama Behera*

FCC 83–83

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of

Brother Rama Behera and Disciples of the Lord Jesus

against

WCCO Television, Inc.

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on September 24, 1982, by Brother Rama Behera and Disciples of the Lord Jesus (hereinafter complainants),[1] of the Broadcast (now Mass Media) Bureau's ruling of August 25, 1982.[2] On October 15, 1982, WCCO Television Inc. licensee of WCCO-TV, Minneapolis, Minnesota, filed an Opposition to the Application for Review.

The Complaint

2. The complaint was based upon the station's broadcast and rebroadcast of the program "Thy Will Be Done" on January 3, 1980, and April 1, 1981, respectively. According to WCCO-TV, "Thy Will Be Done" was a news documentary about religious cults. The contents of this broadcast are set forth in the Bureau's ruling.

3. In their original complaint filed June 4, 1980, complainants claimed that by broadcasting "Thy Will Be Done" the licensee had

[1] Pastor Grant Kemp filed both the initial complaint and the subsequent amended complaint on behalf of Brother Behera and his church, Disciples of the Lord Jesus.
[2] A copy of that ruling is attached (Appendix).

violated the Fairness Doctrine. The initial complaint was denied by the Bureau in its letters of September 16, and October 20, 1980, and April 21, 1981, because complainants failed to establish a *prima facie* Fairness Doctrine complaint. In response to the Bureau's denial of the original complaint, complainants filed a "Petition for Reconsideration,"[3] which raised new matters, including a complaint under the personal attack rule. The Bureau treated the "Petition" as a new complaint.

4. Complainants alleged that WCCO-TV's broadcast and rebroadcast of the program contained personal attacks reflecting upon the honesty, character, integrity or the like personal qualities of Brother Behera and his church. They argued that during the program they were accused of "*DECEPTIVE PRACTICES . . . BRAINWASHING AND HUMAN INDECENCY . . .*." (Emphasis in original.) They defined the controversial issue of public importance during which the alleged personal attack occurred as "deprogramming." They asserted that WCCO-TV failed to meet its obligations under the personal attack rule (Section 73.1920(a) of the Commission's rules) to notify them within seven days of the broadcast, provide a tape or accurate summary of the broadcast, and present them with an opportunity to reply.

5. The licensee filed a response to the "Petition for Reconsideration" on September 21, 1981. In its response, the licensee maintained that complainants had not established prima facie violations of the Fairness Doctrine and the personal attack rule. Furthermore, it denied that a personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. The licensee argued that the personal attack rule is solely directed at words that relate to the personal credibility or moral turpitude of an individual and, therefore, does not encompass words that are merely derogatory.

6. Because complainants' petition raised a new personal attack complaint, the Bureau requested the licensee's further comments in a letter dated December 7, 1981. On February 9, 1982, the licensee filed a response to the Bureau's inquiry. The licensee maintained that "Thy Will Be Done," one of several WCCO-TV prime time news documentaries, did not deal with "controversial issues of public importance" within the meaning of the Fairness Doctrine. The licensee described the subject program as "a 90-minute prime time examination of mind control as related to religious cults." It asserted

[3] In its August 25 ruling the Bureau stated:

> On May 18, 1981, you filed a brief one page pleading that you characterized as a "Petition for Reconsideration" and in which you stated you would file, "[u]nder separate cover, new facts, additional information and further argument . . ." On June 29, 1981, you filed a "Petition for Reconsideration," which raised new matters including a personal attack complaint.

that the initial broadcast of "Thy Will Be Done" was followed by a 120-minute "Town Meeting" that featured several persons of diverse viewpoints on the subject matter of the documentary. It stated that the 1981 rebroadcast of the program was followed by a half-hour program that provided time for certain groups, who had objected to some of the content of the original broadcast, to respond to the material in the program. The licensee also stated that in the fall of 1979, and as the program was being produced, efforts were made to interview Brother Behera, and that prior to the original broadcast in 1980, an invitation was extended to him to participate in the "Town Meeting" that followed the broadcast. The licensee further maintained that prior to the 1981 rebroadcast, an invitation was extended to Brother Behera to participate in the half-hour program that followed it. However, the licensee stated, Brother Behera declined all offers made to him. The licensee asserted that, (1) "deprogramming" was not the focus of the program; (2) the issue allegedly discussed was not defined sufficiently; and (3) "deprogramming" was not a controversial issue of public importance within the meaning of the Fairness Doctrine at the time of the subject broadcasts.

7. Even though the licensee denied that any personal attacks occurred within the meaning of the rule, it claimed that the three affirmative requirements of the personal attack rule, notifying the person attacked within seven days of the broadcast, providing a tape or accurate summary of the broadcast, and offering a reasonable opportunity to reply over its facilities, had been substantially satisfied.

8. On March 31, 1982, complainants filed a "Reply" to the licensee's response, in which they denied the licensee's claims that "deprogramming" was not a controversial issue of public importance at the time of the broadcast, and that "deprogramming" was not the subject of the program. They argued that the remarks made during this program constituted an attack upon the honesty, integrity or like personal qualities of Brother Behera and his church. Finally, they denied the licensee's assertion that it had complied with the three requirements of the personal attack rule.

Bureau Ruling

9. In its ruling, the Bureau denied the complaint on several grounds. The Bureau held that there was no need to determine whether "deprogramming" was a controversial issue of public importance at the time of the broadcast since, even if it was, the Bureau could not conclude that the licensee was unreasonable in maintaining that "Thy Will Be Done" did not contain personal attacks against Brother Behera and his church. The Bureau found that complainants had made an unsubstantiated allegation that the deceptive practices, brainwashing and human indecency discussed in the program was understood by the audience as involving Brother

Behera and his church. Citing *Theodore C. Salveter IV, Esq.*, 51 FCC 2d 73 (B/c Bur. 1975), the Bureau stated, "It is not sufficient for purposes of the personal attack rule for an individual to claim that he or she knows that statements made on a program referred to him or her." Consequently, the Bureau held that the licensee was not acting unreasonably when it found that the comments contained in the subject program did not specifically identify Brother Behera and his church for purposes of the personal attack rule.

10. In addressing the issue of whether the licensee complied substantially with the three affirmative requirements of Section 73.1920, the Bureau relied on *L. E. White*, Jr., 11 FCC 2d 687 (1968). There the Commission ruled that in the case of a personal attack, when an offer of time to the complainant is still outstanding, Commission action is not warranted. The Bureau noted that, based on the record, Brother Behera had not accepted the licensee's offers of its broadcast facilities. In view of these circumstances and given Brother Behera's clear awareness of the available opportunity to reply, the Bureau concluded that the licensee was not required to issue a more specific invitation to Brother Behera and his church and, therefore, that the licensee had sought to provide Brother Behera and his church with time to respond.

Application for Review

11. In its Application for Review complainants reiterate their complaint. They allege that since the Bureau did not find it necessary to determine whether "deprogramming" was a controversial issue of public importance in its ruling, it must presume for the purposes of this Application for Review that the subject issue is a controversial issue of public importance. They take issue with the Bureau's holding that the comments in "Thy Will Be Done" did not specifically identify Brother Behera and his church. Citing *Rev. Daniel S. Hamilton*, 50 FCC 2d 330, 331 (B/c Bur. 1974), they argue that what is necessary in order for a person or group to be "identified" in a program is that the identification of the party allegedly attacked be such that "the licensee could reasonably be expected to know exactly who or what finite group is 'best able to inform the public of the contrasting viewpoint.'" Complainants predicate their argument that Brother Behera and his church were "identified" in the subject program, on the fact that efforts to interview him were made and that an invitation was extended to him to participate in the half-hour program that followed "Thy Will Be Done." Complainants claim that the attacks on them were by way of "guilt by association," stating that "while certain direct references were made about Brother Rama and the Disciples, the program 'Thy Will Be Done' taken as a whole and given the manner in which it was edited, associated the complainants with the reprehensible conduct of religious cults, such as that of Jim Jones in Guyana."

12. Complainants disagree with the Bureau's holding that "even if a personal attack was broadcast, . . . the licensee substantially complied with the three affirmative obligations of Section 73.1920." They maintain that after the rebroadcast of the subject program WCCO-TV did not notify them, did not supply to them a script or tape of the program, and did not offer them a reasonable opportunity to respond. Complainants deny the licensee's claim that because the April 1, 1981 program was essentially a rebroadcast of the January 3, 1980 program, it was absolved from its three affirmative obligations under the personal attack rule. They also argue that even "if precedent is reversed and WCCO-TV is deemed to have complied with those requirements because the program was a rebroadcast, WCCO-TV still failed to offer the complainants a reasonable opportunity to respond. They assert that "the reasonableness of the licensee's conduct must be determined in light of the guilt-by-association nature of the personal attack and the fact the program was a rebroadcast."

Opposition to Application for Review

13. In its opposition the licensee maintains that the Application for Review is "substantively devoid of merit." First, the licensee asserts that complainants "failed to demonstrate the unreasonableness of its judgment that the program 'Thy Will Be Done' did not present discussion on such an issue." Within this framework, the licensee contends that "deprogramming" was not the topic and focus of "Thy Will Be Done." Moreover, it argues that "deprogramming" is not and was not a controversial issue of public importance within the meaning of the Commission's rules. The licensee denies having made an attempt in the subject program to discuss the legality of deprogramming or the rights of either side to a deprogramming.

14. Secondly, the licensee questions the complainants' allegation that the Bureau erred in concluding that the comments in the subject program did not specifically identify the complainants. The licensee asserts that although "There is no question that the complainants were mentioned during the course of 'Thy Will Be Done,' . . . the point is that they were not the object of a direct attack on their character, honesty, integrity or similar personal qualities." According to the licensee the complainants' application contained no showing of any specific statements broadcast during the subject program "which directly referred to the complainants in particular *and* which constituted an attack on their character, honesty, integrity, or similar personal qualities." The licensee distinguishes this particular case from cases cited by the complainants on the ground that the commentator on "Thy Will Be Done" noted that there were "differences" as well as "similarities" between the various groups or cults. The licensee then notes that the Bureau determined in its

September 16, 1980 ruling on the first complaint, that the word "cult" does not constitute a personal attack.

15. Finally, the licensee asserts that "Notwithstanding the fact that 'Thy Will Be Done' did not deal with 'controversial issues of public importance,' and notwithstanding the fact that the program did not contain an attack on the character, honesty, integrity, or similar personal qualities of the complainant, WCCO-TV did, nonetheless, substantially comply with the three affirmative obligations of Section 73.1920 of the Rules. . . ." The licensee predicates its assertion of having complied with its personal attack obligations on the fact that the Bureau's ruling dealt solely with the *rebroadcast* of the subject program, which meant that complainants had already viewed the program. The station asserts that the complainants were "intimately familiar" with the program's contents, and were notified of WCCO-TV's plans to repeat it. Therefore, according to the licensee both the personal attack rule requirements to notify the party attacked and provide a tape or summary of the broadcast had in essence been satisfied. Furthermore, the licensee maintains it "made not one, but at least three, distinct offers of a reasonable opportunity for Brother Behera to reply to the alleged attack in the rebroadcast of 'They Will Be Done.'"

Discussion

16. Having carefully examined the pleadings before us, we cannot conclude that complainants have presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that in this case there is no need to determine whether "deprogramming" is a controversial issue of public importance since even if it is, we cannot conclude that "Thy Will Be Done" contained personal attacks against Brother Behera and his church. Within this framework, complainants made "an unsubstantiated allegation that the deceptive practices, brainwashing' and 'human indecency' discussed in the program, would be understood by the general public as involving Brother Behera and his organization." The burden is on complainants to establish that during the discussion of a controversial issue of public importance an attack was made upon the honesty, character, integrity or like personal qualities of an *identified* person or group. The complainants have made no persuasive argument to show the licensee was unreasonable in concluding that the personal attacks were not understood by the viewing audience as being directed against Brother Behera or his church. Although complainants allege that the "deceptive practices," "brainwashing" and "human indecency" discussed in the program were understood by the general public as involving Brother Behera and his church, they do not substantiate this allegation. Furthermore, complainants do not negate the fact that during the program various organizations were discussed

generally and that it was noted that there were *differences* among these organizations. Based upon the information before us, we cannot find that the licensee was unreasonable in concluding that during the discussion of "deceptive practices," "brainwashing" and "human indecency," Brother Behera and his church were not specifically identified.

17. Complainants also have failed to show that under the circumstances of this case the licensee's invitation to them to participate in the half-hour program that preceded the rebroadcast, in addition to WCCO-TV's previous efforts to interview complainants before the program was originally broadcast and its invitation to them to participate in the "Town Meeting" that followed the original broadcast, did not constitute a diligent effort by the licensee to provide complainants with time to respond. Complainants only make bare allegations as to the unreasonableness of the licensee's offers, describing WCCO-TV's offers as nothing more than an attempt "to cast Brother Rama with actors in a format he and the Disciples find repugnant, ..." Noting the invitations and citing, *L. E. White, Jr.*, supra, the Bureau concluded that given the facts of this case, and since Brother Behera was clearly aware that an opportunity to reply was available, the licensee's invitations were specific enough to satisfy its personal attack obligation to provide Brother Behera with opportunity to respond. In this instance, the crux of the matter is not whether the personal attack rule is applicable to the program "Thy Will Be Done," but that the licensee attempted unsuccessfully by letter, by telephone, and in person, both before the original broadcast and before the rebroadcast, to make its facilities available to complainants. Furthermore, the reasons given by complainants for rejecting every one of the licensee's offers was that they did not trust the media and that the format of the response time was unacceptable because of its "guilt-by-association" nature. Complainants provide no evidence to support their allegations. The personal attack rule requires nothing more from broadcast licensees than what WCCO-TV has already done. We agree with the Bureau that we cannot find the licensee unreasonable in this instance. Finally, we also agree with the Bureau that in view of Brother Behera's demonstrated familiarity with the contents of the first broadcast, the licensee was not unreasonable in concluding that it is was not necessary to provide a tape or summary of the program.[4]

18. Accordingly, in view of the above considerations, the Application for Review filed by complainants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[4] In this connection, we note that complainants purchased a tape of "Thy Will Be Done," from the licensee on May 18, 1981, well before their June 29, 1981 pleading. *See Trans America Broadcasting Corp.*, 8 FCC 2d 349 (1967).

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

August 25, 1982

IN REPLY REFER TO
8330-L
C6-1283(81)
C2-253
C3-810

Pastor Grant E. Kemp
Disciples of the Lord Jesus
1040 Forest Hills Drive S.W.
Rochester, Minnesota 55901

Dear Pastor Kemp:

This is in response to your complaint against station WCCO-TV, Minneapolis, Minnesota.[1]

On June 4, 1980, you filed a complaint concerning an alleged Fairness Doctrine violation by the licensee. In our letters of September 16 and October 20, 1980, and April 21, 1981, we denied your Fairness Doctrine complaint because you did not establish a *prima facie* case. On May 18, 1981, you filed a brief one page pleading that you characterized as a "Petition for Reconsideration" and in which you stated you would file, "[u]nder separate cover, new facts, additional information and further argument. . . ." On June 29, 1981, you filed a "Petition for Reconsideration," which raised new matters including a personal attack complaint. In our December 7, 1981 letter of inquiry to the station we informed it that your "petition" was being treated as a new complaint. It is this new complaint that we now consider.

You state that WCCO-TV's broadcast of the program "Thy Will Be Done" on January 3, 1980, and its rebroadcast of this program on April 1, 1981, contained personal attacks reflecting upon the honesty, character, integrity or like personal qualities of Brother Rama Behera and his church, Disciples of the Lord Jesus. You allege that during the program Brother Behera and his church were accused of *"DECEPTIVE PRACTICES . . . BRAINWASHING and HUMAN INDECENCY . . . ."* (Emphasis in original.) You define the controversial issue of public importance, during which the alleged personal attack occurred, as "deprogramming." You allege that WCCO-TV has failed to meet its obligations under the Personal Attack Rule (Section 73.1920(a) of the Commission's rules) by failing to notify you within seven days, provide a tape or accurate summary of the broadcast, and present you with an opportunity to reply. In its September 21, 1981 response to your June 29 pleading,[2] the licensee asserts that you have not established a *prima facie* violation of the

[1] Because of the voluminous correspondence in this case and in order to assure clarity, we have attached an Appendix that provides a chronological summary of this correspondence.

[2] The licensee argues that, if considered to be a Petition for Reconsideration, your June 29 pleading is late and does not provide any additional information. Since the petition is being treated as a new complaint, we need not discuss further the licensee's arguments as to why your petition was procedurally defective. Also, we need not discuss your reply of October 14, 1981, since it comments only on the licensee's pleadings regarding the procedural aspects of your complaint.

Fairness Doctrine and Personal Attack Rule. Furthermore, it denies that a personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. The licensee maintains that the Personal Attack Rule is solely directed at words that relate to the personal credibility or moral turpitude of an individual and, therefore, does not include words that are merely derogatory.

On December 7, 1981, we informed WCCO-TV that your pleadings of May 18 and June 29, 1981, raised a new personal attack complaint, and asked it to comment on its merits. On February 9, 1982, WCCO-TV filed its response. Initially, the licensee explains that the broadcast and rebroadcast of the program "Thy Will Be Done" were part of several prime time news documentaries that were broadcast by WCCO-TV beginning in December 1979 and are still continuing to the present. It maintains that "these documentaries generally did not and do not deal with 'controversial issues of public importance' within the meaning of the Fairness Doctrine." The licensee states that the program "'Thy Will Be Done' was a 90-minute prime time examination of mind control as related to religious cults." It maintains that "[t]he January 3, 1980 broadcast was followed by a 120-minute 'Town Meeting' . . . [that] featured seven or eight persons of diverse viewpoints [on] the subject matter of the documentary." Further, the licensee states that "Thy Will Be Done" was rebroadcast on April 1, 1981, followed by a half hour program that provided time for particular groups, which had objected to some of the content of the original broadcast, to respond to the material in the program. The licensee also states that (1) "in the Fall of 1979 and as [the program] was being produced," efforts were made to interview Brother Behera, and (2) prior to the original broadcast, an invitation was extended to him to participate in the "Town Meeting" that followed the rebroadcast. Furthermore, prior to the rebroadcast an inviation was extended to him to participate in a half hour program that followed it. However, the licensee states that Brother Behera declined all offers made to him by the station. Moreover, the licensee contends that:

> . . . first, "deprogramming" was not the topic or focus of "Thy Will Be Done," second, the issue allegedly discussed has not been defined with any precision whatever, and third, "deprogramming" was not a "controversial issue of public importance" within the meaning of the Fairness Doctrine.

The licensee asserts that no personal attack was made upon the honesty, character, integrity or like personal qualities of Brother Behera and his church. Even if personal attacks were broadcast, the licensee claims that it substantially satisfied the three affirmative requirements of the Personal Attack Rule—it notified the person attacked within seven days, provided a tape or accurate summary of the broadcast, and offered a reasonable opportunity to reply over its facilities.

On March 31, 1982, you filed a "Reply" to the licensee's February 9, 1982 response in which you deny the licensee's claims that: (1) the issue you defined is not a controversial issue of public importance; and (2) it was not the subject of the program. Since you believe that during the program there was a discussion of a controversial issue of public importance, you assert that the remarks made during this program constituted an attack upon the honesty, integrity or like personal qualities of Brother Rama Behera and the Disciples of the Lord Jesus. Finally, you deny the licensee's assertion that it has complied with the three requirements of the Personal Attack Rule.

Discussion

The Personal Attack Rule is a particularization of the Fairness Doctrine.[3] The

[3] In your "Petition for Reconsideration" you do not contend that the broadcasts of "Thy Will Be Done" constituted violations of the Fairness Doctrine. Nor do you deny that the licensee made the aforementioned offers to Brother Behera. Thus,

Fairness Doctrine requires a station to present controversial issues of public importance and to afford reasonable opportunity for the discussion of contrasting viewpoints in its overall programming when it broadcasts one side of such an issue. The Personal Attack Rule is contained in Section 73.1920 of the Commission's rules, and provides in pertinent part:

> (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group, attacked:
>
> (1) Notification of the date, time and identification of the broadcast;
>
> (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
>
> (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

Personal attacks are not prohibited. If a licensee airs a personal attack, it must notify and afford an opportunity for response to the individual or group attacked. The licensee is not required to apologize or make restitution, since the Personal Attack Rule is designed to ensure the public's right to know, rather than redress any loss allegedly suffered by the attacked individual or group. The primary distinction between the requirements of the Fairness Doctrine and those of the Personal Attack Rule is that in the case of a personal attack the licensee is obligated to offer an opportunity to respond to the particular person or group attacked. If the complaint involves a Fairness Doctrine violation the licensee is required to afford an oppurtunity for the presentation of contrasting viewpoints by *any* spokesperson[s] that the licensee reasonably and in good faith chooses.

In codifying the personal attack principle, with its more specific requirements on the licensee, the Commission relied on the fact that in the case of personal attacks there is an identified person or group, which is vitally affected and best able to inform the public of the contrasting viewpoint. *In re Amendment of Part 73 of the Rules*, 8 FCC 2d 721, 723 (1967). In this context, for the rule to apply, the group allegedly attacked must be such that the licensee could reasonably be expected to know exactly who or what finite group is best able to inform the public of the contrasting viewpoint. This is necessary so that the licensee will be able to comply with the rule's affirmative obligation to transmit to that person or group the requisite information and offer to respond. Thus, the licensee is called upon to make reasonable, good faith judgments on the facts of each situation as to whether the group or person is identified sufficiently to come within the rule. The Commission's role is not to substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

As noted above, the Personal Attack Rule applies only to broadcasts that discuss one side of a controversial issue of public importance. However, in this case there is no need to determine whether "deprogramming" is a controversial issue of public importance since, even if it is, we cannot conclude that "Thy Will Be Done" contained personal attacks against Brother Behera and his church. Within this framework, you make an unsubstantiated allegation that the "deceptive practices, brainwashing" and "human indecency," discussed in the program, would be understood by the general public as involving Brother Behera and his organization. It is not sufficient for

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even if "deprogramming" is a controversial issue of public importance, the record indicates that not only did the station make the offers to Brother Behera for an opportunity to reply, but other groups did in fact appear on WCCO-TV to present contrasting views.

purposes of the Personal Attack Rule for an individual to claim that he or she knows that statements made on a program referred to him or her. *Theodore C. Salveter IV, Esq.*, 51 FCC 2d 73 (B/c Bur. 1975). Consequently, since you have not provided us with information to the contrary, we cannot find the licensee unreasonable in its determination that the comments contained in "Thy Will Be Done," do not specifically identify Brother Behera and his church for purposes of the Personal Attack Rule.

Furthermore, even if a personal attack was broadcast, we believe the licensee substantially complied with the three affirmative obligations of Section 73.1920 to notify the party attacked, to furnish a script or tape and to offer a reasonable opportunity to reply. The licensee states that the first two requirements were satisfied because (1) the complaint was based solely on the rebroadcast; (2) Brother Behera was notified that the program complained about would be repeated; and (3) Brother Behera, as evidenced by his continual complaining about the program, in detail for over a year, was already fully conversant with the program. As to the last requirement, the licensee maintains that not only were efforts made to interview Brother Behera prior to the original broadcast and an invitation extended to him to participate in the "Town Meeting" that followed this broadcast, but an invitation was also extended to him to participate in the half hour program that followed the rebroadcast, which provided response time for those groups that had objected to some of the content of the original broadcast. Furthermore, upon viewing this half hour program we noted that each of the participating groups were alloted eight minutes of uninterrupted, unedited time to discuss any parts of the program to which they objected. In this context, we believe the Commission's decision in *L. E. White, Jr.*, 11 FCC 2d 687 (1968), applies. The Commission stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time to Reverend Hargis to respond to the broadcast in question." As we mentioned above, the record here shows that you did not accept the licensee's offers of its broadcast facilities. Under these circumstances, and especially given your clear awareness that an opportunity to reply was available, we conclude that the licensee was not required to issue more specific invitations to you and, therefore, that it diligently sought to provide you with time to respond. *Cf. International Brotherhood of Teamsters (NBC)*, 59 FCC 2d 1317 (B/c Bur. 1976). Moreover, it should be noted that the licensee has discretion in this area, and you have not shown that the licensee's offer of five minutes of uninterrupted response time was unreasonable in these circumstances. Finally, we agree with the licensee that in view of your demonstrated familiarity with the contents of its first broadcast, compliance with *Trans America Broadcasting Corp.*, 8 FCC 2d 349 (1967), which requires that a tape, transcript, or summary of the attack physically accompany the offer of reply time, was not required in this case.

In view of the foregoing, no further action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of public notice of this letter (see Commission's rule 1.4(b)(2)) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

APPENDIX

Date of Document	
February 10, 1980	Letter from Disciples of the Lord Jesus to Chairman Ferris.
February 13, 1980	Letter from Pastor Kemp to President Carter.
March 17, 1980	Letter from Chairman Ferris to Pastor Kemp.
March 21, 1980	Letter from Pastor Kemp to President Carter.
April 24, 1980	Letter of information from Bureau to Pastor Kemp regarding his letter to Chairman Ferris.
June 4, 1980	Complaint enclosing: – January 10, 1980: Letter from Pastor Kemp to licensee. – February 25, 1980: Letter from licensee to Pastor Kemp. – March 5, 1980: Letter from Pastor Kemp to licensee.
September 16, 1980	Letter from Bureau to Pastor Kemp.
October 3, 1980	Letter from Pastor Kemp to Bureau.
October 20, 1980	Letter from Bureau to Pastor Kemp.
March 25, 1981	Letter from Pastor Kemp to Bureau complaining about rebroadcast.
April 21, 1981	Letter from Bureau to Pastor Kemp determining that no further action is warranted.
May 18, 1981	Letter from Pastor Kemp to Bureau stating Petition for Reconsideration "is hereby made and submitted."
June 29, 1981	Pleading entitled *Petition for Reconsideration.*
July 27, 1981	Letter from licensee to Bureau confirming extension of time.
July 27, 1981	Letter from licensee to Pastor Kemp enclosing copy of letter sent to Bureau confirming extension of time.
August 20, 1981	Letter from licensee to Bureau confirming second extention of time.
September 9, 1981	Letter of licensee to Bureau confirming third extension of time to him.
September 21, 1981	Licensee response to June 29 pleading.
September 24, 1981	Letter from Pastor Kemp to Bureau confirming grant of extension of time.

October 14, 1981	Pastor Kemp's *Reply* to licensee's response.
December 7, 1981	Letter of inquiry to station.
December 7, 1981	Letter from Bureau to Pastor Kemp enclosing a copy of letter of inquiry sent to the station.
December 29, 1981	Letter from licensee confirming the grant of an extension of time.
December 31, 1981	Letter from licensee noting that a copy of the December 29, 1981 letter, which had not been sent to Pastor Kemp, was being sent.
February 8, 1982	Licensee's response to our December 7, 1981 letter of inquiry enclosing: - December 18, 1979: Letter from licensee to Brother Behera. - December 28, 1979: Letter from Brother Behera to licensee. - January 7, 1980: Letter from Brother Behera to licensee. - September 17, 1980: Letter from licensee to Brother Behera. - October 2, 1980: Letter from licensee to Brother Behera. - October 15, 1980: Letter from Brother Behera to licensee. - February 9, 1981: Letter from licensee to Brother Behera. - February 28, 1981: Letter from Brother Behera to licensee.
February 9, 1982	Letter from Pastor Kemp confirming the grant of an extension of time.
March 31, 1982	Pastor Kemp's *Reply* to licensee's response.

Authority, Delegation of, by FCC
CATV CARS Band
Review, Application for
Zoning

Application for review of grant of CARS station construction permit denied. Bureau Chief did not exceed delegated authority in applying clear precedent. CARS licensee eligibility not jeopardized by disputed application of local zoning laws.
–*Cable Dallas, Inc.*

FCC 83-86

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
CABLE DALLAS, INC. Dallas, Texas	CAR-19062-01 CARS Station WGZ-478
Application for Review	

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983; Released: March 14, 1983)

BY THE COMMISSION:

Introduction

1. On June 9, 1982, Warner Amex Cable Communications, Inc. (hereinafter "Warner Amex"), operator of a cable television system serving Dallas, Texas, pursuant to Section 1.115 of the Commission's Rules, filed an "Application for Review" of the action taken by the Chief of the Cable Television Bureau pursuant to delegated authority in *In re Cable Dallas, Inc.* (Dallas, Texas) (adopted May 18, 1982) (hereinafter *"Cable Dallas I"*).[1] Warner Amex's application is opposed by Cable Dallas, Inc. (hereinafter "Cable Dallas"), operator

[1] Simultaneously with its "Application for Review," Warner Amex filed a "Request for Stay" of the Bureau Chief's decision in *Cable Dallas I, supra*. This request was denied by the Bureau Chief, pursuant to delegated authority. *In re Cable Dallas, Inc.* (adopted July 26, 1982).

of cable television systems in Dallas, Texas and permittee of Cable Television Relay Service (CARS) Station WGZ–478, Dallas, Texas.[2] Warner Amex has replied.

2. On October 21, 1980, Video International Productions, Inc. d/b/a Satellite Television Service (hereinafter "VIP") filed an application for a construction permit (CAR–15446–01) to construct a new CARS station in Dallas, Texas. This application was granted on May 12, 1981. *In re Video International Productions, Inc.* (Dallas, Texas) (adopted May 12, 1981). In doing so, the Chief of the Cable Television Bureau found, *inter alia*, ". . . that VIP is the operator of cable television systems and is eligible for CARS licensing," *id.*, pursuant to Sections 76.5(a) and 78.11 of the Rules. VIP served several clusters of apartment buildings in Dallas, each of which is composed of buildings not under common ownership, management, or control, serving more than 50 subscribers. Each cluster is interconnected with cable transmission lines. Therefore, each cluster of interconnected buildings constitutes a separate cable system. However, VIP subsequently sold its cable television systems to Cable Dallas and surrendered its CARS station construction permit for cancellation. *See* Cable Television Actions Report No. 2547, Mimeo No. 346 (released November 4, 1981). Cable Dallas applied for its own construction permit, which was granted *Cable Dallas I*, *supra*. The Bureau Chief found that, as was VIP, ". . . Cable Dallas is the operator of cable television systems and is eligible for CARS licensing." *Id.* No interference problems were found with Cable Dallas' amended application, nor was pending local litigation concerning Cable Dallas' authority to operate its cable systems in Dallas found to be disqualifying. The Bureau Chief noted that "the grant of a permit in this case confers no Commission right to operate in Dallas," which is a matter of local concern.[3]

Summary of Pleadings

3. In support of its "Application for Review," Warner Amex again argues that Cable Dallas does not operate cable systems as defined by the Commission, and that the surrender and cancellation of VIP's construction permit (*see* paragraph 2, *supra*) necessitates a *de novo* determination of this issue. Warner Amex reiterates its contention that Dallas has officially and finally determined that Cable Dallas' interconnection of apartment buildings violates city zoning ordinances,[4] and therefore that it can neither operate cable

[2] The status of the entities operated by Cable Dallas is a main issue in this proceeding.

[3] Additional issues relating to interference and spectrum utilization were resolved by the Bureau Chief and are not raised in the instant application.

[4] Warner Amex alleges that because Cable Dallas failed to appeal to the Board of Adjustment [illegible] from the Dallas Department of Housing

systems nor be eligible to be a CARS licensee. Warner Amex contends that the pending litigation referred to in *Cable Dallas I, supra*, is an enforcement action to determine a remedy, rather than an action to adjudicate the existence of a violation, and therefore the Bureau Chief's decision will allow Cable Dallas to operate illegally, disregarding an official local determination. Citing the *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket No. 21002, RM–2695, and RM–2723*, FCC 79–228, 71 FCC 2d 569, 571 (1979); *Clarification of the Cable Television Rules*, FCC 74–384, 46 FCC 2d 175 (1974); and the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 207 (1972), Warner Amex argues that the determination to allow cable television service in a particular community is a local decision, and that absent local authorization, the Commission will not issue its own authorization. Finally, Warner Amex asserts that the Bureau Chief's determination in *Cable Dallas I* was beyond the authority delegated him in Section 0.288 of the Rules and was unprecedented and contrary to Commission policy.

4. In its "Opposition to Application for Review," filed June 24, 1982, Cable Dallas argues that it is settled that Cable Dallas operates cable systems composed of interconnected apartment buildings and condominiums not under common ownership, management, and control. Cable Dallas states that it did not purchase its cable systems until November 1981, two months after the date of the Inspector's Notice cited by Warner Amex, and therefore the notice is not applicable to Cable Dallas. In any event, notes Cable Dallas, on June 18, 1982, the City of Dallas withdrew its suit against Cable Dallas. Therefore, claims Cable Dallas, Warner Amex's arguments based on Dallas zoning ordinances are now moot. Cable Dallas contends that the Bureau Chief's decision in *Cable Dallas I, supra*, was not unprecedented, citing *Morehead State University* (Morehead, Kentucky), Mimeo No. 6906, 44 RR 2d 170 (1978); *Citizens Development Corp.* (Lake San Marcos, California), FCC 75–506, 52 FCC 2d 1135 (1975); *Champaign-Urbana Communications, Inc., et al.*, FCC 75–388, 52 FCC 2d 425 (1975); *Pacific Western Mobile Estates, Inc.* (San Jose, California), FCC 74–1058, 49 FCC 2d 269 (1974); and *Bayhead Mobile Home Park* (Leon County, Florida), FCC 74–589, 47 FCC 2d 763 (1974). In addition, Cable Dallas asserts that Warner Amex's citation of the *Clarification of the Cable Television Rules, supra*, is out of date, as it addressed the issuance of certificates of compliance, a practice abandoned by the Commission in the *Report and Order in CT Docket No. 78–206 and RM–3102*, FCC 78–690, 69 FCC 2d 697 (1978). Cable Dallas also suggests that Warner Amex is inconsistent in its pleadings, urging the use of an Inspector's Notice to VIP

and Urban Rehabilitation within 15 days of the notice's issuance on September 9, 1981. Section 51–4.703(a)(2)(A) of the Dallas Development Code has made this notice a final decision.

against Cable Dallas but challenging the application of *In re Video International Productions, Inc., supra*, to Cable Dallas.

5. Warner Amex filed its "Reply to Opposition" on July 8, 1982. Warner Amex contends that Cable Dallas should not now be allowed to correct its construction permit by stating that it does operate interconnected buildings, but should have its permit rescinded and reprocessed. Moreover, asserts Warner Amex, Cable Dallas' statement establishes that it is in violation of the Dallas Development Code. Warner Amex claims that Cable Dallas is inconsistent in its pleadings, asserting that a Commission determination concerning VIP applies to Cable Dallas but not a Dallas Inspector's Notice. Warner Amex submits a letter from Joseph G. Werner, Assistant City Attorney for the City of Dallas. Warner Amex alleges that Mr. Werner states that Dallas still contends that Cable Dallas is in violation of local law, but "expresses no opinion as to Cable Dallas' eligibility to receive a CARS license." Citing *Northbanke Corp., et al.*, FCC 79–548, 46 RR 2d 453, 457 (1979), and *J. Sherwood, Inc., et al.*, FCC 76R–278, 63 FCC 2d 151 (1976), Warner Amex argues that a zoning agency's adverse initial decision rebuts the ordinary presumption of zoning authority. Here, Warner Amex maintains, such an adverse initial decision has been made by both the agency and by the City of Dallas itself, to which the Commission should defer, citing *Lester H. Allen, et al.*, FCC 69R–475, 20 FCC 2d 478 (1969), and *Big Chief Broadcasting Co. of Lawton, Inc., et al.*, FCC 69R–420, 20 FCC 2d 127 (1969). Warner Amex reiterates its arguments that Commission authorization cannot issue in this situation, and argues that *CT Docket No. 78–206 and RM–3102, supra*, was not meant to alter substantive rule provisions. Absent requisite local authority, asserts Warner Amex, "the Commission must deny the authority to operate as an FCC sanctioned 'cable television system' . . .," citing, *inter alia*, *Keystone Cable-Vision Corporation*(Pittsburgh, Pennsylvania), FCC 77–860, 67 FCC 2d 348 (1977), *recon. denied*, FCC 78–542, 68 FCC 2d 1419 (1978); *Teleprompter Cable Communications Corp. d/b/a South Jersey Television Cable Co., et al.*, FCC 76–385, 59 FCC 2d 251 (1976); and *Bayhead Mobile Home Park, supra*. Warner Amex argues that FCC Form 327 on which Cable Dallas' application for construction permit was submitted requires an applicant to possess all requisite local authority pursuant to the former Certificate of Compliance rules because the standard form allows an applicant to indicate a Certificate of Compliance as authorization for a signal to be relayed by the CARS station. Finally, Warner Amex reiterates its contention that the Bureau Chief's action in *Cable Dallas I, supra*, exceeded his delegated authority.

Discussion

6. For the most part, Warner Amex reiterates its earlier arguments which we find the Bureau Chief fully considered and

properly disposed of in his decision Warner Amex itself admits that Cable Dallas operates an interconnected system. This admission is sufficient for this Commission to determine that the entity is physically a cable system.

7. Failing to establish that Cable Dallas does not qualify physically as a cable system, Warner Amex argues that the interconnection violates Dallas' zoning ordinances. Consequently the granting of the CARS license somehow sanctions an illegal act and thus interferes with Dallas' exercise of its municipal authority. We do not find Warner Amex's arguments in this regard to be persuasive. Warner Amex asserts that Cable Dallas' failure to appeal the September 1981 Inspector's Notice to VIP within fifteen days of the notice's issuance makes the notice final, and binding against Cable Dallas. We note that this contention was not made by Dallas in its suit against Cable Dallas, *City of Dallas v. Cable Dallas, Inc., et al.*, No. 81-13327-I (162d Judicial District, Dallas Co., Texas, filed Nov. 23, 1981). Moreover, and far more important, that suit has now been dismissed at the request of the city. In lieu of formal court proceedings, Warner Amex has submitted a letter from Assistant City Attorney Joseph G. Werner concerning the effect of the dismissal of this case on June 18, 1982. However the letter specifically "expresses no opinion as to Cable Dallas' eligibility to receive a CARS license," nor does it address the question of the effect on and applicability to Cable Dallas of the September 9, 1981 Inspector's Notice to VIP. In any event, the Bureau was correct in noting a grant of this licensee does not confer any right on Cable Dallas to operate in the City of Dallas.[5] That is a matter to be determined under local law.

8. Warner Amex's assertions stemming from our former certification process for cable systems are entirely misplaced. FCC Form 327 addresses the question not of operating authorization, but of carriage authorization, which has been settled in relevant part by Cable Dallas' registration of its signal carriage, pursuant to Section 76.12 of the Rules. *See Keystone Cable-Vision Corporation* (Pittsburgh, Pennsylvania), FCC 82-15, 88 FCC 2d 1072, 1073 (1982); *CT Docket No. 78-206 and RM-3102*, 69 FCC 2d at 703. This precedent is clear, as is other precedent relied on by the Bureau Chief, and we find that he did not exceed his delegated authority in deciding *Cable Dallas I*. The Commission no longer requires Certificates of Compliance for cable system operation, nor does the Commission any longer require compliance with the franchise standards of former Section 76.31(a) of the Rules. A check for compliance with those standards and access related rules was a major reason for requiring the

[5] The cases cited in this point in paragraph 5 by Warner all relate to site availability in broadcast comparative licensing proceedings, which are of no relevance to this case, especially since the sites are available.

submission of local franchises. Registration statements required by the Commission pursuant to Section 76.12 of the Rules are for informative purposes. *See Keystone Cable-Vision Corporation, supra*; *CT Docket No. 78-206 and RM-3102, supra*. Essentially, through this proceeding, Warner Amex has been seeking Commission intervention in a matter of local policy and concern where the responsible local authority has declined to pursue the matter further. This is not this Commission's function. *See Keystone Cable-Vision Corporation*, 88 FCC 2d at 1073.

In view of the foregoing, we find that grant of Warner Amex's "Application for Review" is not in the public interest.

Accordingly, IT IS ORDERED, That the "Application for Review" filed June 9, 1982, by Warner Amex Cable Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Cellular Communications Systems
Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular Applications

Commission approved agreements of nonwireline applicants in cellular service for Indianapolis, Indiana and Milwaukee, Wisconsin, Standard Metropolitan Statistical Areas. Commission found agreements in the public interest since they eliminate hearings and will provide for a needed service without delay. –*Cellular Communications Systems*

FCC 83-70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CELLULAR MOBILE SYSTEMS OF INDIANA, INC.	File No. 26172-CL-P-(11)-82
MIDWEST MOBILEPHONE CORP.	File No. 26060-CL-P-(4)-82
WESTEL-INDIANAPOLIS COMPANY	File No. 26112-CL-P-(7)-82
For a Construction Permit to establish a cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Indianapolis, Indiana, Standard Metropolitan Statistical Area	
In re Applications of	
WESTEL-MILWAUKEE COMPANY, INC.	File No. 26128-CL-P-(6)-82
CELLULAR MOBILE SYSTEMS OF ILLINOIS, INC.	File No. 26174-CL-P-(6)-82
For a Construction Permit to establish a cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Milwaukee, Wisconsin, Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER

(Adopted February 17, 1983: Released March 3, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES DISSENTING IN PART AND ISSUING A STATEMENT.

1. Presently before the Commission are Joint Requests for Approval of Settlement Agreement and Related Relief filed by the three captioned nonwireline applicants for the Indianapolis, Indiana, Standard Metropolitan Statistical Area and the two captioned nonwireline applicants for the Milwaukee, Wisconsin, Standard Metropolitan Statistical Area (SMSA).[1] The Indianapolis agreement appeared on Public Notice No. 1092, dated November 30, 1982, and the Milwaukee agreement on Public Notice No. 1204, dated December 7, 1982. No comments were received on either agreement.

2. *Indianapolis Settlement Agreement.* On November 19, 1982, Cellular Mobile Systems of Indiana, Inc. (CMS), Midwest Mobilphone Corp. (Midwest) and Westel-Indianapolis Company (Westel) filed the cited Joint Request for Approval of Settlement Agreement and Related Relief.[2] The Settlement (or Partnership Agreement) basically provides for a merger of interests of all the nonwireline cellular applicants in the Indianapolis market. The new partnership, Indianapolis Telephone Company (ITC) is comprised of the three applicants, who will participate equally in the partnership. The partnership will establish a cellular communications system and offer cellular service both directly to the public and to resellers in Indianapolis upon grant of authorization by the Commission. Each applicant will make an initial capital contribution of $1,666,667 and will assume an equal share of the risks and benefits of the venture. Each partner will name an equal number of members to the Partners Committee which will conduct the business affairs of the

[1] Four applications were filed in Indianapolis and two in Milwaukee requesting the wireline allocation (frequency block B). Settlement agreements were filed for both SMSAs. *See* Public Notice, Mimeo 737, Report No. CL–6, released November 10, 1982. We will consider the wireline allocations in a separate order.

[2] On September 21, 1982, the Commission was notified of an understanding to settle the proceeding without the need for a comparative hearing by a Notification of Settlement. On September 29, 1982, James M. Carpenter filed an Opposition to Notification of Settlement. In his opposition Carpenter makes general allegations concerning a conspiracy to keep him out of business by wireline carriers and the Commission, rearguing allegations made in his petition for reconsideration of the Common Carrier Bureau's action returning as defective his application for a cellular system in Indianapolis. *See, Carpenter Radio,* FCC 83–51, released January 31, 1983. He requested that the Notification of Settlement be stricken or designated for hearing. We find that Carpenter's Opposition fails to raise any substantial issues and, therefore, is denied. It should be noted that Carpenter did not file any comments against the settlement agreement during the prescribed comment period.

partnership. The agreement contains the typical covenants and conditions of a partnership agreement.

3. The applicants have agreed to amend and prosecute the application of CMS. An amendment to substitute ITC for CMS as the applicant has been filed. The applicants request, pursuant to section 22.29 of the Commission's rules, that the Commission approve the settlement, permit withdrawal of the petitions to deny the CMS application, accept the amendment of the CMS application effectuating the merger, grant the application as amended and dismiss the applications of Midwest and Westel. The applicants also request exemption from the requirements of section 22.31 and section 22.29(e), if applicable.

4. *Milwaukee Settlement.* On December 1, 1982, Westel-Milwaukee Company, Inc. and Cellular Mobile Systems of Illinois, Inc., filed a Joint Request for Approval of Settlement Agreement and Related Relief. The new partnership, Milwaukee Telephone Company (MTC), formed on December 1, 1982, provides for a merger of interests of the two Milwaukee nonwireline cellular applicants. The partnership agreement contains essentially the same clauses and covenants as the Indianapolis agreement except the Partners' Committee will consist of five members, two representatives appointed by each partner, and a fifth member appointed with the unanimous consent of the partners to serve for a one-year term. Each partner will make an initial capital contribution of $2,000,000 and assume an equal share of the risks and benefits of the venture. The agreement provides that if the partners are in substantial disagreement as to the conduct of the partnership's business and that the disagreement, if unresolved, can impair the functioning of the business, then either partner can demand that the other sell its interest in the partnership to the "offering partner". Section 7.3 of the agreement.

5. The applicants have agreed to amend and prosecute the application of Westel and substitute MTC as the applicant. They request that the Commission approve the settlement, permit withdrawal of the petition to deny filed against the Westel application, accept the amendment to the Westel application effectuating the merger, grant the application as amended and dismiss the application of CMS.

6. *Discussion.* In prescribing the regulatory structure and procedures for the establishment of operational cellular systems, this Commission has taken particular cognizance of the fact that the delays in the delivery of cellular service necessitated by comparative hearings among competing applicants would be inimical to the public interest in the rapid deployment of this new technology. Accordingly, we have explicitly stated that we "encourage settlements" among competing applicants to speed the provision of needed cellular service to the public. *See Cellular Communications Systems,* 86 FCC 2d 469, 490–91 (1981), 89 FCC 2d 58 (1982) at para. 38. Our

policies of encouraging settlement on both the wireline and nonwireline side also foster competition. They avoid the problem of having one applicant capture the market and thereby develop a monopoly. The Commission, therefore, favors such agreements since they further our policies of competition and expedited service to the public.[3]

7. After review of the Settlements and Partnership Agreements and related pleadings, we conclude that the parties have shown that approval of their agreements is in the public interest. The agreements will eliminate the need for costly and time consuming hearings and will provide for a needed new service without delay. They also promote the Commission's objective of providing cellular service to the public in the shortest possible time. We have carefully examined the technical proposal of CMS in Indianapolis and Westel in Milwaukee and the financial, legal and technical qualifications of CMS, Westel and Midwest. Based on our examination, we conclude that the parties have demonstrated that each is legally, technically[4] financially and otherwise qualified.[5]

8. Basic qualifying issues against the parties were raised in the petitions to deny filed against each respective application. Even though we are dismissing the petitions, we will consider the basic qualifying issues. It was alleged that Graphic Scanning Corp., CMS'

[3] The settlement agreement among the four wireline applicants in Indianapolis and the two in Milwaukee became ripe for our consideration when the pleading period expired on January 6, 1983. The United States Department of Justice (DOJ) filed comments on November 22, 1982, seeking clarification of our wireline settlement policy. To the extent DOJ's comments may be relevant as well to nonewireline settlements, we will address them in dealing with the wireline settlements.

[4] In our review of the CMS (Indianapolis) and Westel (Milwaukee) applications we have discovered discrepancies or conflicts in some of the technical proposals. We are, therefore, ordering ITC and MTC to file technical amendments, and we will condition the grants upon compliance with our order. We have also found that CMS' proposed Cellular Geographic Service Area (CGSA) and 39 dbu contours for cells numbers 6 and 7 extend beyond the Indianapolis SMSA into Bloomington, a secondary SMSA, and into Rush and Henry Counties, non-SMSA areas, respectively. CMS justifies the extensions for technical reasons, i.e., that they are necessary to efficiently and comprehensively serve the Indianapolis CGSA. Westel's CGSA and 39 dbu contours for cells B (West Allis), C (West Bend), D (Delafield) and E (Richfield) also extend beyond the Milwaukee SMSA into Racine, a secondary SMSA, and Dodge, Fondulac and Jefferson Counties, non-SMSA areas. The extensions are allowed under the rules, they cover small areas and there is no apparent effort to cover a population center in another SMSA. *Cf.* Advanced Mobile Phone Service, et al. (Philadelphia Order), CC Mimeo 1882, released January 21, 1983. However, we will condition the authorizations to the effect that they will not be protected in these areas, and if another licensce is awarded a grant for these areas, the Indianapolis and Milwaukee operators will have to coordinate with the adjacent system(s) licensee and provide interference free operation. The coordination may require the Indianapolis and Milwaukee licensees to pull back the CGSA and 39 dbu contours. *See* Section 22.902(d) of the rules.

[5] CMS' qualifications are discussed in para. 8, *infra*.

parent and one of its subsidiaries, Graphnet, are wireline carriers; thus CMS could not apply for the non-wireline block of frequencies in cellular markets. Essentially the same allegation was raised against Westel, *i.e.*, that Western Union Telegraph Company, parent of Western Union Cellular Technologies, a 21.1% stockholder of Westel, is a wireline carrier. Neither Graphic nor Western Union is a carrier that falls within the meaning of Section 22.902 of the Commission's rules referring to carriers engaged in the business of affording public landline message telephone service. Therefore, their subsidiaries are elegible to apply for the nonwireline block of cellular frequencies. *See Xerox Corp. and MCI Communications Corp.*, 90 FCC 2d 547 (1982); *See also, Xerox Corporation*, 74 FCC 2d 471 (1970), and Section 222 of the Communications Act of 1934, as amended, 47 U.S.C. §222. We have previously found CMS financially qualified to construct and operate the cellular systems it proposed. *See Advanced Mobile Phone Service, et al. (Chicago Order)*, FCC 82–452, released November 1, 1982. We also find that Midwest and Westel have sufficient financial resources to meet their partnership obligations. CMS' and its parent Graphic Scanning Corp.'s qualifications may be affected by the issues being investigated in *A.S.D. Answer Service, Inc. et al. (ASD)*, FCC 82–391, released August 24, 1982. Section 8.4 of the Partnership Agreements provides for this possibility. We will reserve the right to reexamine and reconsider the qualifications of CMS to have an interest in a cellular license, should *ASD* be resolved adversely to any of CMS' affiliate or parent companies or to any of their principals. *See, Chicago Order, supra* at n.19. In this regard, Section 7.2 of the Partnership Agreements provide a mechanism for disposing of the interest of any partner who may ultimately be found unqualified to hold a cellular license (Right of First Refusal-Third Party Transactions).

9. The applicants request exemption from the cut-off provisions of Section 22.31 of the rules involving the impact of major amendments on the status of an application. We conclude that good cause exists for the exemption and the same will be granted pursuant to Section 22.31(e)(3) and (4). They also request, if applicable, waiver of the detailed accounting requirements of Section 22.29(e). We conclude that the detailed accounting requirements of Section 22.29(e) apply only to reimbursement or buy-out agreements and not to *bona fide* merger of interests as in this case, where there is no reimbursement to the dismissing applicants. The agreements do not contemplate that either of the dismissing applicants will be reimbursed for expenses incurred in prosecuting their applications. *See Domestic Public Land Mobile Radio Service*, 60 FCC 2d 549, (1976) 559, *Baird Communications*, Inc., 88 FCC 2d 381 (1981); *Houston Radiophone Service*, 75 FCC 2d 624 (1980). *See also Revision and Update of Part 22*, CC Docket No. 80–57, FCC 82–349, released September 8, 1982, 47 Fed. Reg. 43842, at A–54–55.

Ordering Clauses—Indianapolis

10. Accordingly, IT IS ORDERED, pursuant to Section 22.29 of the Commission's Rules, that the Joint Request for Approval of Settlement Agreement and Related Relief, filed by Cellular Mobile Systems of Indiana, Inc., Midwest Mobilphone Corp., and Westel-Indianapolis Company IS GRANTED, and the accompanying November 11, 1982, Partnership Agreement IS APPROVED.[6]

11. IT IS FURTHER ORDERED that the amendment to the Cellular Mobile Systems of Indiana, Inc. application IS ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4); and the amended CMS application, hereinafter, Indianapolis Telephone Company, File No. 26172-CL-P-(11)-82, IS GRANTED, subject to compliance with the conditions listed below.

12. IT IS FURTHER ORDERED that the request for withdrawal of the applications filed by Midwest Mobilephone Corp., File No. 26060-CL-P-(4)-82, and Westel-Indianapolis Company, File No. 26112-CL-P-(7)-82 IS GRANTED and the applications and the petitions to deny filed against them are DISMISSED.

13. IT IS FURTHER ORDERED that the request for withdrawal of the petitions to deny filed against the CMS application by Midwest and Westel IS GRANTED and the petitions are DISMISSED.

14. IT IS FURTHER ORDERED that the Opposition to Notification of Settlement filed by James M. Carpenter on September 29, 1982 IS DENIED.

15. IT IS ORDERED that the authorization is conditioned upon the Indianapolis Telephone Company filing the following amendments:

(a) Resubmit site availability letters for sites 7, 8 and 9 since the ones submitted were not legible. Resubmit site availability letters for sites 1 and 2 since the ones submitted did not correspond to the locations proposed in the engineering exhibit.

(b) The radiation center height above average terrain for site No. 10 seems unusual. Topographic maps used to determine the two to ten averages for the eight radials and showing location plot for the site should be submitted. If it is determined that the radiation center height above average terrain is incorrect file a revised engineering proposal. This should include any revisions to height/power and service contour calculations and necessary maps revisions indicating appropriate 39 dbu contours and CGSA.

[6] We remind the partners that pursuant to Section 212 of the Communications Act of 1934, as amended, officers or directors of more than one carrier are required to have authorizations to hold interlocking directorships.

16. IT IS FURTHER ORDERED that the authorization is conditioned upon the Indianapolis Telephone Company obtaining the appropriate antenna structure clearances.

17. IT IS FURTHER ORDERED that the Commission reserves the right to reexamine and reconsider the qualifications of CMS to be a Commission licensee following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82–391, released August 24, 1982.

18. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Indianapolis SMSA, and further conditioned upon the Indianapolis Telephone Company coordinating with future licenses of the Bloomington SMSA, Henry and Rush Counties and upon providing interference free operation in these areas.

Ordering Clauses Milwaukee

19. IT IS FURTHER ORDERED, that the Joint Request for Approval of Settlement Agreement and Related Relief, filed by Cellular Mobile Systems of Illinois, Inc. and Westel-Milwaukee Company, Inc. IS GRANTED, and the accompanying December 1, 1982, Partnership Agreement IS APPROVED.[7]

20. IT IS FURTHER ORDERED that the amendment to the Westel-Milwaukee Company, Inc. application IS ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4), and the amended Westel application, hereinafter, Milwaukee Telephone Company, File No. 26128–CL-P–(6)–82, IS GRANTED.

21. IT IS FURTHER ORDERED that the request for withdrawal of the application filed by Cellular Mobile Systems of Illinois, Inc., File No. 26174–CL-P–(6)–82 IS GRANTED and the application and the petition to deny filed against it are DISMISSED.

22. IT IS FURTHER ORDERED that the request for withdrawal of the petition to deny filed against the Westel application by CMS IS GRANTED and the petition is hereby DISMISSED.

23. IT IS FURTHER ORDERED that the authorization is conditioned upon the Milwaukee Telephone Company filing the following amendments:

(a) Resubmit site availability letters for sites A and C since the ones submitted did not correspond to the locations proposed in the engineering exhibit.

(b) Submit calculations or appropriate amendments for sites A, D and F. Our calculations demonstrate that the ERP at these sites exceeds 100 watts. Pursuant to Rule 22.904 Milwaukee Telephone Company will only be authorized to operate at a maximum of 100 watts in any radial direction.

[7] See note 6, *supra*.

24. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Milwaukee SMSA, and further conditioned upon the Milwaukee Telephone Company coordinating with future licensees of the Racine SMSA, Dodge, Fondulack and Jefferson Counties and upon providing interference-free operation in these areas.

25. IT IS FURTHER ORDERED that the authorization is conditioned upon Milwaukee Telephone Company obtaining the appropriate antenna structure clearances.

26. IT IS FURTHER ORDERED that the Commission reserves the right to reexamine and reconsider the qualifications of CMS to be a Commission licensee following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82–391, released August 24, 1982.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Separate Statement
of
Commissioner Joseph R. Fogarty

In Re: Approval of Nonwireline Cellular Service Applicant Settlement Agreements for Indianapolis, Indiana, and Milwaukee, Wisconsin, SMSAs.

In my Separate Statement accompanying the Commission's *Cellular Reconsideration* Order, I said that "[I]t is imperative that competing applicants be encouraged in the strongest terms to settle their differences by joint venture or other agreement so as to avoid the delay of comparative hearings–delay which can only work to the detriment of the public interest in the expeditious provision of cellular service."* I am certainly pleased that my advice is being heeded on both the wireline and nonwireline sides of the cellular split frequency allocation.

As a result of these settlements and today's Commission action, not only will two more cellular systems be implemented in two major metropolitan areas, but also two nonwireline companies may well attain "headstarts" over their wireline competitors. These developments demonstrate clearly that the headstart issue is a "two-way street" where, as here, nonwireline applicants agree to resolve their comparative hearing differences and to expend their resources and energies instead on providing cellular service to the public.

The Commission's efforts throughout the cellular rulemaking have been directed toward satisfying the demonstrated public demand for high-quality mobile telephone service. The settlement agreements which we approve here significantly advance this

*89 FCC 2d at 110 (1982).

fundamental objective. I want to repeat my counsel to all competing cellular applicants: "Settle!"

February 28, 1983

Statement
of
Commissioner Anne P. Jones

Dissenting in Part

I am delighted to approve the overall result of this decision which will make cellular service available in Indianapolis and Milwaukee in the near future. Nonetheless, I must dissent from the language of the decision which espouses a Commission policy of encouraging settlements as a means of avoiding comparative hearings among competing cellular applicants. I am disturbed that instead of reforming or streamlining our comparative processes to handle these situations, we attempt to sidestep our responsibilities and place the burden of finding a way to shorten the process on the applicants. In my opinion, encouraging the kind of compromises that must result from such forced settlements will deny the public the benefits that competitive entry would foster and run contrary to the purpose of the antitrust laws. I therefore dissent from that notion.

Common Carrier, Data Processing Service
Common Carrier, Specialized Services
Computer Terminals Equipment

Order adopted granting petitions for reconsideration of Commission order released October 20, 1981, 88 FCC 2d 33, and terminating stay order released June 16, 1982, 90 FCC 2d 233. Order granted waiver of Computer II structural separation requirements for the two companies.
–*Cincinnati Bell Inc.*

FCC 83–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Motion of Cincinnati Bell Inc. for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission Decisions in the Second Computer Inquiry (Docket No. 20828)

Motion of Southern New England Telephone Company for Declaratory Ruling to Remove Uncertainty of its Status Under the Commission's Decisions in the Second Computer Inquiry (Docket No. 20828)

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. We have before us petitions for reconsideration filed by Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET). In these petitions as supplemented to reflect imminent changes in the Bell System corporate structure and operations, CBI and SNET urge the removal of any structural separation requirements which we would impose on them for the provision of customer premises equipment (CPE) and enhanced services. These requirements were established for AT&T and its affiliated carriers in the *Second Computer Inquiry (Computer II)*[1]. We made clear that these requirements applied to CBI and SNET in our

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (Final Decision), modified on reconsideration, 84 FCC 2d 50 (1980),

subsequent *Memorandum Opinion and Order (Order)* released October 20, 1981, 88 FCC 2d 33. Subsequently we issued a stay of the obligations imposed upon CBI and SNET because of the substantial uncertainty created by the then pending Modification of Final Judgment in the case of *U.S. v. Western Electric Company*, C.V. 17–49 (D.N.J. 1956) (proposed MFJ). *See Memorandum Opinion and Order ("Stay Order")* released June 16, 1982, 90 FCC 2d 233 (1982). This MFJ has been entered, with certain revisions, by the United States District Court for the District of Columbia, *see US v. American Telephone and Telegraph Co.*, Civ. Nos. 74–1698 and 82–0192,—F. Supp.—, 47 Fed. Reg. 40, 392 (D.D.C. 1982), and updated information and arguments have recently been filed in our reconsideration proceeding. For the reasons set forth below, we now grant both CBI and SNET waivers of the separation requirements heretofore established for their offering of CPE and enhanced services.

I. Background

2. On April 7, 1980, the Commission adopted the *Final Decision* in *Computer II* establishing the policy and procedures for the deregulation of enhanced services[2] and customer premises equipment. As modified subsequently by the *Reconsideration Order* and the *Further Reconsideration Order*, *Computer II* requires that only basic services will continue to be regulated by the Commission, while all enhanced services were detariffed beginning January 1, 1983.

3. The *Final Decision*, as modified, also provides for the phased, or "bifurcated," deregulation of CPE. New CPE may be sold or leased only on an unregulated basis, and embedded CPE will be removed from the carriers' rate bases and detariffed in a manner to be determined in a separate Commission proceeding, CC Docket No. 81–893. *See Notice of Inquiry in Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Implementation Proceeding)*, 89 FCC 2d 694 (1980).

4. An integral part of our *Computer II* decisions is the requirement that AT&T or its affiliated carriers[3] can offer enhanced services and CPE (after a transition period) solely through a separate subsidiary.[4] We established these conditions for carriers under the

further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom., CCIA v. FCC, 693 F. 2d 198, (D.C. Cir. 1982).

[2] "Enhanced services" are those services, offered over common carrier transmission facilities used in interstate communications, that employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Communications Act. Final Decision, 77 FCC 2d at 498.

[3] Other carriers are permitted to directly provide such services and equipment but must keep separate books of accounts for these activities. Final Decision, 77 FCC 2d at 476.

direct or indirect control of AT&T after we had completed a cost-benefit analysis based on a reasoned consideration of the following factors:

(a) a carrier's ability to engage in anti-competitive activity through control over 'bottleneck' facilities . . .;
(b) a carrier's ability to engage in cross-subsidization to the detriment of the communications ratepayer;
(c) the integrated nature of the carrier and affiliated entities, with special emphasis upon research and development and manufacturing capabilities that are used in conjunction with, or are supported by, communications derived revenues; and
(d) the carrier's possession of sufficient resources to enter the competitive market through a separate subsidiary.

Reconsideration Order, 84 FCC 2d at 72.

5. Our assessment led us to the conclusion that, on balance, the benefits of imposing structural safeguards for carriers other than AT&T did not outweigh other public interest considerations and that such requirements were currently unwarranted.[5] In contrast, we determined that for AT&T and its associated carriers, structural separation would be essential to maximizing the wellbeing of the ratepayers.

6. On February 11 and 20, 1981, Cincinnati Bell Inc. (CBI) and Southern New England Telephone Company (SNET), respectively, filed motions for declaratory rulings with the Commission, seeking an interpretation that the structural separation requirements established in the *Second Computer Inquiry* would not apply to their operations. CBI and SNET argued that since AT&T holds only a minority interest in them, AT&T does not exercise sufficient control to warrant that they be required to offer CPE and enhanced services only through a separate subsidiary. In the alternative, each sought a waiver of structural separation requirements. Eight parties[6] opposed

[4] During the implementation phase of Computer II, we have reviewed and approved, with certain modifications, capitalization plans for AT&T's enhanced services and CPE subsidiary. Memorandum Opinion and Order, 90 FCC 2d 404 (1982), and Memorandum Opinion and Order, released November 4, 1982. We have also permitted the new unregulated subsidiary and other AT&T entities to share certain administrative services. FCC 82-549, Order released December 13, 1982. Finally, we have conditionally allowed shared installation and maintenance activities between the new subsidiary and affiliated carriers. *See, e.g.*, August 30, 1982 letter from Chief, Common Carrier Bureau to D. W. Culkin, AT&T Assistant Vice President.

[5] In the Final Decision in the Second Computer Inquiry, we stated that both AT&T and GTE should be subject to structural separation requirements for their provision of CPE and enhanced services. 77 FCC 2d at 470. In the Reconsideration Order we concluded that GTE should be excluded from this separate subsidiary resale structure. 84 FCC 2d at 72.

[6] Association of Data Processing Service Organizations, Inc. (ADAPSO), Associated Telephone Answering Exchanges, Inc. (ATAE), Computer and Business Equipment Manufacturers Association (CBEMA), Connecticut Association of Telephone

one or both motions, challenging the contentions by CBI and SNET that AT&T does not control them.

7. In an *Order*released October 20, 1981, 88 FCC 2d 33, the Commission denied the motions. At that time we found that despite the fact that AT&T held only a minority stock interest in CBI and SNET, the companies were full partners in the Bell System and subject to AT&T control. Although AT&T owned substantially less than half of the outstanding stock for either company, we determined that it was clearly the dominant shareholder in both cases. *Id.*at 39. CBI and SNET were also found to enjoy, along with the other Bell operating companies (BOCs), a special and significant contractual relationship with Bell Telephone Laboratories and Western Electric. *Id.*at 39, 43. Both also received financial advances as needed from AT&T and subscribed to AT&T corporate management plans. *Id.*Since the two were virtually indistinguishable from the rest of the BOCs, we concluded that CBI and SNET must be governed by the same *Computer II*rules that govern other Bell System members. *Id.*at 45.

8. Further, we denied both waiver requests after concluding that CBI and SNET must be viewed not in isolation, but as members of the Bell System family, which we determined, as a whole, wielded substantial market power and warranted structural separation. Like other Bell telephone companies and unlike non-Bell entities, CBI and SNET have had ready access to the substantial resources of AT&T, Western Electric, and Bell Labs.

9. On November 19, 1981, CBI and SNET petitioned for reconsideration of the October 20 *Order*. Both claim that changed circumstances warrant a waiver. CBI Petition at 2; SNET Petition at 3. They argued that AT&T had not invited them to participate in the new AT&T national separate subsidiary. In addition, it was asserted that their participation would not be in the long-range best interests of their customers and shareholders because individual opportunities would be forfeited in favor of an "infinitessimal proportion" of the AT&T subsidiary's equity. CBI Petition at 2–4; SNET Petition at 5–6. Further, SNET opined that the factors which led the Commission to its finding of AT&T control will not be present in future AT&T-SNET relationships. SNET Petition at 4–11. Both telephone companies also argued that a correct application of the four standards for determining whether structural separation should be imposed would result in the conclusion that a waiver should be granted. CBI Petition at 4–16; SNET Petition at 11–20. See Para. 4 *supra*. CBI and SNET insisted that the Commission did not and could not find that the two carriers have control over bottleneck facilities

Answering Services, *et al.* (CATAS), MCI Telecommunications Corp. (MCI), North American Telephone Association (NATA), Southern Pacific Communications Company (SPCC), and (on reply) Independent Data Communications Manufacturers Association (IDCMA).

on a broad national geographic basis. CBI contended that the Commission has failed to determine whether CBI has the ability to engage in cross-subsidization, while SNET stressed that accounting safeguards should permit adequate regulatory controls. Both companies emphasized that their probable absence from participation in the new AT&T subsidiary because of high risks and high costs would effectively negate any advantages of integration. Finally, CBI and SNET stated that a separate subsidiary requirement would cause duplication of costs and argue that this condition is harmful to its ratepayers and stockholders. They also asserted that the requirement is unfair, given the many independents and GTE subsidiaries similarly or better situated that are free from such a constraint. Their petitions were opposed by five parties.[7]

10. On January 8, 1982, AT&T and the Department of Justice announced that they had agreed to a proposed settlement of their pending antitrust case. If sanctioned by the court, the agreement would require a significant restructuring of the Bell System and its existing interrelationships. CBI and SNET would not be divested under the terms of the recommended Modification of Final Judgment (MFJ), but would be required to terminate certain contractual arrangements.

11. Subsequently SNET filed a request for stay of the effectiveness of certain of our actions in *Computer II*. In its March 18, 1982 submission, the Bell company cited the significant changes contemplated by the proposed MFJ and urged the Commission to stay the October 20, 1981 *Order*, the pending reconsideration proceeding, and certain *Computer II* reporting requirements. 90 FCC 2d 233 (1982).

12. In its *Stay Order* released June 6, 1982, *id.*, the Commission determined that the tremendous uncertainty and the potentially profound changes to the structure of the telecommunications industry attributable to the proposed MFJ compelled a finding that a selective stay of brief duration would best serve the public interest. We found that it was demonstrably the wrong time to apply structural separation requirements to SNET and CBI[8] and to continue the reconsideration proceeding. Specifically, we stayed the affirmative obligations imposed on CBI and SNET under *Computer II* but continued to bar the two companies from offering any new enhanced services unless through fully separate subsidiaries. CBI and SNET were explicitly permitted to file a waiver request concerning the separate subsidiary condition for a particular service. *Id.* at 237.

13. If the stay remained in effect beyond January 1, 1983, the

[7] IDCMA, ADAPSO, CBEMA, ATAE, and NATA.

[8] Although the Commission was ruling on the SNET request, we also granted *sua sponte* a similar stay for CBI, whose situation closely parallels that of SNET. *Id.* at n. 3.

deadline established for AT&T and affiliated carriers to meet separation requirements for providing CPE and enhanced services, the Commission directed CBI and SNET to comply with our *Computer II* conditions applicable to non-separated telephone companies. Hence, the two BOCs would be required to keep separate books of accounts for their respective regulated and unregulated operations.[9] *Id.* at 238.

14. We also stayed the requirement imposed on CBI and SNET in *Computer II* relating to the filing of detailed administrative services sharing reports, installation and maintenance (I&M) plans, and capitalization plans. Both carriers were directed, however, to submit to the Commission within thirty days of the release date of the *Stay Order* a general description of their contingency plans in these areas. These plans were filed by SNET and CBI in a timely fashion.[10]

15. On August 24, 1982, the United States District Court for the District of Columbia approved, with certain revisions, the proposed MFJ. This consent decree required, *inter alia*, that twenty-two Bell operating companies be divested from AT&T by February 24, 1984 and that these BOCs would be restricted to the provision of local exchange and exchange access services and to new customer premises equipment.[11] AT&T, in turn, would be essentially freed from the constraints of the 1956 Consent Decree and would be able to participate in virtually any market of its choosing.[12] Under the

[9] These safeguards became operative earlier this year.

[10] "The Southern New England Telephone Company General Description of Contingency Plans for the Formation and Operation of a Fully Separate Subsidiary" and the "Cincinnati Bell Inc. General Description of Fully Separated Subsidiary Capitalization Plan Contingent Upon Imposition of Structural Requirements Developed in Second Computer Inquiry (Docket 20828)" were filed with the Commission on July 15 and July 16, 1982, respectively. CBI had already submitted its administrative sharing and I&M plans to us on January 11, 1982.

[11] AT&T has announced that it intends to implement the requisite divestiture on January 1, 1984. Hence, if sanctioned by the court, embedded CPE must be transferred from the BOCs to AT&T or sold to BOC customers or others by that date. Once divestiture occurs, however, the MFJ will permit the BOCs to provide new CPE. Under the terms of our *Computer II* decisions, the BOCs are required to offer all new CPE only through a separate subsidiary. In a proceeding instituted today, we are reviewing the question of the applicability of our structural separation conditions in view of the imminent divestiture. By our action today relating to CBI and SNET we are not prejudging the *Computer II* separation issues in the Notice of Inquiry and Proposed Rulemaking concerning the BOCs. CBI and SNET differ from the BOCs and their successor regional operating companies in terms of, *inter alia*, the requirement for divestiture from AT&T, the size and scope of operations, access to the new central staff organization which will provide service and assistance to the regions, and prior to divestiture, the existence of non-AT&T stockholders.

[12] Certain prohibitions would remain, however. For example, AT&T will be banned from engaging in electronic publishing over its own transmission facilities for a period of seven years beginning from the date of entry of the consent decree.

terms of the MFJ, AT&T's ownership interest in CBI and SNET would be unaffected, but the two BOCs' license contract and standard supply contract arrangements with AT&T and Western Electric, respectively, must be terminated no later than the date of divestiture.[13]

16. In compliance with the terms of the Commission's *Stay Order*, SNET and CBI filed supplements to their original petitions for reconsideration in this proceeding on October 7 and October 8, 1982, respectively. They argue that the MFJ will dramatically transform the telecommunications industry, both regulated and competitive, and will significantly alter their specific situations. SNET Supplement at 22; CBI Supplement at 10. Both emphasize that the MFJ directly affects them through the required termination of their license contract and standard supply contract and the dismantling of the vertically and horizontally integrated Bell System. As a result, CBI and SNET conclude that they now do not meet any of the four standards for determining the applicability of the *Computer II* structural separation requirements. Specifically, the two companies assert that (1) they will no longer be part of a national local exchange network, or "bottleneck," which will be eliminated through the divestiture of the BOCs; (2) the accounting methods being developed in the *Implementation Proceeding* as well as the need for CBI and SNET to contract with numerous unrelated organizations in the areas of exchange services and competitive offerings, will assure the Commission and ratepayers that no cross-subsidies will exist; (3) the Commission's concern about integration of local exchange services with the manufacture and distribution of CPE has been solved by the termination of the license contract and standard supply contract, and their replacement by new arrangements between CBI and SNET and a number of unrelated entities; and (4) CBI and SNET are small, geographically limited corporations which do not and will not possess market power sufficient to justify the expense of separate subsidiaries. CBI Supplement at 1–3, 5–9; SNET Supplement at 10–23. SNET also cites the court's findings in *Northeastern Telephone Company v. AT&T, et al.*, 651 F.2d 76, 96 (2d Cir. 1981) as evidence that it has not acted anticompetitively. SNET argues that it meets this standard and the other two standards (competition with AT&T and entry of new competitors) used by the Commission in waiving the structural separation requirements initially established for Telenet after it was acquired by GTE. *Id.* at 20–21.

17. SNET points out that the MFJ, when implemented, will split the Bell System into three types of entities: (1) AT&T and its remaining affiliates; (2) the divested BOCs; and (3) SNET. SNET

[13] The specific nature of the successor agreements for the license contract and standard supply contract has not yet been determined for CBI and SNET.

Supplement at 4. It asserts that the MFJ will create significantly different interests, assets, market entry possibilities, and areas of operation for these entities. *Id.* at 4–6. Further, SNET states that the primary methods of alleged AT&T control over SNET which underlay the Commission's rationale for its October 20, 1982 *Order* have been eliminated by the 1982 consent decree. The company insists that termination of the license and standard supply contracts will sever its economic integration with AT&T, Western Electric, and the divested BOCs. *Id.* at 7–10.

18. Seven parties filed comments opposing the CBI and SNET supplements to their petitions for reconsideration.[14] These parties contend that the MFJ has not fundamentally altered the Commission's finding that the two Bell telephone companies shoudl be subject to the structural separation requirements established in *Computer II*. They emphasize that except for termination of the license and standard supply contracts, the relationship of CBI and SNET with AT&T remains unaltered by the MFJ, *i.e.*, AT&T *de facto* control over the two companies is unchanged. CBEMA and IDCMA argue that the MFJ does not purport to address the basic relationship between AT&T and either CBI or SNET. CBEMA Oppositions at 2 (both submissions); IDCMA Comments at 12–14. SPCC, IDCMA, and CATAS point to the continuing AT&T ownership of CBI and SNET common stock as an area of control which remains intact. SPCC Opposition at 2; IDCMA Comments at 5–6; CATAS Memorandum at 6–7. UTCC and NATA stress that nothing in the MFJ precludes AT&T from engaging in various activities which the Commission determined to be indicia of control.[15] UTCC Comments at 9; NATA Comments at 9. IDCMA, NATA, and SPCC observe that the traditionally close relationship between AT&T and the two BOCs is likely to continue based on the agreements in principle consummated in 1982.[16] IDCMA Comments at 6–9; NATA Comments at 8–9; SPCC Opposition at 3–4. SPCC, UTCC, and CATAS indicate that notwithstanding the effects of the MFJ, accounting safeguards alone would not prevent cross-subsidization and other anti-competitive

[14] These include CATAS, ATAE, CBEMA (separate comments submitted for each movant), IDCMA, NATA, Southern Pacific Communications Company (SPCC), and United Technologies Communications Company (UTCC).

[15] Among the devices and arrangements which we found facilitates AT&T control over its carrier affiliates are: contracts generally; patent control, including patents developed by Bell System companies; control of policy and supervision of actions of operating companies, including selection of company executives, salaries, etc.; license contracts; financial advances to operating companies; and prescription of standard operating practices for the operating companies.

See Connecticut Water Company, 25 FCC 1367, 1371 (1958). *See also* 88 FCC 2d at 39.

[16] "Memorandum of Understanding Between Cincinnati Bell, Inc. and American Telephone and Telegraph Company" (April 23, 1982). "Memorandum of Understanding Between the Southern New England Telephone Company and American Telephone and Telegraph Company" (May 12, 1982).

conduct. SPCC Opposition at 4–6; UTCC Comments at 2, 6; CATAS Memorandum at 6. The latter also claims that SNET has engaged in cross-subsidization and other dubious behavior in the telephone answering market, but that even structural separation would not restrict such conduct. *Id.* CBEMA, IDCMA, NATA, and UTCC argue that CBI and SNET when viewed as part of the Bell System meet the four separation criteria even if the impact of the MFJ is included. They perceive affiliation with AT&T, rather than carrier size, as the key to determining the applicability of *Computer II* structural requirements to various telephone companies. CBEMA Oppositions at 4–7; IDCMA Comments at 10–12; NATA Comments at 10–12; UTCC Comments at 13–14. UTCC also stresses that CBI and SNET have failed to demonstrate that the waivers they seek will "better serve" the public interest as required by *Carolina Broadcasting Company*, 18 FCC 2d 482, 483–84 (1969). *Id.* at 14–16. Finally, ATAE and CATAS assert that the Commission's *Computer II* decisions should remain valid until at least the AT&T reorganization is completed. ATAE Comments at 3–4; CATAS Memorandum at 7.

19. On reply SNET and CBI deny the validity of the claims by other parties regarding AT&T's control of the two companies. SNET claims that the required termination of the license contract and the standard supply contract, as well as the voluntary termination of other arrangements between SNET and AT&T, such as AT&T funding of SNET, rotation of SNET managers to AT&T, and SNET compliance with changes in AT&T's standard operating practices will eliminate the Commission's concern with *de facto* control of SNET by AT&T. SNET Reply at 3–4. SNET also argues that it will supplant the traditional Bell arrangements with agreements between SNET and many other parties, only one of which will be AT&T. *Id.* at 5–6. CBI specifically rejects the argument that the MFJ does not appreciably change the relationship of AT&T with CBI because AT&T will continue to own about 30 percent of CBI's common shares; stock ownership is claimed to be the only facet of the CBI-AT&T relationship that will not change under the MFJ. CBI Reply at 3–5. Both CBI and SNET posit that divestiture of the BOCs will eliminate AT&T's control of a natinwide network of local exchange facilities, thereby removing the primary basis for their structural separation requirement. *Id.*; SNET Reply at 3–4. Further, the two BOCs assert that they should be treated no differently than any (independent) telephone company. SNET observes that several independents are not only larger than SNET but also have the advantage of an integrated research, development, and manufacturing capability. SNET Reply at 7. CBI underscores the "crippling inefficiency" imposed by a separate subsidiary requirement and the adequacy of accounting standards as a safeguard against undesirable cross-subsidies. CBI Reply at 6–7. CBI also stresses the tremendous financial and administrative burden imposed by structural separa-

tion that would ignore and jeopardize the interests of CBI's more than 18,000 non-AT&T stockholders as well as hinder CBI in a competitive marketplace. *Id.* at 8–9. Finally, SNET claims that CATAS' argument that SNET has engaged in anti-competitive conduct in the telephone answering market is not valid and also stands in opposition to the Commission's pro-competition policies. SNET Reply at 8.

20. The two companies conclude that they should be exempted from the structural separation requirement. CBI requests that it be relieved of the obligation to offer CPE and enhanced services only through a fully separate subsidiary. CBI Reply at 8. In turn, SNET asks that the Commission grant its motion for declaratory ruling or, alternatively, issue a waiver of the structural separation requirement. SNET Reply at 9.

II. Discussion

21. We are cognizant of the substantial impact that the new consent decree will have on the telecommunications sector as a whole and especially on AT&T and its affiliates. Given this fundamental restructuring, then, we must assess the need to require CBI and SNET to establish fully separate subsidiaries for the provision of CPE or enhanced services. To this end, we must re-examine the two broad tests embraced by the Commission in its October 20, 1981 *Order* (88 FCC 2d 33):

(1) the applicability of Computer II structural separation requirements to CBI or SNET, *i.e.*, whether or not AT&T controls the two carriers; and
(2) whether or not CBI or SNET meets the requisite standards for a waiver grant.

A. AT&T Control

22. Under traditional tests for corporate control, AT&T controls CBI and SNET. AT&T continues to hold a controlling financial interest in both companies today. The MFJ does not require, either explicitly or implicitly, that AT&T divest itself of its holdings in the two Bell companies. Although its stock ownership percentage for CBI and SNET is less than 50 percent (approximately 30 percent and 23 percent, respectively), AT&T's share of CBI and SNET common stock exceeds the combined holdings of the next 29 largest stockholders in each case. This essentially represents little or no change from the relative ownership interests in the two carriers which existed at the time we were considering their original motions in this proceeding. *See Order* at 39.

23. Although considerable uncertainty exists regarding the other indicia of control upon which we relied in making our findings in the October 20, 1981 *Order*, we are aware of the potential for additional control through these means. Hence, such traditional

practices as rotation of CBI and SNET managers to AT&T, prescription of standard operating practices for CBI and SNET by AT&T, and use of the Bell logo are not prohibited by the MFJ and may well be used to reinforce AT&T control of the two Bell companies. Two important elements of AT&T's existing control over all Bell System telephone companies, the license contract agreement and the standard supply contract, will cease to exist as a result of the MFJ and are scheduled to be terminated on January 1, 1984.[17] However, CBI and SNET entered into Memoranda of Understanding (MOUs) with AT&T in mid-1982 as an initial step toward replacing the various intrasystem arrangements which currently exist.[18] Rather than successor arrangements *per se*, each MOU contains a list of principles that are "intended to guide the development of replacement agreements providing [CBI and SNET] value equivalent to that which they are now entitled to receive under the License Contract and other agreements." SNET and CBI MOUs at 2, 3. In addition, other principles "may be added by mutual consent." *Id.* We have been informed by AT&T that

> [c]urrently, separate negotiations are underway respecting detailed agreements between CBI and SNET and the BOC or AT&T entities which after divestiture will have possession of the resources currently used by AT&T to provide License Contract and other services. It is expected that these negotiations will result in a series of agreements which will replace the existing agreements.[19]

In essence, AT&T's control—either realized or potential—over CBI and SNET appears to remain largely intact.

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[17] Although not specified in the MFJ, other BOC intra-system arrangements currently in effect, business information systems (BIS), cost sharing agreements, and a number of miscellaneous operational agreements, will also be terminated on the date of divestiture pursuant to termination agreements. *See* "AT&T Plan of Reorganization," esp. pp. 425–434, filed December 16, 1982 in the MFJ proceeding. The Division of Revenues contracts, the means by which revenues are allocated among Bell System companies to compensate them for costs incurred in providing interstate services, will also be terminated but may be in effect for some limited time beyond the divestiture deadline because of the inherent need for retroactive revenue settlements. *Id.* at 434–35. AT&T has announced its preference for retaining several existing categories of contracts (*e.g.*, leases, rights-of-way) involving the BOCs. These agreements are regarded by AT&T as not significant in scope or financial impact and allegedly do not create an economic integration inconsistent with the consent decree. *Id.* at 433–34.

[18] See n. 23. Hereafter we will refer to these documents as "CBI MOU" and "SNET MOU." These MOUs were signed by the Chairman of AT&T and the President of CBI or SNET, respectively.

[19] Letter dated November 19, 1982 from F.C. Minter, AT&T Assistant Comptroller to Chief, Common Carrier Bureau. Pursuant to Section 211(b) of the Communications Act, as amended, we direct CBI and SNET to file with the Commission copies of the new contracts that will result from these MOUs and ongoing negotiations.

B. The Waiver Issue

24. Thus, the fundamental question to be addressed in evaluating the reconsideration petitions submitted by CBI and SNET is whether circumstances have substantially changed since the findings made in the October 20, 1981 *Order*. In our consideration of the original CBI and SNET petitions for waiver, we required that they show good cause for the requested departure from our rules. 88 FCC 2d at 42. We used a "hard look" standard, analyzing on a cost-benefit basis the applicability of a separate subsidiary condition to CBI and SNET, and concluded that, as members of the Bell System, they should be subject to the same structural safeguards as the other Bell telephone companies. *Id.* at 43. As affiliates of AT&T, CBI and SNET were found to meet the four criteria established in our decisions in *Computer II*. *See* para. 4 *supra*.

25. Our denial of the CBI and SNET waiver petitions predates both the proposed AT&T-Justice Department settlement of pending antitrust litigation and the entry of the MFJ. The implementation of the MFJ will clearly cause profound changes to the current market structure of the telecommunications industry. It is this occurrence on which the petitioners principally base their arguments for reconsideration of our previous decision to require structural safeguards for CBI and SNET, see paras. 9, 18, 19, *supra*, and it is to these new circumstances we now turn.

26. In brief, we believe a grant of the waiver requests submitted by SNET and CBI is consistent with the public interest. Our initial findings in the *Order* were based on the existence of the world's largest vertically integrated telephone system. The AT&T corporate family at that time consisted of, *inter alia*, (1) the parent, composed of a mammoth headquarters operation providing financial, technical, and legal advice and assistance to "in-house" telephone companies (the General Department) as well as the nation's dominant provider of long distance telephone service (Long Lines); (2) twenty-four Bell System Operating Companies that furnished some 80% of local telephone service in the United States; (3) the 22d largest manufacturing firm based in this country (Western Electric)[20]; and (4) an affiliated research laboratory widely regarded as one of the preeminent R & D facilities in the world (Bell Telephone Laboratories). As we noted in the *Final Decision* in *Computer II* (84 FCC 2d at 74):

> There is no dispute in the record as to the relative size of AT&T compared to the independent telephone companies. We believe this disparity in size leads to the result that the benefits of structural separation for AT&T are greater than the costs, while this calculus is reversed for the independent telephone

[20] "Fortune 500" Survey, May 3, 1982 *Fortune*, p. 260.

companies. In addition, AT&T has enormous research and development and manufacturing capabilities, which greatly complicates assessing allegations of cross-subsidy.

27. As a result of the MFJ approved by the court on August 24, 1982, however, CBI and SNET will no longer be an essential part in AT&T's control over our nationwide local exchange facilities.[21] Divestiture of twenty-two Bell operating companies on January 1, 1984 pursuant to the terms of the MFJ will effectively separate CBI and SNET from the traditional integration of Bell System local exchange facilities.

28. Earlier we concluded that (88 FCC 2d at 43):

> [W]e cannot view CBI and SNET in isolation, as they would have us do. We have already noted that both are under the control of AT&T. The relative size of the AT&T corporate family and the diverse national markets the family serves give each member of the Bell System market power which is disproportionate to its firm or market size.

29. At the present time, the structural requirements of *Computer II* can be viewed as applying to three different types of entities: (1) AT&T as a regulated provider of interexchange service and a provider of CPE; (2) the as yet undivested BOCs; and (3) CBI and SNET. In examining the appropriateness of the application of structural separation to these two telephone companies, we note that, viewed in light of the changed world of telecommunications they have neither the control of an overwhelming majority of the nation's bottleneck facilities which has been enjoyed by the unified Bell System,[22] nor the control of a significant percentage of the nation's interexchange facilities as both was the case with the Bell System and will be the case with AT&T's control of inter-LATA facilities.

30. Viewed in this light, the companies, in fact, fail to meet the necessary standards for structural separation. Neither possesses sufficient size nor market dominance in a significantly large regional area to warrant imposition of a separate subsidiary requirement. For example, SNET and especially CBI pale in terms of market presence relative to the exempt GTE telephone companies. Clearly neither SNET nor CBI can be said to have the ability to draw upon a broad-based national network of local exchanges if they intended to engage in anti-competitive behavior. We also have not been persuaded that the benefits of outweigh the costs of requiring a separate subsidiary.

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[21] Nor will CBI or SNET be part of any new "regional operating company" formed as a result of the MFJ. The applicability of our *Computer II* structural separation conditions to the divested companies presents different issues. *See* n.11, *supra*.

[22] Indeed, we note that the percentage of the nation's bottleneck facilities controlled by CBI or SNET is quite small even when compared to a post-divestiture regional Bell company.

With respect to local offerings, neither CBI nor SNET possesses a market dominance which differs from that enjoyed by many large independent telephone companies. The continuation of the separate subsidiary requirement with respect to AT&T will provide adequate protection in connection with national offerings by either CBI or SNET. Moreover, any such offerings are likely to be made in competition with American Bell. Such findings prevent us from affirming our prior conclusions concerning the applicability of the *Computer II* structural requirements for CBI or SNET.

31. Thus, with the imminent split-up of the AT&T family, we must recognize that AT&T's affiliated local exchange carriers will be reduced from 24 companies serving a broad national geographic area to two entities, CBI and SNET, operating in much smaller regions of the country.[23] In addition, certain incentives previously lacking should favorably impact CBI, SNET, and AT&T from the ratepayers' perspective. With the changes brought about by the MFJ and the recent Commission actions and policies favoring the growth of competition, we anticipate that the two telephone companies will compete with AT&T's wholly-owned American Bell Inc. (ABI) at least in their respective service areas. The prospects for such competition have already been boosted by the announcement that AT&T will use the national distribution system of Sears, Roebuck and Company to market Bell CPE.[24] In addition, SNET has recently announced that it will enter the telecommunications equipment market outside of the State of Connecticut. Further, SNET and (impliedly) CBI have indicated that they expect to compete directly with AT&T in the CPE market.[25] SNET Reply at 5; CBI Supplement at 8. This intention has been indicated with regard to enhanced services as well. *Id.* Indeed, *Computer II* and terms of the MFJ will require the two Bell companies to offer basic "pipeline" transmission service to AT&T and anyone else pursuant to tariff, with equal charges for equal interconnection, on a nondiscriminatory basis just as CBI and SNET will in many cases be required to take inter-LATA transmission capacity from AT&T or other inter-LATA carriers.

III. *Conclusion*

32. The telecommunications industry is currently undergoing

[23] *See* n. 26 *infra*.

[24] During the fourth quarter of 1982 Sears began retailing customer premises equipment on a trial basis pursuant to an agreement reached with AT&T earlier that year.

[25] In their MOUs with AT&T, CBI and SNET contemplate that under the replacement contracts, they will act as an ABI agent and/or distributor for new CPE and services. They also have indicated that they expect to sign or - in some cases - have already signed agreements with non-Bell suppliers of equipment and research services. These companies include Mitel, GTE, ITT, Northern Telecom and Bell Northern Research.

fundamental changes in its structure as a result of the 1982 Modification of Final Judgment terminating the Justice Department's 1974 antitrust suit against AT&T. With this restructuring of the Bell System has come the need to reexamine, *inter alia*, the applicability of *Computer II* separate subsidiary requirements to its current members. In this proceeding reconsidering our October 20, 1981 *Order*, we have focused on the relationship of CBI and SNET to AT&T and the desirability of imposing structural separation on the two Bell operating companies in light of the new environment. We have concluded that as a result of the changed circumstances created by the MFJ, there is no longer a need to require CBI and SNET to establish fully separate subsidiaries for their provision of customer premises equipment and enhanced services. While AT&T continues to control these companies through at least its ownership interests, the imminent dissolution of AT&T's national bottleneck of local exchanges compels us to view CBI and SNET as the sole remaining entities of that network in the near future. Viewed from this perspective, we find that the two BOCs possess insufficient market dominance to warrant such structural conditions. Hence, we conclude that sufficient federal interest does not dictate the imposition of a separate subsidiary requirement. Upon reconsideration we grant the requests for waiver sought by Cincinnati Bell Inc. and Southern New England Telephone Company.

33. Our findings are predicated on the new telecommunications environment that, we expect, will be created by implementation of the MFJ. Changed circumstances or specific evidence of abuse, of course, could cause us to reassess our conclusions today. For example, failure to divest the twenty-two Bell Operating Companies could negate many of our findings and would necessitate a reexamination of the need for structural separation for CBI and SNET. We intend to monitor the implementation of the consent decree in the coming months in order to keep abreast of any such developments.[26]

[26] We are aware that divestiture will likely not occur until January 1, 1984 and that the broad-based AT&T bottleneck control will continue until that time. Rolm Corporation in comments filed in this proceeding on February 9, 1983 insists that SNET through its new unregulated subsidiary, SONECOR, has preempted competitive bidding by Rolm and others by offering both Bell (Western Electric) and non-Bell multi-line CPE at below cost, noncompensatory prices. Rolm argues that the pending stay on the *Computer II* structural separation requirements for SNET be terminated and that such separation be specifically imposed on SNET "so long as it maintains all of its affiliations with AT&T and the Bell System" (pp. 6–7). In the alternative, it is asserted, the Commission should commence evidentiary proceedings in which the anticompetitive abuses may be demonstrated. We are, of course, concerned about any allegations of abuse but to date have received no evidence regarding Rolm's claims. *See* Telocator Network of America v. FCC, No. 78-2218, D.C. Circuit decided October 5, 1982. Absent concrete evidence of significant marketplace abuses, it would appear that the costs of requiring CBI and SNET to establish separate subidiaries for provision of

IV. Ordering Clauses

34. Accordingly, IT IS ORDERED, That the petitions for reconsideration and the supplements thereto filed by Cincinnati Bell Inc. and Southern New England Telephone Company relating to this Commission's Memorandum Opinion and Order released October 20, 1981, 88 FCC 2d 33, ARE GRANTED TO THE EXTENT SET FORTH IN THIS ORDER and ARE OTHERWISE DENIED.

35. IT IS FURTHER ORDERED, That the Stay of the Commission's previous decision in this proceeding, released June 16, 1982, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

CPE and enhanced services would greatly outweigh any attending benefits of mitigating the potential for abuse through such a structural remedy.

Application for Review
Call Letters, Assignment

Application for review denied and staff action affirmed. In resolving questions concerning the likelihood of public confusion arising from similar call signs, the controlling question is simply whether the letters in two call signs, apart or in combination, would sound sufficiently alike to the average listener, so that the listener would confuse one station for another.
–*Classical B/cing Society of San Antonio, Inc.*

FCC 83-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Matter of

CLASSICAL BROADCASTING SOCIETY
OF SAN ANTONIO, INC.
San Antonio, Texas

For Assignment of the Call Letters KPAC
to a New Noncommercial Educational FM
Radio Station

MEMORANDUM OPINION AND ORDER

(Adopted: February 1, 1983; Released: February 4, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned application; (b) an objection thereto dated May 24, 1982, by KISS Broadcasting, Inc., licensee of AM radio Station KMAC, San Antonio, Texas; (c) the staff action of June 29, 1982, denying the objection; and (d) an application for review filed July 8, 1982, by KISS Broadcasting directed against that staff action.

2. The applicable standard in this case is that stations may request call letters of their choice, excepting the initial letter, if the desired call letters are available, are in good taste, and are sufficiently dissimilar phonetically and rhythmically from the existing call letters of stations in the same service area, so that there will be no significant likelihood of public confusion. *John Poole Broadcasting Co., Inc.*, 25 RR 335 (1963). Section 73.3550(j) of the Commission's Rules embodies this principle. Applying the principle to this case, the staff concluded that there is sufficient dissimilarity between the call letters KPAC and KMAC to obviate a significant

likelihood of public confusion and denied KISS Broadcasting's objection.

3. In its application for review, KISS Broadcasting contends that the staff action conflicts with the Commission's decision in *Salem Media Corp.*, 48 RR 2d 996 (1980), and the Bureau's ruling in *Etowah Broadcasters, Inc.*, Ref. 8840-RH (Broadcast Bureau, July 29, 1974).[1] We have considered these past precedents, and we agree that the fact situation in the instant proceeding is similar. Nonetheless, the controlling factor in resolving the matter now before us is the particular call letters involved. *See John Poole Broadcasting Co., Inc.*, *supra* at 337.

4. After careful consideration of this matter, we feel that, although three letters are common to the call signs KMAC and KPAC, the differences between "M" and "P" are, in this instance, sufficient to dispel a significant likelihood of public confusion. Furthermore, Commission records do not reveal, and the staff has no recollection of any instances of actual public confusion arising out of call letter assignments of comparable similarity.[2] In light of this, we are inclined to believe that, to the extent that the test for likelihood of public confusion arising from similar call signs has been construed as involving quasi-scientific or expert judgment, it exalts form over substance.[3] The controlling question is simply whether the letters in two call signs, apart or in combination, would sound sufficiently alike to the average listener so that a listener would confuse one station for another. In this case, we agree with the staff that the *P* and *M* in KPAC and KMAC sound so dissimilar that the stations are very unlikely to be mistaken for one another by members of the public.

5. Finally, we have carefully reviewed the *Salem* and *Etowah* cases (*see* paragraph 3 and footnote 1, *supra*). To the extent that the results of those cases suggest an analysis inconsistent with that described in the preceding paragraph, we are overruling them. Until

[1] In *Salem Media*, we denied an application for review and affirmed a staff action refusing to assign the call letters WMNY to a New York City AM station, thereby sustaining the objection by the licensee of FM Station WYNY, New York. In *Etowah*, the Broadcast Bureau denied a request by an FM station in Gadsden, Alabama, for assignment of the call letters WKNG, sustaining the objections of the licensee of AM Station WDNG, Anniston, Alabama.

[2] One example that is especially relevant to the present controversy is the coexistence in Los Angeles of AM Station KLAC and AM and FM Stations KFAC. To our knowledge, there have been no instances of public confusion as a result of the similarities between the call letters of these stations.

[3] In the early days of the development of broadcast stations, this Commission may have been properly concerned with protecting one station from possibly trading on another's good will, by adopting similar call letters. However, today broadcast is a mature and healthily competitive industry, and there is less need for protectionist rules. Indeed, we presently shall consider initiating a rulemaking looking into the current usefulness of our call letter assignment policies.

we have concluded our forthcoming rulemaking on call sign assignments, we shall apply the common sense test for public confusion described above.

6. Accordingly, IT IS ORDERED, That the aforementioned application for review IS DENIED and the staff action of June 29, 1982, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Common Carrier, Authorization
Common Carrier, Rates, Charges
Competition, Common Carriers
Reconsideration, Petition for, Denial of

Petitions for reconsideration of *Second Report and Order*, 91 FCC 2d 59, denied. FCC authority to forbear imposing requirements of Section 203 and 214 of the Communications Act upon resellers of basic domestic terrestrial common carrier services affirmed.
–*Common Carrier Services*
CC Docket No. 79–252

FCC 83–69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy and Rules Concerning Rates for Competitive Common Carrier Services and Faciiities Authorizations Therefor	CC Docket No. 79–252

ORDER ON RECONSIDERATION

(Adopted: February 17, 1983; Released: March 21, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

1. Before the Commission are three petitions for reconsideration of our *Second Report and Order* (*Second Report*) in the above proceeding.[1] There, we concluded that we have the discretion to

[1] 91 FCC 2d 59 (1982), 47 F.R. 37889 (August 27, 1982). Petitions have been filed by American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI), and the Association of Long Distance Telephone Companies (ALTEL). Oppositions or comments have also been filed by the following parties: MCI; ALTEL; Satelco Incorporated, Tel Systems Management Corporation and Teltec Saving Communications Co. (Joint Resellers); GTE Telenet Communications Corporation (Telenet); U.S. Telephone Communications, Inc. (U.S. Tel); Satellite Business Systems (SBS); Holiday Inns, Inc. (Holiday Inns); American Hotel & Motel Association, New York State Hotel & Motel Association, Inc. and

forbear imposing traditional Title II regulation[2] in instances where such action furthers statutory purposes and the public interest. *Second Report* at para. 5. As a first step in exercising this discretion the *Second Report* relieved resellers of basic domestic terrestrial communications services[3] of the obligations to file tariffs and to obtain authority to provide or discontinue services under Sections 203 and 214 of the Act, respectively. For reasons to be explained, we conclude that the instant petitions fail to raise matters which warrant reconsideration of our *Second Report* and therefore deny them in their entirety.

I. Background

2. The history and purpose of this proceeding is set forth in detail in the *Second Report* and need not be repeated here. For present purposes, it is sufficient to recount that this proceeding seeks to update our regulatory scheme in light of the significant changes occurring in the telecommunications industry, especially the emergence of a more competitive marketplace. Thus, in our *First Report*, *supra* n. 3, we established a two-tiered regulatory framework. Under this approach, those carriers found to possess market power, *i.e.*, power to control price in the marketplace, are classified as dominant and continue to be subject to the full panoply of tariff and licensing regulation to ensure that they do not exploit their dominance to the detriment of the public. On the other hand, carriers lacking market power are classified as non-dominant, and the regulatory requirements imposed upon them have been streamlined or eliminated. Although the *First Report* was a significant initial step in modifying our regulatory processes to better reflect the realities of the industry, we recognized that more fundamental regulatory reforms were necessary to enhance the Commission's pro-competitive policies and further the public interest. Therefore, we issued a *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981) (*Further*

Hotel Association of New York City, Inc. (Hotel Associations); Association of Data Processing Service Organizations, Inc. (ADAPSO); International Business Machines Corporation (IBM); Computer and Business Equipment Manufacturers Association (CBEMA); Independent Data Communications Manufacturers Association (IDCMA); TDX Systems, Inc. (TDX); Henry Geller; and Western Union International, Inc. (WUI). AT&T, MCI and U.S. Telephone and Telegraph Corporation (UST&T) have filed replies.

[2] As noted in n. 3 of the Second Report, traditional Title II regulation means control over price, publication of terms and conditions of service, control over investments and the obligation to serve all. *See generally* Sections 201–203 and 214 of the Communications Act (the Act), 47 U.S.C. §§201–203 and 214.

[3] As defined in the Second Report, resellers are those carriers which do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes. Such carriers were already classified as non-dominant in our First Report and Order in this proceeding, 85 FCC 2d 1 (1980) (First Report). The Second Report did not affect the regulatory status of resellers of domestic satellite services which are currently classified as dominant. *See* Second Report at n. 6.

Notice), in which, after a comprehensive and detailed discussion of the economic, legal and other factors involved, we determined that we were not required to apply traditional Title II regulation to all carriers providing basic communications service.

Thus, we proposed to remove regulatory requirements where the imposition of a comprehensive Title II regulatory scheme on carriers without market power was counterproductive to the advancement of the objectives of the Act, advancing two alternative approaches for doing so. Under the first, we tentatively concluded that for communications suppliers with little or no market power, the imposition of common carrier status and accordingly, the imposition of Title II regulation, was inappropriate. In the second, we asserted discretion to forbear imposing Title II requirements in whole or in part upon common carriers in instances where the costs of such regulation outweighed any perceivable benefits.

3. As explained, the *Second Report* followed this latter approach and affirmed our tentative conclusion that we possess discretionary "forbearance" authority. Moreover, we chose initially to confine our exercise of forbearance discretion to resellers of basic domestic terrestial services for several reasons. For one thing, our experience had shown little public need for regulation of resellers. We pointed out that rarely, if ever, had we had the occasion to reject or suspend and investigate tariff filings of resellers or to deny and/or condition reseller applications for facilities certification. Thus, the costs imposed by such regulation appeared to weigh especially heavily on these carriers, resulting in the unwarranted delay of new services and marketing strategies. In addition, we perceived the recent profusion of entities seeking to resell MTS/WATS services and the fact that the commenting parties for the most part agreed that regulation of resellers should be minimized or eliminated to be further indications that resellers could be deregulated separately and without further delay. *See Second Report* at paras. 5–7. Accordingly, we stated that rather than relying on tariff regulation, competitive market forces and the complaint process of Section 208 of the Act[4] would be sufficient to ensure that resellers' rates are reasonable and not unjustly discriminatory. We also found that the entry and exit requirements of Section 214 failed to serve any public policy when applied to resellers that would not be better served by competitive market forces.

II. Contentions

4. As an initial matter, MCI asserts that the Commission lacks the authority to forbear applying Title II rate and entry/exit regulation to resellers. In support, it cites the Supreme Court's decision in *Federal Power Commission v. Texaco*, 417 U.S. 380 (1974)

[4] 47 U.S.C. §208.

and the decisions of the U.S. Court of Appeals for the Second Circuit in *American Telephone and Telegraph Company v. FCC*, 572 F.2d 17, 25 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (Resale and Shared Use) and *American Telephone and Telegraph Company v. FCC*, 487 F.2d 864, 872–81 (2d Cir. 1973) (Special Permission). Moreover, noting that the Commission envisions the use of creative contract arrangements to satisfy customer needs,[5] MCI argues that such carrier-customer contracts are not provided for in the Act.[6] According to MCI, the only statutorily-sanctioned methods of operation are by tariffs and carrier-to-carrier contracts. Indeed, MCI continues, these methods are the only means for the Commission to ensure compliance with Sections 201 and 202 of the Act.[7] Thus, MCI contends that the complaint process will be ineffective in ensuring compliance with Sections 201–202 since customers will be unable to examine resellers' tariffs to ascertain the rates charged to other customers.

5. MCI also contends that our forbearance from regulation of resellers is contrary to sound public policy. Without tariffs, Section 214 authorizations and intercarrier contracts, MCI maintains that the Commission cannot determine if resale carriers possess adequate qualifications to be Commission licensees and that they comply with the other provisions of the Act. As an alternative to forbearance, MCI proposes a regulatory scheme whereby resellers would be required to obtain an initial Section 214 authorization but then permitted to expand service without further authorizations and to file tariffs to be effective on one day's notice.

6. ALTEL, a resellers trade association, challenges our findings that the costs and burdens of the tariff filing and Section 214 certification processes on non-dominant resale carriers outweigh the public benefits derived. Rather, according to ALTEL, the Section 214 process is affordable, as evidenced by the large number of such applications filed by resellers. It is also said to serve as a valuable informational process by facilitating contact and dealings within the telecommunications industry and between the industry and the public. Furthermore, ALTEL asserts that tariff filing requirements promote efficiency in managing carrier-customer relationships by obviating the necessity for resale carriers to develop, maintain and modify separate contracts with each customer. However, should the Commission affirm its decision to forbear from regulating resellers,

[5] *See* Second Report at para. 24.

[6] In support, MCI cites Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *recon. denied*, 423 U.S. 886 (1975) and American Broadcasting Companies, Inc. v. FCC, 643 F. 2d 818 (D.C. Cir. 1980).

[7] Section 201 basically requires common carriers to furnish service upon reasonable request under charges, practices, classifications and regulations that are just and reasonable. Section 202 makes unlawful any unjust or unreasonable discrimination in charges, practices, classifications, facilities or services for or in connection with communications service.

ALTEL requests, at the very least, that the Commission allow existing certificated resale carriers to continue operating under Sections 203 and 214 for a transition period extending through the implementation of the AT&T restructuring pursuant to the Modified Final Judgment (MFJ) in the AT&T Consent Decree proceeding, *U.S. v. American Telephone and Telegraph Co.*, Civ. Nos. 74–1698 and 82–0192, —F. Supp.—, 47 Fed. Reg. 40,392 (D.D.C. 1982).

7. Additionally, ALTEL claims that the *Second Report* fails to define clearly which resale entities are deregulated and moreover, that it ignores the Commission's own decision in the *Second Computer Inquiry (Computer II)* [8] by theoretically broadening the category of resale services within our Title II jurisdiction to include enhanced resale services. Accordingly, ALTEL requests a ruling that certain services and functions[9] are enhanced or private in nature and thus not subject to Title II regulation.[10]

8. For its part, AT&T challenges the *Second Report* only in so far as we declined to forbear regulating reseller entities established by dominant carriers.[11] It claims that this exemption is arbitrary and capricious because no discussion of the factors supporting it were set forth in our opinion. In fact, according to AT&T, the reasons advanced in our *Second Report* to justify forbearance from regulation of resellers should apply equally to resale entities established by dominant carriers. At the very least, if we affirm our decision to continue tariff and facilities regulation of reseller entities established by dominant carriers, AT&T maintains that we should exempt from that policy American Bell, Inc. (ABI), its separate subsidiary formed to provide enhanced services and customer premises equipment (CPE) in accordance with *Computer II*. In support, AT&T asserts that the separation requirements imposed upon ABI by *Computer II* [12] exempt that entity from the effects of any policy issues regarding the resale of basic services by the subsidiary of a

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[9] *E.g.* teleconferencing or message storage and retrieval, authorization codes, discounted rates to key cities, call detail reports, offering service to a limited customer base, and network managers and sharing groups. *See* ALTEL Petition at 17–21.

[10] ALTEL also asks that we refrain from further deregulation until the implementation of the MFJ because of uncertainties regarding the MFJ's impact. ALTEL further asserts that other issues affecting resellers, such as application of Exchange Network for Interstate Access (ENFIA) charges to resellers and preemption of intrastate entry barriers and tariff restrictions on resale and shared use, warrant immediate consideration.

[11] *See* Second Report at n. 37. Dominant carriers were listed in n. 2 of the Second Report.

[12] *See* 77 FCC 2d at 475–86.

dominant carrier. Moreover, it contends that this result will assure fair competition by ABI as a resale carrier.

III. Discussion

9. For the most part, the petitioners simply repeat arguments we have already addressed in detail in our previous decisions in this proceeding. For example, MCI's challenge to our authority under the Act to forbear relies on legal precedent which we have fully demonstrated to be inapposite and on policy considerations which are irrelevant to the present communications marketplace. *See* 84 FCC 2d at 472–484 and 488–496 (*Further Notice*), and the *Second Report* at paras. 11–29 and especially n. 34. In these circumstances, further discussion of these issues is unnecessary.[13]

10. In addition, MCI and ALTEL have failed to convince us that the reasoning behind our findings and conclusions as to the deregulation of resellers is flawed. As we previously stated at para. 21 of the *Second Report*, we believe that competitive forces in the marketplace will ensure that resellers do not engage in practices violating Sections 201 and 202 of the Act. Our experience fully bears out this conclusion, since instances of such conduct by resellers have not come to our attention. Further, the complaint process of Section 208 remains available if market aberrations should occur, although no complaints have been filed since we adopted the *Second Report* last August. We recognize, of course, that some types of conduct proscribed by the Act could be more difficult to detect without a tariff filing requirement. However, given the small likelihood that such practices will occur, this appears to be a small risk when compared to the public interest gains that are likely to be achieved. Furthermore, ALTEL's arguments that tariffs promote efficiency in

[13] After the release of the Second Report, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in Computer II. Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982). In its reply pleading, MCI claims that this opinion lends further support to its view that we are without the authority to forbear from exercising Title II regulation over resellers, since although the court affirmed our discretionary authority to forbear, it limited such exercise to unique circumstances. We find no merit in this contention. While it is true that the Court's opinion recognized that the Commission does not have "unfettered discretion to regulate or not regulate common carrier services," (slip op. at 29), it also went on to find that the Commission has some leeway to decide what regulatory tools to use in regulating common carrier services. *Id.* at 28. Plainly, our action here comes well within the parameters set by the Court. The Commission in this case has recognized that the underlying carrier from whom the reseller obtains transmission capacity would remain subject to regulation and that this would serve to constrain the ability of resellers to fix unreasonably high rates. Second Report at para. 21. Moreover, we have specifically reserved both the complaint process under Section 208 of the Act and our power to reimpose certification and tariffing requirements should the need arise. *Id.* at 23. For these reasons, we do not agree that the Court's opinion compels a different result.

managing carrier-customer relationships and that the Section 214 process generates valuable information for the industry miss the point. Rate and facility regulation is not designed to convenience carriers, but rather, in the main is to police unreasonable prices or discrimination and to ensure against imprudent investments by carriers. Where, as here, we have found little likelihood exists for carrier abuse of the protections afforded the public by the Act, regulation is superfluous. Thus, even if we were to assume that the costs of these regulatory requirements are minimal, as ALTEL contends, where those costs exceed any benefits derived, we have the duty to assess the continued effectiveness of those regulations in furtherance of the public interest and the Act's objectives and to act accordingly. *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979). We expect that lifting of unnecessary tariff and facilities regulatory requirements will produce the considerable benefits noted in the *Second Report* that are clearly within the public interest and are consistent with the Act's objectives. *See*, for example, para. 29 of the *Second Report*. Accordingly, we will continue to follow the implementation principles set forth in paras. 30–32 of the *Second Report*. Specifically, no additional Section 214 applications will be processed, and resellers are given permission to cancel their tariffs on five days notice. We have not ordered resellers to remove their tariffs by a date certain, so that where necessary they may effect a gradual transition from the tariff regime.[14]

11. This brings us to the matter of continued tariff and facilities regulation of resale entities established by dominant carriers. To repeat, our decision to deregulate resellers was based on our finding that resellers do not possess any market power and accordingly, that imposition of certain Title II requirements did not further the objectives of Section 1 of the Act.[15] However, because we had not fully analyzed and resolved the issue of whether the market power of a dominant carrier may be imputed to a subsidiary engaged in the resale of its parent's basic service, we limited the scope of our forbearance policy pending further consideration.[16] This analysis is

[14] We will deny ALTEL's request that we rule as to the enhanced or private nature of various resale services and functions. As many of the parties opposing ALTEL's petition have noted, the distinctions requested by ALTEL are beyond the scope of this proceeding and a sufficient record has not been developed here on which to base adequate findings as to these matters. Furthermore, in n. 8 of the *Second Report*, we noted that enhanced services built on the transmission services obtained from underlying carriers are not subject to Title II jurisdiction.

[15] 47 U.S.C. §151.

[16] The majority of those commenting on the petitions here, if anything, underscore some of the complexities inherent in this issue. For example, MCI, U.S. Tel., ADAPSO, IDCMA, Joint Resellers, CBEMA, and Telenet, in opposing AT&T's petition, assert that the resale subsidiary of a dominant carrier would possess sufficient market power to engage in predatory pricing or to forestall competition through delays in service, thereby thwarting the power of the marketplace to ensure a reasonable relationship between rates and actual costs. Many also

continuing, and we intend to consider further deregulatory actions in future orders. Stated another way, the *Second Report* was not intended to be the last word on this subject and by no means forecloses the exercise of our forbearance authority as to this class of resellers in the future. Rather, our decision reflects this Commission's step-by-step approach to deregulation. Consequently, while we reject AT&T's argument that our decision to continue tariff and facilities regulation, for the time being, of resellers established by dominant carriers is arbitrary and capricious, we will be prepared to deal expeditiously with the generic issue. Hence, we will also deny AT&T's request that we exempt ABI from the forbearance policy of the *Second Report*. As basic policy issues surrounding AT&T's request have yet to be resolved, we believe that a decision on such a request should be made as part of a more comprehensive determination.[17] However, we are aware that some resale entities provide service for the most part outside of the serving areas of the independent telephone companies with which they are affiliated. In these circumstances, we anticipate looking favorably on requests for waivers of the tariff filing and facilities authorization requirements in our rules.[18]

12. As a result of our findings in Phase 2 of the MTS-WATS Market Structure Inquiry, *Second Report and Order in Docket No. 78–72*, FCC 82–515, released November 30, 1982, and our decision there adopting an open entry policy for service to Alaska, we conclude that all of the policies adopted so far in Docket No. 79–252 shall immediately apply to carriers serving Alaska, including forbearance for certain resellers as to tariff and facilities regulation under sections 203 and 214 of the Act. Accordingly, Alascom, Inc. and the Alaskan exchange carriers are now obligated to provide interconnection, upon appropriate request, even to carriers who no longer are required to obtain Section 214 authorizations. As a separate matter, in the *First Report*, *supra* n.3, we also excluded Hawaii, Puerto Rico, and the U.S. Virgin Islands, as well as other offshore points, from this proceeding because of possible policy, legal, economic, or facility program considerations unique to these areas. *See First Report* at n.95 and at paras. 132–34. However, under our

question the presence of real competition between an underlying dominant carrier and its resale subsidiary and argue that the dominant carrier could restrict competition by designing and/or pricing service offerings specifically for its subsidiary. By contrast, Henry Geller and IBM support AT&T's position on the theory that the Commission should not affect the degree of competition in the marketplace by forbidding AT&T to engage in resale through a subsidiary.

[17] As part of this determination, we expect to consider whether forbearance may expand the nature of services ABI is authorized to provide. *See* Computer II, 77 FCC 2d at 474 (para. 231).

[18] In this regard, we note that the decision not to forbear presently as to resale entities of dominant carriers applies to entities affiliated with, as well as subsidiaries of, dominant carriers.

interpretation of the Record Carrier Competition Act of 1981 (47 U.S.C. §222), all of the States, Territories, and possessions of the United States, and the District of Columbia, are considered domestic points. *See Puerto Rico Communications Authority*, FCC 83-28, released February 8, 1983, at paras., 22-25. Upon further reflection, we see no reason why the policies adopted in this proceeding should not also extend to carriers providing service to all other domestic points outside the continental United States besides Alaska. However, we would like to develop a record on this issue, and therefore, we are delegating authority to the Common Carrier Bureau to solicit public comments.

13. Accordingly, IT IS ORDERED, That the petitions for reconsideration filed by American Telephone and Telegraph Company, MCI Telecommunications Corporation and the Association of Long Distance Telephone Companies ARE DENIED.

14. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is delegated the authority to solicit comments and issue a final order as to the application of the policies in Docket No. 79-252 to domestic points outside the continental United States.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Statement
of
FCC Commissioner James H. Quello
Concurring in Part

In re: CC Docket No. 79-252, Competitive Carrier Rulemaking Proceeding

I agree with the majority that this is not the vehicle for dealing with the question of forbearance regarding "dominant" resellers. However, I believe this significant issue must be dealt with and soon. Having received assurances from the staff that we will move ahead expeditiously to resolve this issue, I am satisfied that in denying AT&T's petition we are not signaling that the issue of resale of service by independent carriers and American Bell, Inc. will be shoved aside for a prolonged period of time.

Therefore, with staff assurances of reasonable expedition, I concur.

Dissenting Statement
of
Commissioner Joseph R. Fogarty

In Re: Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor

I dissent to the portion of this Order which would countinance the continued regulation under Sections 203 and 214 of the Communica-

tions Act of resale entities established by independent telephone companies and AT&T.[1] Fair is fair. I find no need to restrict resale carriers controlled by telephone companies by imposing tariffing and facilities regulation on them while their competitors are free to compete in the same markets without such encumbrances. It is specious to argue that this regulation is necessary because of the parent's terrestrial dominance which is imputed to the resale subsidiary. No further analysis is required. The Commission has all the information it requires to permit telephone companies to compete fully in the resale market without burdensome waiver requirements.

Continued tariff and facilities regulation of these entities has created a number of anomalies. For example, Heins Systems, Inc. is a resale provider controlled by principals of the Heins Telephone Company of Sanford, North Carolina.[2] Although Heins Systems serves Greensboro and Raleigh, areas completely outside of the Heins Telephone Company's exchange, and is reselling the wide area telecommunications service of AT&T,[3] it is required to file tariffs under Section 203 and seek authorization under Section 214. On the other hand, its much larger competitors such as ITT and MCI are not under such regulatory strictures. Freed of the need to obtain FCC approval for every act, these resellers may respond to competitive situations much more rapidly than Heins may. It is absurd to impute whatever dominance Heins Telephone may have in its Sanford local exchange area to Heins Systems, Inc. serving the competitive Greensboro@ Raleigh resale market. It is a strange type of regulation which benefits the large established competitors to the disadvantage of small new competitors.

But this is not the only anomaly. Rotelcom, a resale entity established by the Rochester Telephone Company, is presently serving the State of Hawaii, which is also served by the Hawaiian Telephone Company. Since both must file tariffs, this competition is fair. However, if Rotelcom were to seek to serve Syracuse, New York, it, like Heins Systems, would be required to file tariffs and seek authorization from the Commission, while its aggressive competitors would not.

The PACNET situation also demonstrates the absurdity of the regulation in question. PACNET Communications Corporation is a

[1] Consistent with my Concurring Statement in the *Second Report and Order*, I continue to oppose deregulation of DOMSAT resellers which I believe to be a special case. See Concurring Statement of Commissioner Joseph R. Fogarty, *Second Report and Order*, 91 FCC 2d 59 (1982).

[2] Heins Telephone Company is a small independent company serving 31,300 telephones with telephone operating revenues of $8,091,000. *See*, Independent PhoneFacts '82.

[3] *See, Heins Systems, Inc.*, File No. W-P-C-4418 (adopted January 12, 1983, by Chief, Domestic Facilities Division, Common Carrier Bureau).

deregulated resale carrier which is a wholely owned subsidiary of INET (a Texas Corporation) which is, in turn, a wholely owned subsidiary of Cable & Wireless, North America (a Texas Corporation) which is, in turn, a wholely owned subsidiary of Cable & Wireless, PLC, the British owned telecommunications entity. Prior to deregulation, PACNET was authorized to serve thirty cities and use 100 four KHz channels.[4] Under this decision a foreign owned entity, such as PACNET can compete in this country without regulation while resale entities controlled by independent telephone companies serving less territory cannot. The Commission never intended this result.

The FCC should permit resale entities established by independent telephone companies to offer service without being subjected to onerous regulatory requirements that are not placed on their competitors. The same argument is applicable to American Bell Inc. (ABI) and to AT&T. ABI should be permitted to offer untariffed resale services. To the extent that there exists concern about the dominance of either the independent telephone companies or AT&T, this was resolved by the requirement that these companies offer basic transmission facilities to all on comparable terms.[5] Exchange carriers are unable to favor their resale entities at the expense of other resellers. Any unforseen difficulties may be resolved through the Section 208 complaint process. It is imperative that the independent telephone companies and AT&T be allowed to compete fully and fairly now in the resale market.

Separate Statement
of
Commissioner Mimi Weyforth Dawson

In Re: Reconsideration of Second Report and Order in the Competitive Carrier Rulemaking Proceeding

The Commission's decision to forbear from regulating non-facilities based resellers of terrestrial services (so-called pure resellers) is one that I fully support. In this order, we take another step toward meeting the overriding objective of the *Competitive Carrier Rulemaking* proceeding,[1] i.e. to encourage competition through the elimina-

[4] PACNET was authorized to serve the following cities: Agana, Guam; Atlanta, GA; Amarillo, TX; Anchorage, AK; Austin, TX; Boston, MA; Chicago, ILL; Cleveland, OH; Dallas, TX; Denver, CO; Detroit, MI; Ft. Lauderdale, FL; Honolulu, HI; Houston, TX; Kansas City, MO; Los Angeles, CA; Minneapolis, MN; New Orleans, LA; New York, NY; Oakland, CA; Oklahoma City, OK; Omaha, NE; Phoenix, AZ; Portland, OR; Salt Lake City, UT; San Antonio, TX; Santa Ana, CA; Seattle, WA; St. Louis, MO; and Washington, D.C.

[5] See *Second Computer Inquiry*, 77 FCC 2d 384 (1980).

[1] Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Further Notice of Proposed Rulemaking (IRC Further Notice), FCC 82-187 (released April 21, 1982.

tion of unnecessary and overly burdensome regulation of non-dominant common carriers.

The *Second Report and Order*, however, also demonstrates the inequities that may result from our failure to resolve in an expeditious manner the issues which remain pending in this docket. For example, it has come to the Commission's attention that several Independent Telephone Companies have begun offering resale services outside their local service areas through affiliates. These resale affiliates, which apparently cannot take advantage of the parent companies' control over local exchange facilities, are non-facilities based carriers. Nevertheless, such affiliates may not compete on an equal footing with the non-affiliated resellers encompassed by the forbearance policy adopted today. This anomalous situation results from the Commission's continued adherence to an analytical construct adopted in the *First Report and Order* whereby a carrier which is dominant in one market is considered dominant in all markets it serves, i.e. the carrier specific approach. Under this approach, Independent Telephone Companies, which were found to be dominant in their local service areas, must be treated as dominant in their provision of all basic services, including resale services.[2]

Over two years ago, the Commission recognized the static and inflexible nature of a dominant/non-dominant classification scheme based on a carrier specific approach. *Further Notice of Proposed Rulemaking*, 84 FCC 2d at 498. It therefore proposed analyzing the communication industry using a market specific approach. This approach could lead to a carrier which is dominant in one service market nevertheless being considered non-dominant in another. Although there was virtually no opposition to the proposal in comments subsequently filed, no action has yet been taken on it.

I believe it is imperative that the issues which remain pending in this docket be resolved without further delay in order that the Commission's own inaction does not work at cross purposes with its goals in the *Competitive Carrier Rulemaking* proceeding. As demonstrated by the situation described above, we must ensure that our rules keep pace with changes that are occurring in the communication market as a result of increased competition. Otherwise, the example set forth is likely to repeat itself with frequency as carriers continue to diversify their service offerings.

[2] The Commission's assurances to resale affiliates of Independent Telephone Companies that it will look favorably upon requests for waiver of the dominant carrier rules will somewhat alleviate the inequitable situation described above. Nonetheless, I believe the Commission would be remiss in its duties if it were to unnecessarily delay resolving the question whether the resale affiliates operating outside of their corporate parents' local service areas are in fact dominant carriers.

Common Carrier, International
Satellite Communications

Application for authority to provide satellite communications service to non-carriers at all U.S. international earth stations granted for public convenience and necessity.
-COMSAT

FCC 83-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORPORATION	File No. I-P-C-83-008
Application for authority to provide satellite communications service to non-carriers at all U.S. international earth stations COMMUNICATIONS SATELLITE CORPORATION	Transmittal Nos. 428 and 431
Revisions to Tariff F.C.C. No. 101	

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983; Released: February 2, 1983)

BY THE COMMISSION:

I. *Background and Filings*

1. The Commission has before it for consideration the application of the Communications Satellite Corporation (Comsat) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to implement our recent *Authorized User* decision.[1] Also before us are three "emergency" filings by RCA Global Communications, Inc. (RCA) relating to recent actions taken pursuant to delegated authority by the Chief, Common Carrier Bureau, to implement that decision. Specifically, RCA has filed (a) an application for review of a grant in File No. I-P-C-83-008 of special temporary authority to Comsat to provide basic transmission capaci-

[1] Proposed Modifications of the Commission's Authorized User Policy Concerning Access to the International Satellite Service of the Communications Satellite Corporation (Authorized User), 90 FCC 2d 1394 (1982), *appeal docketed sub nom.* RCA Global Communications, Inc. v. FCC, No. 82-1972 (D.C. Cir., filed August 20, 1982), *case consolidated with* ITT v. FCC, Nos. 79-1046 *et al.* (D.C. Cir., filed January 12, 1979).

ty directly to users at U.S. international earth stations under the same terms and conditions that it provides such capacity to authorized carriers;[2] (b) a motion to stay the effectiveness of the grant of special temporary authority to Comsat to provide direct service to non-carriers pending review of this grant of special temporary authority by the U.S. Court of Appeals for the District of Columbia;[3] and (c) an application for review of an order which denied RCA's petition to reject or suspend and investigate the proposed revisions to Comsat's Tariff F.C.C. No. 101 which implement our *Authorized User* decision.[4] Below we (a) summarize the *Authorized User* decision; (b) review Comsat's application and the Bureau's grant of special temporary authority in File No. I-P-C-83-008; (c) outline Comsat's revisions to its Tariff F.C.C. No. 101 and address the Bureau's order denying the IRCs' petitions to reject or suspend and investigate; and (d) further describe RCA's three "emergency" filings. We then analyze Comsat's application in File No. I-P-C-83-008 and the filings of RCA.

A. *Authorized User*

2. On August 19, 1982, we released a Report and Order in the *Authorized User* proceeding. In this decision we reviewed our *Authorized User* policy which had previously limited Comsat to the role of a carrier's carrier.[5] After examining comments filed by various parties, including RCA which opposed any change in the

[2] RCA's submission, filed December 29, 1982, is titled Emergency Application of RCA Global Communications, Inc. for Review. The Bureau's letter grant of special temporary authorization in File No. I-P-C-83-008 of which RCA seeks review (and a stay) was dated December 29, 1982, Mimeo No. 1596.

[3] RCA's submission, filed on December 29, 1982, is titled Emergency Motion by RCA Global Communications, Inc. for Stay Pending Review. On January 3, 1983, RCA supplemented its Motion for Stay. On January 4, 1983, ARINC submitted an Opposition to RCA's Motion for Stay. On January 6, 1983, WUI filed a Request for Stay Pending Court Review which it indicated could be treated by the Commission as an independent request for stay or as comments supporting RCA's filings. We address it as a stay motion. ARINC filed an Opposition to WUI's submission on January 13, 1983, and WUI filed a Reply on January 14, 1983. On January 25, 1983, ITT filed an Application for Review and joined in the RCA and WUI stay motions.

[4] RCA's submission, filed on December 29, 1982, is titled Emergency Application of RCA Global Communications, Inc. for Review. The Bureau's order of which RCA seeks review is Comsat, Mimeo No. 1592 (released December 29, 1982).

[5] This policy, adopted in Authorized Entities and Authorized Users, 4 FCC 2d 421 (1966), *recon. granted in part*, 6 FCC 2d 593 (1967), proscribed non-carriers from direct use of Comsat's satellite transmission facilities except in unique or exceptional circumstances. Review of the Authorized User policy was initiated by Notice of Proposed Rulemaking in Docket No. 80-170, 77 FCC 2d 535 (1980). In the Notice, the Commission tentatively concluded that changing circumstances had cast doubt on the continued validity of its 1966 Authorized User policies and solicited public comment on a specific proposal to authorize Comsat to offer international satellite communications service directly to the public.

Authorized User policies, and analyzing the competitive and economic developments and changed policy perspectives in the international communications market, we concluded that continuation of "carrier's carrier" constraints on Comsat's service was no longer warranted. 90 FCC 2d at 1415. We therefore adopted new policies which would enable Comsat to provide service directly to both carrier and non-carrier entities by (a) requiring Comsat to make its INTELSAT basic transmission facilities available on the same terms and conditions to both non-carriers and carriers; and (b) permitting Comsat, through a separate subsidiary, to enter the end-to-end service market in competition with the IRCs.[6] Comsat was ordered by the Commission to commence offering basic satellite transmission capacity to non-carriers at all United States satellite earth stations operating with the INTELSAT global satellite system. To this end, Comsat was directed to file within 60 days of the release date of the *Authorized User* decision appropriate amendments to its authorizations under Section 214 of the Communications Act and to file all necessary revisions to its Tariff F.C.C. No. 101 to implement this new policy. 90 FCC 2d at 1435.

B. *Comsat's Section 214 Application and Grant of Special Temporary Authority*

3. Pursuant to our *Authorized User* decision, Comsat filed an application under Section 214 of the Communications Act requesting authority to provide satellite communications services directly to non-carrier users. This application, File No. I-P-C-83-008, was filed on October 18, 1982, and placed on public notice on October 27, 1982. Petitions to deny, dismiss, defer or condition were filed by RCA, ITT World Communications Inc. (ITT), Western Union International, Inc. (WUI), and TRT Telecommunications Corporation (TRT). The American Telephone and Telegraph Company (AT&T) submitted comments. Opposition pleadings were submitted by Comsat and Aeronautical Radio, Inc. (ARINC). Thereafter replies were filed by RCA, ITT, WUI, TRT and AT&T.

4. In its application to provide basic transmission capacity to non-carriers at U.S. international earth stations Comsat indicates that (a) it will continue to lease the same space segment capacity from INTELSAT and utilize the same earth station capacity at U.S. international earth stations; (b) it forsees no increase in staffing; (c) it will coordinate the alignment of service between foreign and domestic earth stations on the same basis for all users, and will provide the same quality control, signal conditioning, technical coordination, monitoring, testing and maintenance activities for all users; (d) it may enter into agreements with overseas administrations, particularly where new services or facilities are involved; (e) it

[6] Authorized User, 90 FCC 2d at 1396–97.

may incur some additional advertising costs in support of its service offering to non-carriers but does not anticipate any significant change in its revenue requirements; and (f) it will maintain an account for each user and may enter into reciprocal billing arrangements with overseas administrations.

5. In opposition to Comsat's request for authority in File No. I-P-C-83-008 to provide basic transmission capacity to carriers and non-carriers on the same terms and conditions, the IRCs argue, *inter alia*, that (a) action on Comsat's application should be deferred until the Commission resolves alleged inconsistencies between the *Authorized User* and *Comsat Structure* orders;[7] (b) action on Comsat's application should be deferred until final resolution by the Commission of issues designated for inquiry relating to the future competitive relationship between Comsat and the IRCs;[8] (c) Comsat's proposed service, as reflected in its tariff, will violate CCITT recommendations on the resale of services; (d) Comsat's provision of service to users under the proposed market structure would unlawfully discriminate against carriers, result in higher rates to IRC customers, be contrary to the competitive mandate of the Communications Satellite Act and violate the antitrust laws; and (e) there is no basis in the record to grant Comsat's Section 214 application, that a grant would result in a significant revenue diversion,[9] and that an evidentiary hearing on the merits of the application is necessary. Additionally, TRT requests that certain specific conditions be imposed on any Comsat authorization to insure that Comsat provides non-carriers only those service features it now provides to the IRCs.[10] AT&T, in its

[7] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation (Comsat Structure), 90 FCC 2d 1159 (1982).

[8] Modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system, 90 FCC 2d 1458 (1982), and Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982).

[9] In support of this allegation RCA submitted a traffic and revenue diversion study. We address this study in paragraphs 15–25.

[10] TRT requests that Comsat be specifically prohibited from providing any of the following service features which it represents are currently provided by the IRCs but not by Comsat:

1. Arranging for the acquisition on behalf of the customer of connecting terrestrial circuits or terminal equipment;

2. Advising the customer on the connecting terrestrial circuits or terminal equipment that it should acquire;

3. The coordination with other carriers in the installation or restoration of end-to-end services;

4. End-to-end testing of the customer's circuitry;

5. End-to-end circuit conditioning and balancing;

6. Fault isolation other than that necessary to determine that the satellite link

comments, emphasizes that any service offered to users pursuant to our *Authorized User* decision must only be for basic transmission or transparent satellite channels and may not be for an end-to-end service. In their opposition filings Comsat and ARINC emphasize that the proposed service will not be an end-to-end offering and that the IRCs' contentions were fully considered and dismissed by the Commission in its *Authorized User* decision.

6. In their reply filings the IRCs generally reiterate their earlier pleadings. They emphasize (a) the competitive impact on their operations if Comsat is authorized to provide service to non-carriers; (b) the need to limit any Comsat direct offering to basic transmission capacity and the importance of not permitting Comsat to bootstrap or graft incidental service features onto such a service offering; and (c) alleged inconsistencies between the *Authorized User* and *Comsat Structure* orders in which the former order permits the provision of basic transmission service directly to users by Comsat's World Systems Division while the latter order requires a separate subsidiary for any competitive offering. In its reply filing AT&T states that the Commission should ensure that any activities undertaken by Comsat pursuant to the *Authorized User* decision do not deviate from or blur the basic transmission service concept.

7. By letter dated December 29, 1982, the Bureau made a *sua sponte* grant of special temporary authority to Comsat for the provision of direct service to non-carriers on the same terms and conditions that it provides service to carriers. The Bureau letter noted the positions of TRT and Comsat, and indicated that the grant of special temporary authority did not in any way prejudge Commission action on the underlying application. RCA petitions the Commission to review and summarily reverse this Bureau action or to grant its motion to stay the effectiveness of this decision taken pursuant to delegated authority. The Bureau subsequently requested Comsat to extend the effective date of its tariff to allow adequate time for Commission review of RCA's various requests.[11]

C. *Tariff Revisions and Bureau Order*

8. Also pursuant to our *Authorized User* decision, Comsat filed Transmittal Nos. 428 and 431 to revise its Tariff F.C.C. No. 101 in order to offer non-carrier entities direct access to its satellite communication facilities. These revisions are currently scheduled to

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provided by Comsat is operating in accordance with tariffed specifications; and

7. Visits to the customer's premises either in the United States or in other countries, by technical or engineering personnel in the employ of Comsat or under contract to Comsat.

[11] The tariff revisions were originally scheduled to become effective on January 16, 1983, but Comsat has deferred the effectiveness of the revisions at the request of the Bureau to permit Commission review and to provide an opportunity for judicial stay requests to be considered by the court.

become effective on March 2, 1983. RCA, ITT and TRT petitioned for rejection or suspension and investigation of these tariff revisions. Comsat and ARINC filed replies opposing the IRCs' petitions. In their filings the IRCs argued, *inter alia*, that (a) Comsat is precluded by the *Comsat Structure* order from implementing the proposed revisions except through a separate subsidiary; (b) Comsat's filing should be rejected for lack of proper cost support data as required by Section 61.38; (c) Comsat's tariff may be unreasonably discriminatory toward carriers within the meaning of Section 202(a) of the Act to the extent Comsat proposes to offer service to non-carriers at the same rates as carriers despite alleged cost differences; (d) the tariff revisions should be rejected since Comsat lacks Section 214 authority; (e) Comsat's tariff would permit the unlimited resale and shared use of international circuits in abrogation of CCITT recommendations; (f) provision of service to non-carriers by Comsat would prejudice the Commission's consideration of issues in pending proceedings; and (g) the tariff provisions would enable Comsat to engage in anticompetitive practices.

9. In an order released on December 29, 1982, the Bureau found the IRCs' arguments to be without merit and denied the IRCs' petitions to reject or suspend and investigate. In doing so, the Bureau noted that many of the arguments raised by the IRCs, especially regarding the competitive effect of Comsat's offering to non-carriers, had already been considered and rejected in the Commission's *Authorized User* decision. Thus, the tariff review process was simply not the proper context in which to seek reconsideration of this decision. Additionally, although Comsat failed to submit the cost support data required by Section 61.38 of the Commission's Rules, the Bureau emphasized that the proposed service and rates were identical to that currently offered to carriers and information concerning this offering was already on file with the Commission. Under these circumstances, and given our stated desire to expedite implementation of our revised *Authorized User* policies, the Bureau waived the Section 61.38 requirements. The Bureau also dismissed claims that the proposed rates would be unreasonably discriminatory toward carriers, finding that Comsat's decision to charge the same rates to carriers and non-carriers by averaging costs among all users was an acceptable practice. In any event, the Bureau noted that cost differences, if any, between Comsat's provision of service to carriers and non-carriers would appear to be *de minimis*. [12] RCA now

[12] The Bureau also found no merit to the IRC claim that the revisions should be rejected or suspended pending investigation of tariff provisions which would permit the unlimited resale and shared use of international satellite circuits. The Bureau rejected this claim because the instant revisions contain specific language which conditions the resale and shared use of satellite circuits upon bilateral agreement between the United States and overseas entities. As to the argument that Comsat is precluded from offering service to non-carriers except through a separate subsidiary, the Bureau determined that the separate subsidiary require-

requests that the Commission review and summarily reverse this Bureau order.

D. *RCA's Filings*

10. RCA presents two arguments in its application for review of the grant of special temporary authority in File No. I-P-C-83-008. First, RCA argues that the action taken by the Bureau was unnecessary to achieve its stated reason. Noting that the Bureau's grant of temporary authority was based on the *Computer II* requirement that entities detariff their enhanced services by January 1, 1983, and thus become users of satellite facilities under *Authorized User* rather than carriers under Title II, RCA contends that the grant of special temporary authority to Comsat to provide direct service to users (non-carriers) was unnecessary since the Bureau, by letter dated October 21, 1982, deferred the date for carriers to file any necessary tariff revisions.[13] Second, RCA contends that the grant of special temporary authority forecloses, as a practical matter, the relief it seeks in the Section 214 proceeding, specifically its argument that (a) no authorization be granted until the Commission has completed its rulemaking proceedings on the issues of earth station ownership and direct access;[14] or (b) any authorization be conditioned to require Comsat to provide direct service to users through a separate subsidiary until the earth station ownership and direct access proceedings are completed.

11. In its motion to stay the effectiveness of the grant of special temporary authority pending review of the grant by the appropriate appellate court,[15] RCA contends that a stay is justified under the standards developed in *Virginia Petroleum Jobbers* and *Holiday Tours*.[16] First, RCA argues that it is likely to prevail on the merits of

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ment set out in the *Comsat Structure* order applies to Comsat's entry into the end-to-end service market in competition with the IRCs and is therefore not relevant to Comsat's provision of INTELSAT basic transmission capacity to non-carriers as contemplated in *Authorized User*.

[13] The pertinent part of the Bureau letter deferring the effective date is as follows:

> To the extent that you, or any other international carrier, are of the opinion that tariff modification for existing international services are warranted to comply with Computer II, any requirement to file appropriate tariff revisions for these services is deferred until the Commission has acted on the pending petitions filed in connection with the above-referenced order.

Letter to RCA, dated October 21, 1982.

[14] *See* note 8, *supra*.

[15] In the alternative, RCA requests that a limited stay be granted "pending submission to, and review by, the court of appeals of a motion by RCA Globcom to stay the effectiveness of such awards pending review thereof by the court." (RCA stay motion, page. 2).

[16] Virginia Petroleum Jobbers Association v. FPC (Virginia Petroleum Jobbers), 259 F.2d 921 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours (Holiday Tours), 559 F.2d 841 (D.C. Cir. 1977).

its appeal because (a) the Commission has unlawfully revised its *Authorized User* policy; (b) the Commission has departed from a Congressionally sanctioned policy without taking concurrent action on the IRC requests for cost-based access to INTELSAT; and (c) the grant of special temporary authority was unnecessary. Secondly, RCA contends that it will be severely and irreparably injured in the absence of a stay. In support of this claim RCA submitted a separate study on traffic and revenue diversions relating to our *Authorized User* decision and the provision by Comsat of direct private line service to non-carriers at U.S. international earth stations. According to RCA, Comsat's entry into the retail market will inflict quantifiable revenue losses on RCA in excess of $17.9 million annually ($11.9 million in pretax income after deducting avoidable costs) until RCA gains cost-based access to INTELSAT. RCA further states that other losses not subject to quantification will also occur. Thirdly, RCA avers that no other party will be harmed by preserving the *status quo* through the issuance of a stay. RCA states that adequate service is now provided to the public at rates which reflect costs and that any delay in the initiation of direct service to non-carriers by Comsat is justified by the severity of the losses which RCA and other IRCs would face without a stay. Finally, RCA indicates that the public interest will be promoted by the issuance of a stay.

12. In its application for review of the Bureau's order denying its petition to reject or suspend and investigate Comsat's tariff revisions, RCA contends that summary reversal of the Bureau's December 29, 1982 order is warranted because the Bureau erred in waiving the cost support data required under Section 61.38 of the Commission's Rules. Thus, according to RCA, information necessary to determine whether cost differences in the provision of service to carriers and non-carriers warranted different rates, or whether it was reasonable for Comsat to average such costs among both carrier and non-carrier customers, was excluded. Indeed, RCA concludes, the Bureau, in dismissing the IRC's claim that Comsat's rate averaging was unreasonably discriminatory, relied upon estimates furnished by parties opposed to Comsat's tariff proposal.[17]

II. *Discussion*

13. In our *Authorized User* decision we found that permitting non-carriers to obtain basic transmission capacity directly from Comsat on the same terms and conditions Comsat now offers to

[17] RCA Globcom also contends that the Bureau's action was inconsistent with its disposition of similar claims regarding Comsat's extension of its television services to all users in Communications Satellite Corporation, 79 FCC 2d 562 (1980). It is argued that in that case, where Comsat also failed to submit Section 61.38 material, the Bureau sought additional information on expenses related to direct user service. *See* para. 31, *infra*, for discussion of this issue.

carriers would advance the goals of the Communications Satellite Act, provide additional benefits and alternatives to users, and otherwise serve the public interest. We also found that permitting Comsat to provide end-to-end service, through a separate subsidiary and in competition with the IRCs, would be beneficial to users. The RCA and other IRC filings once again largely repeat arguments that were previously rejected in the Commission's *Authorized User* decision and the recent order denying WUI's motion for stay.[18] Upon consideration of the filings before us we shall grant Comsat's application in File No. I-P-C–83–008 to implement our *Authorized User* decision and deny RCA's application for review of the Bureau's order denying its petition to reject or suspend and investigate Comsat's tariff revisions. Below we discuss the basis for these actions.[19]

A. *Comsat Application File No. I-P-C–83–008*

14. We cannot agree with the IRCs that Comsat's request for authority to implement our *Authorized User* decision should be deferred, denied or conditioned. First, in our *Authorized User* decision we analyzed the Communications Satellite Act and carefully traced the history of the provisions relating to Comsat service offerings. We found that the plain language of the Communications Satellite Act does not bar Comsat from providing service directly to users. We also found that the Congressional history and various floor statements could not reasonably be read to suggest that Comsat must be limited to the role of a carrier's carrier.[20] We therefore concluded, in view of the anticipated benefits of direct access by users to basic transmission capacity, that the public interest would be served by modifying the existing *Authorized User* policy. Second, permitting Comsat's World Systems Division to offer basic transmission capacity directly to non-carrier users is not inconsistent with our *Comsat Structure* order. Both *Authorized User* and *Comsat Structure* require Comsat to engage in any competitive undertaking through a separate subsidiary. The provision of end-to-end services by Comsat similar to those offered by the IRCs would be such a competitive undertaking. End-to-end service offerings could only be offered through a separate subsidiary which leased satellite capacity under tariff from Comsat's World Systems Division. *Authorized User*, 90 FCC 2d at 1421. The offering of basic transmission capacity

[18] Authorized User, FCC 82–464 (released November 2, 1982).

[19] The grant of Comsat's underlying application moots RCA's motion for stay and application for review of the grant of special temporary authority. Similarly, WUI's motion for stay is also mooted. However, in acting on Comsat's application, we have considered as supplemental pleadings these RCA and WUI filings relating to the Bureau's grant of special temporary authority.

[20] We reached the same conclusion in Spanish International Network, 70 FCC 2d 2127 at 2133–40 (1978).

either to carriers or non-carriers, however, is a monopoly function to be provided by the World Systems Division under the *Comsat Structure* and *Authorized User* decisions. 90 FCC 2d at 1420–21. Third, Commission action in the separately docketed proceedings relating to cost-based operational and financial access to INTELSAT by the IRCs is simply not a condition precedent to implementation of our *Authorized User* decision. 90 FCC 2d at 1433–34. Deferring action on this application would disadvantage users and enhanced service providers who desire or are required to directly access basic transmission facilities from Comsat. Additionally, *Authorized User* implementation impacts only the U.S. portion of an international satellite transmission. It does not affect the operations of INTELSAT or any foreign administration unless that foreign administration opts to operate directly with a U.S. non-carrier user. On the other hand, the proceedings inquiring into the direct operational and financial access to INTELSAT by U.S. carriers raise distinct legal, economic and technical issues, many of which directly impact the operations of INTELSAT and our foreign partners. Moreover, although the question of direct operational (earth station ownership) and financial access to INTELSAT by U.S. carriers has been raised in other proceedings, it is a subject matter on which we only recently have received any significant amount of direct information on which to base any tentative or final conclusions. Fourth, as noted in the Bureau's tariff order, Comsat's tariff revisions would not violate the CCITT's recommendations restricting resale or shared use of private lines. Fifth, the IRCs have not submitted any persuasive evidence or documentation that direct user access to basic transmission capacity would violate the antitrust laws, result in higher charges to ratepayers or create an unlawful discrimination. Sixth, a clear basis exists in the rulemaking and application proceedings to warrant without an evidentiary hearing a finding that a grant of the pending application is required by the public convenience and necessity. We have already found that providing basic transmission capacity to non-carriers in the expending international market is reasonably feasible and will result in specific and definite benefits to users. 90 FCC 2d at 1419–32. Comsat's application, which indicates that carriers and non-carriers will be provided the same service at the same rate, reinforces this public interest finding. See *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

15. In the Comsat application proceeding, RCA submitted a traffic and economic diversion study to support its contention that a grant of Comsat's application to provide basic transmission capacity to all users would severly and irreparably injure RCA (and the other IRCs) and would not be in the public interest. We believe it necessary to respond to RCA's submission. The RCA study, filed on December 16, 1982, makes an estimate of the potential traffic diversion from RCA to Comsat. This traffic diversion is then converted into an

estimated loss of revenue and pre-tax net income. RCA estimates that it could lose as much as $17.9 million in revenue annually, with a net loss of $11.9 million in pre-tax net income after deducting avoidable costs.[21] In conducting its diversion analysis, RCA employs the following underlying assumptions (a) Comsat will continue to offer basic transmission service at U.S. earth stations at a tariffed rate of $1125 per month per half-circuit (channel); (b) Comsat's marketing activity to attract customers will not exceed current industry levels; (c) customers switching their service from RCA to Comsat will make their own arrangements at their own expense for connecting lines between their premises and the nearest U.S. general purpose earth station and for other services now provided by RCA; and (d) RCA would continue to offer leased channel services under its existing rate structure and at existing rate levels. This final assumption, RCA claims, is based on an examination of the impact of reducing cable rates and a conclusion that such a rate reduction is impractical. RCA states that a reduction in its rates for leased channel services would have a negative effect on its profits. Furthermore, RCA states that it would have to reduce its average rate for leased channel services (approximately $3,980 per month per half-circuit) by 55% in order to match a customer's out-of-pocket expense of dealing directly with Comsat ($1,125 per monthly half-circuit for the space segment plus, on the average, approximately $600 for the domestic landline circuit).

16. In developing its study, RCA excluded all narrowband users as well as wideband leased channel customers in markets Comsat is not authorized to serve (Hawaii, Puerto Rico, and Mexico). RCA thus confined its study to revenues and costs for 548 half-circuits, of which 314 are routed over satellite facilities and 234 are routed over cable facilities. Users were then divided into three categories: customers leasing three or more half-circuits per month; two half-circuits per month; and one half-circuit per month.

17. In RCA's judgment, these categories take into account the trade-off each customer would have to consider in deciding whether to obtain service directly from Comsat or to remain a customer of the IRC, *i.e.*, an evaluation of the cost savings available to customers willing to act as their own "general contractor" in arranging end-to-end services and the additional costs involved in such self directed routing, testing and monitoring.[22] RCA states that large users (three

[21] In reality, what is characterized by RCA as a "pre-tax net income loss," can be viewed through glasses of a slightly different tint and be characterized, to a degree, as "savings" for end-users.

[22] In obtaining satellite transmission capacity directly from Comsat a user would have to perform a variety of testing, maintenance, monitoring, conditioning, balancing and restoration tasks now provided by the IRCs. The user would also have to make its own domestic and foreign transmission tail or link facility arrangements.

or more half-circuits) would find direct access to Comsat to result, on balance, in substantial savings. This would be less true for medium-sized customers (two half-circuits); and the cost savings for small customers would, in many cases, not equal the costs of acting as "general contractor."

18. Of those RCA customers leasing three or more half-circuits, which account for 318 of the study's 548 half-circuits, the largest user by far is the Department of Defense (DOD), which leases 109 channels (43 satellite, 66 cable). RCA estimates that DOD might immediately transfer to Comsat all 43 circuits utilizing satellite facilities and 33 (50 percent) of the circuits using cable facilities, thus accounting for a transfer of 76 of 109 DOD circuits (nearly 70%) from RCA to Comsat. In regard to other large users, based upon a customer survey, RCA "generally concludes" that such customers "might" take advantage of Comsat's lower rates unless RCA had previously installed specialized switching equipment. RCA estimates that nearly 80% of these customers might divert to Comsat.

19. For customers leasing two half-circuits, RCA concludes that those likely to switch would have the technical know-how and sophistication in arranging connecting circuits and could provide services to maintain existing channels. Based upon a customer-by-customer estimate, RCA is of the opinion that nearly 60% of these channels might be diverted to Comsat. For those customers leasing only one half-circuit, it was concluded that approximately 21% of these leased channels might be switched to Comsat. This was based on a judgment that only high-technology firms would arrange for connecting circuits or maintenance personnel.

20. After estimating potential traffic diversion in all three categories, RCA quantifies this diversion with respect to circuit revenue, equipment revenue, landline costs and international facility costs for both satellite and cable circuits. RCA concludes that its estimated traffic losses would result in an annual reduction in leased channel revenues of $15.5 million and equipment revenues of $2.4 million, for a total annual revenue reduction of $17.9 million. After deducting $6.0 million of avoidable or variable costs, *i.e.*, those current costs which would be avoided by losing a customer, RCA estimates that it would experience an $11.9 million reduction in pre-tax net income.

21. Finally, RCA estimates that there will be other adverse financial effects upon it which are not included in the $17.9 million revenue loss estimate. This refers to the embedded or fixed expenses related to the furnishing of leased channel service by RCA, such as facilities, manpower and equipment. RCA states that there could be idling of plant facilities. Additionally, fixed expenses such as cable operation and maintenance would continue even in the absence of leased circuit revenues.

22. For the reasons discussed below we cannot give RCA's

diversion study significant weight. Several of the assumptions made by RCA in its traffic diversion study are subject to serious question. It is claimed, for example, that there would be no reduction in RCA's leased channel rates to counter competition from Comsat because even a slight reduction in rates would have a negative effect on profits. RCA's average monthly half-circuit rate of $3,980 is more than twice as large as the combined $1,125 Comsat service charge and the average landline circuit change of $600 per month. This difference of over $2200 per half circuit per month goes toward the cost of additional services provided by RCA (testing, monitoring, etc.) and RCA's margin of profit. Although the costs for these services are not provided, RCA in essence claims that there is no room for reduction in any of these costs. We cannot accept this unsubstantiated contention. Furthermore, even if there were a reduction in profits, it would not necessarily be in the public interest to deny an application to shield a business from the rigors of competition.

23. Another speculative assumption is "that the DOD may immediately transfer to Comsat all those circuits utilizing satellite facilities and 50 percent of the circuits using cable facilities." This would account for nearly 70% of RCA's leased channel traffic from DOD and nearly 25% of the total circuit loss claimed in RCA's study. However, DOD has clearly stated that it has never contemplated transferring all commercial satellite service to Comsat, even if it could deal directly with Comsat.[23] In fact, DOD indicates that its policy is, and will continue to be, to acquire international leased channel service (cable or satellite) from an IRC on an end-to-end basis. DOD further asserts that it intends to deal directly with Comsat in "only those unique and critical instances (where DOD needs) dedicated wideband links between military installations . . . ." which constitute "a limited portion of DOD international leased-channel requirements." Additionally, RCA's claim that DOD would shift 50% of its cable channels to Comsat is wholly speculative. Its only basis for this assumption is that outside of the U.S., the DOD policy of diversity mix might take second place to the savings involved. First, this does not appear logical in that diversity of circuits to overseas installations may be particularly important to DOD and second, shifting of cable circuits is contrary to DOD's own statements on the subject.

24. Another speculative assumption by RCA is that, for large users, nearly 80% of the non-DOD leased channels might be diverted to Comsat. Although RCA states that this estimate was based upon a customer-by-customer survey, the language used by RCA indicates substantial un ertainty, *i.e.* "it was generally concluded that such customers might take advantage of Comsat's lower rates . . . ."

[23] *See* DOD Opposition to Motion for Stay (page 5-6) in CC Docket No. 80-170, Authorized User, filed September 7, 1982.

Furthermore, we cannot assume, as RCA does, that a vast majority of large users would find Comsat half-circuits a suitable substitute for the IRCs' full service, end-to-end leased channel offering. We note that DOD, the largest user of such end-to-end services, has stated that direct Comsat service will be useful only for a small percentage of its needs and that it will retain the bulk of its IRC provided end-to-end service. In sum, we find unpersuasive RCA's estimates relating to the potential diversion of DOD and other large user traffic to Comsat. We also note that this traffic segment accounts for over 75% of the traffic diversion estimated by RCA in its study.

25. Even if we were to accept all of RCA's contentions, its losses would equate to only about 9% of its total annual revenues, assuming it made no effort to competitively respond to customer desertions. It is questionable whether this loss would be so substantial as to threaten RCA's ability to continue to adequately provide service to the public. RCA has also not considered in its claim of irreparable injury the fact that the market for all types of international record services is likely to grow, thus helping to offset any potential revenue losses from leased channel services. We therefore cannot conclude, as RCA invites us to do, that a grant of this application would irreparably injure the IRCs and would not be in the public interest.

26. Furthermore, we will not specifically impose the conditions proposed by TRT in its petition to deny. Nevertheless, it should be abundantly clear that *Authorized User* permits World Systems Division to offer non-carriers only basic transmission capacity under the same terms and conditions as that capacity is provided to carriers. 90 FCC 2d at 1419–22. In addition to the provision of an end-to-end service, the provision of additional or incidental service functions may not be provided by World Systems Division pursuant to *Authorized User*.[24] While Comsat appears to generally recognize these operating parameters in its application and opposition filing, we note that the application contains some vague language describing World Systems Division's proposed operatings functions. This language is as follows: "These activities may include the conclusion of agreements with overseas administrations, particularly where new services or facilities are involved." To the extent that this language relates to routine technical arrangements for the narrow provision of basic transmission capacity (earth station and space segment) it does not conflict with the policy enunciated in *Authorized User*. To the extent that this language relates to the provision of additional or incidental service functions beyond the earth station

[24] Such incidental or additional services include, but are not limited to, reciprocal billing, direct or indirect acquisition of tail/link facilities, foreign operating agreements, and end-to-end monitoring, coordination and testing.

and space segment it conflicts with our *Authorized User* policy and must be rejected.

27. Finally, we are aware that RCA and WUI have filed requests for stay pending court review of our *Authorized User* decision, and RCA has indicated here that it intends to seek judicial stay of Comsat's Section 214 authorization. While those remarks were directed toward the temporary authority awarded to Comsat, it is evident that they are equally applicable to the permanent 214 authorization granted herein. It is also clear that the arguments raised against the temporary authority would be applicable to any stay request of the permanent authorization. Therefore, in order to conserve both petitioners' and our own resources, and in the interests of expedition, we have considered here whether RCA's arguments would warrant a stay of our permanent Section 214 grant to Comsat. See Rule 18, Federal Rules of Appellate Procedure.

28. The four criteria for issuance of a stay are found in *Virginia Petroleum Jobbers*. The elements which a petitioner must show are as follows (1) Has the petitioner shown that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? 259 F.2d at 925. The above test was slightly modified in the *Holiday Tours* decision. In *Holiday Tours* the court stated that when the second, third and fourth factors of *Virginia Petroleum Jobbers* strongly favor interim relief, a tribunal may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. 559 F.2d at 943. The "strong showing that it is likely to prevail on the merits of its appeal" language of *Virginia Petroleum Jobbers* creates a more difficult test for a movant than the "substantial case on the merits" standard found *Holiday Tours*. The court is clear in *Holiday Tours*, however, that this lower threshhold should be employed only when the court is confronted with a case in which the other three factors strongly favor interim relief. We do not believe that any of the other three factors favor RCA. Furthermore we do not believe that RCA has met even the relaxed standard of *Holiday Tours*.

29. As indicated in paragraph 14, we cannot conclude that RCA is likely to prevail on the merits of its appeal. Nor can we conclude that RCA has made a substantial case on the merits. Our analysis in paragraphs 15–25 of RCA's traffic and revenue diversion study indicates that our action here will not irreparably injure that carrier (or any other IRC). As indicated in paragraph 14, we have found that any delay would substantially harm non-carrier users, Comsat and enhanced service providers. Finally, the benefits described in our *Authorized User* decision indicate that the public interest would not be served by the issuance of a stay. Therefore, unless the parties can

produce new evidence, we would be unwilling to further delay the effectiveness of the actions taken here.

B. *RCA's Application for Review of the Bureau's Tariff Order*

30. We now turn to RCA's request that we reverse the Bureau's order denying its petition to reject or suspend and investigate Comsat's revisions to Tariff F.C.C. No. 101. As explained, petitioner contends that the Bureau's waiver of Section 61.38 was in error because it made it impossible to determine the reasonableness of Comsat's proposal to offer this service to both carrier and non-carrier customers at the same rates by averaging costs among all users. The implication appears to be that had Comsat been required to file cost support material, that material would have shown the difference in costs between providing service to carriers and non-carriers to be sufficiently substantial to warrant rate deaveraging, *i.e.*, a rate discount for carriers or a higher rate for non-carriers.

31. We find this contention to be without merit. As the Bureau correctly observed, Section 61.38 data are not required in all cases, particularly where adequate information is already available. *Communications Satellite Corporation*, 75 FCC 2d 562, 654–65 (1980). Applying that principle here, it is significant that the proposed service offering to non-carriers is identical to that currently being offered to carriers, and is to be offered at the same rates. More to the point, there is already on file with the Commission cost information concerning those rates. Of all these data, RCA took issue with only one cost component, namely, additional administrative expenses related to customer sales, accounting, billing and collections which assertedly Comsat would incur in the provision of service to non-carriers. As the Bureau found, however, such expenses comprised only a small portion of Comsat's total operations. For example, the Bureau pointed out upon examination of Comsat's Annual Report Form M for 1981 on file with the Commission, advertising expenses comprised considerably less than one percent of Comsat's total operating expenses.[25] In these circumstances, particularly where, as here, Comsat has had no actual experience in providing this service to non-carriers, we find the Bureau was well within its discretion to have waived Section 61.38.[26] Moreover, given the absence of any

[25] Comsat's advertising-related expenses for 1981 totaled $991,804, only 0.3 percent of Comsat's total operating revenues of $333,979,265 and only 0.4 percent of its total operating expenses of $252,531,326. Even assuming Comsat might incur some additional costs in expanding its service to non-carriers, the Bureau found no grounds to believe the other administrative expenses cited by RCA would be of such a magnitude to render Comsat's proposed cost averaging unreasonable. Indeed, we note that RCA made no independent showing that such expenses for service provided to non-carriers would be materially greater so as to warrant different rates for carriers and non-carriers.

[26] In addition, we find no merit in RCA's contention that the Bureau's waiver of

independent showing by RCA that the proposed revisions were unreasonably discriminatory, we agree with the Bureau that investigation of the revisions was unwarranted.

III. Conclusions and Ordering Clauses

32. In view of all the above, we conclude that a grant of Comsat's application is required by the public convenience and necessity. Accordingly, we shall grant Comsat's application and also affirm the Bureau's tariff action. Additionally, we shall deny as moot the RCA, WUI and ITT stay motions as well as the RCA and ITT applications for review of the grant of special temporary authority.

33. IT IS ORDERED that Comsat application File No. I-P-C-83-008 IS GRANTED and Comsat's World Systems Division is authorized to provide basic transmission capacity to non-carrier users at U.S. international earth stations and to obtain from INTELSAT the units of satellite utilization necessary to provide this service.

34. IT IS FURTHER ORDERED that the applications for review and motion for stay filed by RCA on December 29, 1982, the motion for stay filed WUI on January 6, 1983, and the application for review and motion for stay filed by ITT on January 25, 1983, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Section 61.38 here is inconsistent with its action in regard to Comsat's international television transmission service tariffs in Communications Satellite Corporation, 79 FCC 2d 562 (1980). RCA implies that because Section 61.38 material was not submitted in that case, the Bureau requested additional information. We note, however, that Section 61.38 was also waived in that case. The additional information referred to by RCA, which formed part of the basis for the Bureau's waiver in its 1980 decision, was requested in connection with Comsat's Section 214 application, and was thus available prior to the tariff review process.

Criminal Law, Violation of
Disqualification
Misrepresentation, Character Qualifications

Review Board affirms disqualification of broadcast applicant because of intentional and material misrepresentations made by applicant's principal in an affidavit filed with the Commission, in pre-remand hearing testimony, in sworn responses to written interrogatories on remand, and in remand hearing testimony.
–*Country Broadcasting Company*
Docket Nos. 21235 and 21236

FCC 83R-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COUNTRY BROADCASTING COMPANY High Springs, Florida	Docket No. 21235 File No. BPH-9937
ALACHUA BROADCASTING, INC. Alachua, Florida	Docket No. 21236 File No. BPH-10269
For Construction Permit	

Appearances

James E. Forsman and *David Meyers*, on behalf of Alachua Broadcasting, Inc.; *Vincent J. Curtis, Jr.*, on behalf of Country Broadcasting Company; and *Charles W. Kelley* and *Arthur I. Steinberg*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: February 14, 1983; Released: February 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. Even in comparative broadcast proceedings, "a little neglect may breed great mischief".[1] What began as a simple contest between Country Broadcasting Company (Country) and Alachua Broadcasting, Inc. (Alachua) for authority to construct a new FM broadcast station (Channel 285)[2] at High Springs or Alachua, Florida, has now

[1] Benjamin Franklin, *Poor Richard's Almanac* (1758).

READEX FICHE best copy available

consumed six years, two Initial Decisions, and two Review Board appeals. In the first Initial Decision, 71 FCC 2d 1238 (1978), then-presiding Administrative Law Judge Frederick W. Denniston concluded that Alachua would have been the preferred applicant under the Section 307(b) issue, but disqualified Alachua under misrepresentation and Section 1.65 failure-to-report issues and granted Country's application. By Memorandum Opinion and Order, 71 FCC 2d 1222, 45 RR 2d 551 (1979), the Review Board held that the record evidence under these latter issues was not sufficient to warrant Alachua's disqualification but that the proceeding should be remanded to explore the knowledge, participation, and responsibility of Alachua principal James E. Forsman for the alleged failure of two of his corporations to remit to the government funds withheld from wages for social security (FICA) taxes.[3] [4]

[2] By Order, 42 Fed. Reg. 34916, published July 7, 1977, the applications were designated for hearing to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), which of the proposals would better provide a fair, efficient, and equitable distribution of radio service, and, in the event that a choice between the applicants should not be based solely upon considerations relating to Section 307(b), to determine on a comparative basis which proposal would better serve the public interest. Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[3] Although the Commission does not generally inquire in the first instance into alleged violations of the statutes or rules of another federal agency, the Board felt compelled to add the tax issue because of *The Noble Broadcasting Corp.*, 1 FCC 2d 154, 155, 5 RR 2d 915, 918 (1965), in which the Commission held that "the licensee has twice failed to remit withholding taxes and was subjected to tax liens therefor, which failures reflect adversely upon its qualifications." Yet the circumstances under which the Commission will adjudicate alleged violations of strictures other than the Communications Act or Commission rules remain uncertain. For example, *compare Intercontinental Radio, Inc.*, 88 FCC 2d 819, 823, 50 RR 2d 1073, 1077 (1981) (FCC will not adjudicate alleged violations of National Labor Relations Act where allegations not first submitted to NLRB) *with Gross Telecasting, Inc.*, 55 FCC 2d 295, 34 2d 1491 (1975) (unfair labor practices issue added despite NLRB consent decree); also *compare Katy Communications, Inc.*, 87 FCC 2d 764, 49 RR 2d 1671 (1981) (consent decree with SEC over alleged securities and banking violations not cause for further FCC inquiry) *with Abbey J. Butler*, 47 RR 2d 852 (1980) (consent decree with SEC and commodities violations affirmed by CFTC raise public interest questions requiring hearing); also *compare Kaye-Smith Enterprises*, 90 FCC 2d 27, 39, 51 RR 2d 839, 848 (1982) (FCC will not in the first instance investigate alleged violations of state perjury laws) *with Central Texas Broadcasting Co.*, 74 FCC 2d 393, 396–397, 46 RR 2d 951, 959 (1979) (Commrs. Fogarty and Jones dissenting) (issue added to determine whether principal of applicant violated state usury laws).

We note that the concerns expressed by Commissioners Fogarty and Jones in *Central Texas, supra*, about the present lack of "fully adequate guidance for fair and consistent resolution" of character issues are also manifested in the Commission's recent *Notice of Inquiry, General Docket No. 81-500*, 87 FCC 2d 836 (1981) (FCC Policy on Character Qualifications), and believe that any future uncertainties will be resolved therein.

2. On remand, Administrative Law Judge Byron E. Harrison (ALJ) was designated to preside in this case. He deleted the issues indicated in note 4, *supra*, expanded the FICA tax inquiry to include failure to remit wages withheld for federal income tax purposes,[5] and added an issue to determine whether James Forsman had intentionally misrepresented facts to the Commission concerning the tax issues since early 1978.[6] By Initial Decision (I.D.), FCC 82D-42, released May 27, 1982, the ALJ reaffirmed Alachua's Section 307(b) preference, but concluded that Alachua should be disqualified because of Forsman's wilful conduct in knowing about, participating in, and being responsible for his companies' failure to remit withheld FICA and federal income taxes, and, as an independent disqualifying basis, because of Forsman's significant misrepresentations concerning his alleged lack of contemporaneous knowledge and involvement in these matters. I.D., Conclusions, 7, 9, 10, 29, 30. He therefore denied Alachua's application and granted Country's.

3. The proceeding is now before the Review Board on exceptions filed by Alachua and reply briefs filed by Country and the Mass Media Bureau. The Board has reviewed the second Initial Decision in light of the exceptions and briefs (including exceptions held in abeyance by the Board's remand order) and our examination of the entire record in this proceeding.[7] We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's conclusion that Alachua is not qualified to be a Commission licensee and the ALJ's grant of Country's application. Because we concur in Alachua's disqualification, we do not reach the question whether Alachua's Section 307(b) preference would otherwise have been dispositive, thereby eliminating Country's High Springs application from comparative consideration,[8] or whether, if not dispositive, the ALJ properly resolved the contingent comparative issue in Country's favor.

4. In its seven pages of exceptions, Alachua takes issue with a number of the ALJ's specific findings of fact and conclusions concerning James Forsman's knowledge of and responsibility for his companies' tax problems. While we agree with Country and the Bureau that the exceptions are not in proper form and do not point out with particularity alleged material errors, Sections 1.276(a) and

[4] Further hearing was also ordered on the Section 307(b) issue and a related comparative coverage issue; however, by Memorandum Opinion and Order, FCC 80M-1045, released June 23, 1980, these remand issues were deleted.

[5] Memorandum Opinion and Order, FCC 79M-857, released July 26, 1979.

[6] Memorandum Opinion and Order, FCC 80M-503, released March 25, 1980.

[7] Alachua originally requested oral argument, which was granted by letter dated October 12, 1982. However, when Alachua failed to file a notice of intention to participate in the argument, the Board granted Country's motion to delete the oral argument by letter dated November 19, 1982.

[8] *See WHW Enterprises, Inc.* , 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982) (dispositive Section 307(b) preference affirmed).

1.277(a) of the Commission's Rules, 47 CFR § 1.276(a) and 1.277(a), we shall nevertheless consider them on the merits.[9] *See Kenneth L. Gilbert*, 92 FCC 2d 126, 52 RR 2d 965, 966 n. 3. The general tenor of Alachua's exceptions is that "the facts do not support a conclusion that there were acts of inappropriate conduct on the part of Mr. Forsman with respect to the payment of IRS matters" (Br., p. 1), and that the I.D. "oversteps the bounds of conclusion based upon fair inference and moves into the realm of speculation based upon out-of-context answers and suppositions based upon answers which were given directly in testimony and by answer to interrogatory" (Br., p. 7). Alachua requests that either it be found basically qualified and issued a grant based on its Section 307(b) preference or that the case be remanded for the taking of further evidence. *Id.*

5. Alachua devotes most of its argumentation to analyzing selected paragraphs of the ALJ's findings on the two tax issues. While we have carefully reviewed each of these arguments and believe that all of the findings contained in the challenged paragraphs are adequately supported by record evidence and that Alachua's criticisms are erroneous, unsupported, or speculative, we base our affirmance of Alachua's disqualification solely on the misrepresentation issue.[10] In so doing, we concur with the ALJ's conclusion that the misrepresentations in question were serious enough to warrant disqualifying Alachua, standing alone, without adverse findings and conclusions on the tax issues.

6. *Misrepresentation issue.* In addition to being the secretary-treasurer, a director, and a 45% stockholder of Alachua, James E. Forsman was responsible for preparing Alachua's application and was Alachua's principal witness and chief proponent throughout this proceeding. Alachua Exh. 19. The misrepresentation issue derives from Forsman's additional business interests as president, director, and 90–100% owner of Young American Clothiers, Inc. (YAC), a retail clothing business, from 1975 onward, and as vice-president, director, and 33% stockholder of Great Southern Music Hall, Inc. (GS), a multi-purpose entertainment center, from 1974 until October 1978. Alachua Remand Exh. 1. In the original proceeding, it appeared that Alachua had failed to report various claims and lawsuits pending against Forsman, YAC, or GS, including federal tax liens, and by Memorandum Opinion and Order, FCC 77M-1951, released November 16, 1977, Judge Denniston added an issue to determine whether Alachua had misrepresented facts or exhibited lack of candor to the Commission regarding the existence of such claims and suits. On December 19, 1977, Country filed a further

[9] We note that counsel for Alachua withdrew from this proceeding on July 19, 1982, and Alachua's exceptions were filed by James Forsman (as Alachua's secretary-treasurer) 30 days later.

[10] See note 3, *supra*.

petition to enlarge issues seeking to explore the effect on Alachua's qualifications of the fact that the tax liens in question resulted from YAC's and GS's failure to remit funds withheld from wages for FICA taxes. By Memorandum Opinion and Order, FCC 78M-343, released March 6, 1978, Judge Denniston denied the requested issue, relying largely on the fact that the matter had already been explored under existing issues at the hearing and on Forsman's January 30, 1978 exculpatory affidavit that was attached to Alachua's opposition to Country's petition.

7. In the first Initial Decision, Judge Denniston concluded that Alachua had violated the reporting requirements of Section 1.65 of the Rules and that Forsman had lacked candor and misrepresented in failing to disclose all claims, including the tax liens. 71 FCC 2d at 1276–77. However, the Judge accepted Forsman's explanations that the withheld tax funds were retained because of the "failure" of Forsman's accountant, that Forsman was unaware of the situation at the time, and that when he became aware he took voluntary action to rectify it by entering into installment payment plans with the Internal Revenue Service. *Id.*, at 1251; Tr. 381–386, 393–394, 624–626. Hence, the Judge concluded that "no character considerations are raised" by the underlying cause for the tax liens. *Id.* at 1277.

8. At the remand proceeding, the issues explored (see paragraphs 1 and 2, *supra*) revealed a very different picture concerning Forsman's alleged lack of awareness or involvement in his companies' failure to remit withheld FICA and federal income taxes in a timely fashion. Forsman continued to rely on his January 30, 1978 affidavit (see paragraph 6, *supra*), in which he asserted that "The failure to remit was not brought to my attention contemporaneously with any of these events" and "The failure to remit these taxes was directly contrary to company policy concerning both Corporations in question." Country Remand Exh. 3, p. 2. This theme was also presented in Forsman's pre-remand hearing testimony (see paragraph 7, *supra*), in his sworn responses to the Bureau's and Alachua's written interrogatories on remand (I.D., Findings, paras. 72–73), and in his remand testimony (Alachua Remand Exh. 1; Tr. 1647–53, 1659–66, 1685, 1692–93, 1703, 1710–18). On the other hand, unlike the pre-remand hearing, three of Forsman's former corporate treasurers or bookkeepers—Ralph Childs and James D. Riley, Sr. at YAC and William O'Byrne, Ralph Childs, and James D. Riley, Sr. at GS—testified at great length[11] that during their successive tenures from June 1974 through September 1978, Forsman *was* contemporaneously aware of his companies' severe cash flow problems and of

[11] Ralph Childs-Tr. 1323–25, 1339–43, 1352, 1384–88; James D. Riley, Sr. -Tr. 1435–41, 1454–55, 1461; William O'Byrne -Tr. 1517–28, 1537–38, 1554–56, 1564–65, 1579, 1583.

their inability to remit the FICA and income taxes of their employees in a timely fashion. While there was no company policy or directive from Forsman prohibiting the prompt payment of the taxes, it is clear that the highest payment priority went to "door openers"—bills that had to be paid in order to keep the companies' doors open—such as utilities, telephone, and C.O.D. deliveries—and that the taxes were not "door openers". It is also clear, according to the bookkeepers, that Forsman specifically and contemporaneously knew when the taxes were not being timely paid due to lack of funds, because the three men orally told him, gave him slips of paper or lists which showed the taxes as unpaid accounts payable, or kept accounts payable notebooks with which Forsman was familiar.

9. In the I.D., the ALJ acknowledged that the record evidence reveals "a direct conflict of testimony as to Forsman's contemporary knowledge" of the non-timely payment of taxes, and that the outcome turned on the credibility of Forsman versus his bookkeepers. I.D., Conclusions, paras. 4–5. He concluded that the testimony of Childs and Riley was "more credible than that of Forsman and "accepted" O'Byrne's testimony over that of Forsman. *Id.*, paras. 5 and 6. Forsman's testimony concerning his lack of knowledge was "rejected" and deemed "simply not acceptable" when compared to that of the bookkeepers. *Id.*, para. 6. Even if O'Byrne's testimony were discounted because of his prior criminal record (I.D., Findings, para. 75) and because he was testifying under a grant of immunity from personal self-incrimination (I.D., Findings, para. 47 n. 9), the ALJ held that there would be sufficient other evidence to demonstrate that Forsman had contemporaneous knowledge of the tax problems. *Id.* In sum, he concluded that Forsman's inaccurate testimony, answers to interrogatories, and affidavit were misrepresentations which were "either deliberate and intentionally deceptive or . . . made with such wanton, gross and callous disregard for the truth as to reflect the equivalent of an affirmative and deliberate intent," and that they were significant enough to warrant disqualifying Alachua. *Id.*, paras. 10 and 30. We agree.

10. The Commission is generally reluctant to overturn the credibility determinations of an ALJ unless his findings are patently in conflict with the record evidence, *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972), because the trier of fact has enjoyed a superior opportunity to evaluate the witnesses' demeanor and judge their credibility, and his determination is entitled to significant weight. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). *See also FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955), and *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965). Our examination of the record evidence herein indicates that the ALJ's credibility conclusions are abundantly supported and well reasoned. On the one hand, the three bookkeepers had no personal interest in the outcome of this proceeding or reason to

deceive; indeed, O'Byrne testified (Tr. 1516) that Roy Kinsey, Alachua's president, director, and other 45% owner, was his primary source of income at the time of the remand hearing. On the other hand, Forsman's interest in the favorable outcome of this proceeding is obvious, and it is simply incredible that the man who effectively "ran" YAC and GS (Forsman)[12] would be unaware that tax payments were not being made or that sole responsibility for these decisions would reside with his bookkeepers. While Forsman maintains that he delegated responsibility for tax payments to his employees, including the authority to determine whether and when tax bills would be paid (Alachua Remand Exh. 1, pp. 3 and 8), this alleged delegation did not preclude him from having contemporaneous knowledge about the companies' tax situation. Yet he denied knowledge as well as responsibility. In light of the cumulative rebuttal testimony, and given Forsman's significant corporate and day-to-day roles with YAC and GS and his heavy ownership interests, Forsman's denials of knowledge cannot be credited, and Alachua's exception that the ALJ disregarded Forsman's record testimony and affidavit and reached a conclusion (that Forsman made misrepresentations) that is "unwarranted within the facts contained in the record" (Br., p. 6) must be denied.

11. Having affirmed the ALJ's conclusion that Forsman made numerous misrepresentations in this proceeding, the final question is whether these misrepresentations warrant the extreme penalty of disqualification. Because the misrepresentation issue was added on both a basic qualifications and a comparative basis, some level of comparative demerit would be a permissible alternative. However, we agree with the ALJ that Alachua's disqualification was appropriate. Since the Commission's entire scheme of regulation is premised on our ability to depend on the accuracy and truthfulness of our licensees' representations to us, *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157, 37 RR 2d 1235, 1248 (1976), *a fortiori* these representations are significant where a prospective licensee's qualifications are being examined. Forsman embarked upon a pattern of intentional deception in this case in January 1978 that has continued to this date. The deception was successful in two matters before Judge Denniston (see paragraphs 6 and 7, *supra*), which caused him not to add a special tax lien character issue against Alachua and not to make adverse character determinations based on the tax lien evidence that was received under other issues. These consequences illustrate the materiality and significance of Forsman's misrepresen-

[12] Alachua asserts in its exceptions, at pages 5 and 6, that GS's board of directors, not Forsman, "really ran" GS's day-to-day affairs. We note that Forsman was the board member most involved in day-to-day operations (I.D., Findings, para. 33) and O'Byrne's unrebutted testimony that the board generally met "at least monthly" but sometimes as often as "two or three times in one week." Tr. 1575. This hardly constitutes day-to-day control by the *board*.

tations. Forsman's denial of contemporaneous knowledge of his companies' tax problems was more than "a little neglect" (see paragraph 1, *supra*), and it clearly created great mischief under the circumstances of this case. Moreover, untruthfulness in an applicant's affidavits or responses to an adversary's interrogatories is as much to be condemned as deception at a hearing itself. *Compare WNST Radio*, 70 FCC 2d 1036, 44 RR 2d 492 (Rev. Bd. 1978) (applicant disqualified for misrepresentations made in interrogatories and at hearing) *with Grenco, Inc.*, 39 FCC 2d 732, 26 RR 2d 1046 (1973) (an applicant that deliberately lies in its testimony before the Commission will be disqualified). Finally, while we note that Forsman technically has only a minority ownership interest in Alachua (45%), his significant role as a principal (see paragraph 6, *supra*) is sufficient to cause Alachua's disqualification because of his delicts. *See WNST Radio, supra* (application denied because of misrepresentations by 12.5% stockholder, president, and director of applicant). We conclude that disqualification is the appropriately grave consequence of Forsman's conduct in this proceeding. *E.g., Nick J. Chaconas*, 28 FCC 2d 231, 21 RR 2d 576 (1971), *recon. denied*, 35 FCC 2d 698, 24 RR 2d 811 (1972), *aff'd without opinion*, 486 F.2d 1314 (D.C. Cir. 1973).

12. *Summation.* All exceptions having decisional significance have been considered by the Board. We affirm the ALJ's conclusion that Alachua is not qualified to be a Commission licensee. Finding that Country is qualified, we also affirm the ALJ's ultimate conclusion that a grant of Country's application will serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the application of Country Broadcasting Company (File No. BPH-9937) for a construction permit to establish a new FM broadcast station at High Springs, Florida IS GRANTED, and the application of Alachua Broadcasting, Inc. (File No. BPH-10269) IS DENIED.

JEROLD L. JACOBS
Member, Review Board
FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
COUNTRY BROADCASTING COMPANY High Springs, Florida	Docket No. 21235 File No. BPH-9937
ALACHUA BROADCASTING, INC. Alachua, Florida	Docket No. 21236 File No. BPH-10269
For Construction Permits	

Appearances

David Meyers on behalf of Alachua Broadcasting, Inc.; *Vincent J. Curtis, Jr.*, and *Richard Hildreth* on behalf of Country Broadcasting Company and *Arthur I. Steinberg* and *Matthew Leibowitz* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
BYRON E. HARRISON

(Issued: May 24, 1982; Released: May 27, 1982)

1. This is a remand proceeding involving the mutually-exclusive applications of Country Broadcasting Company (Country) and Alachua Broadcasting, Inc. (Alachua) for construction permits to operate an FM Channel 285A at High Springs and Alachua, Florida, respectively. By *Memorandum Opinion and Order*, 71 FCC 2d 1222, released March 30, 1979 (MO&O), the Review Board returned this proceeding for further evidentiary hearing under the following issue:

> (1) To determine the facts and circumstances surrounding the failure of corporations wholly or partially owned by James E. Forsman to remit to the government wages withheld under the Federal Insurance Contribution Act, 26 U.S.C. Section 3102, and, in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.

The burden of proceeding with the introduction of evidence was placed upon Country and the burden of proof was placed upon Alachua.

2. By *Memorandum Opinion and Order*, released July 26, 1979 (FCC 79M-857), the Presiding Judge added the following additional issue against Alachua:

> (2) To determine the facts and circumstances surrounding the failure of corporations wholly or partially owned by James E.

Forsman to remit to the government wages withheld for federal income tax purposes, and in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.[1]

The burden of proceeding and the burden of proof were assigned exactly as in Issue 1.

3. By *Memorandum Opinion and Order*, released March 25, 1980, the Presiding Judge further enlarged the issues in this proceeding to include the following:

(3) To determine whether James E. Forsman intentionally misrepresented facts in statements filed and in testimony given in this proceeding, and in light of the evidence adduced, to determine the effect upon Alachua Broadcasting, Inc.'s basic or comparative qualifications to receive a broadcast station construction permit.

The burden of proceeding with the introduction of evidence was placed upon Country and the burden of proof was placed on Alachua.

4. In addition to the Review Board's remand of this proceeding to make a record on Issue 1, *supra*, the Board also reversed the Initial Decision (I.D.) of the previous Presiding Judge released July 20, 1978 (FCC 78D-48). The I.D. found that, through the actions of James E. Forsman, Alachua had made misrepresentations to the Commission and thus lacked the necessary candor to be a Commission licensee. The Board did, however, leave open the possibility that evidence under the added issue could have a bearing on the Section 1.65 qualifying issue being reversed (MO&O at paragraph 2). Further, the Board noted that where a contingent comparative issue is included in a proceeding, it is incumbent upon the Presiding Judge to make findings and reach a conclusion on the issue (MO&O at N. 12). Accordingly, the prior hearing record and the proposed findings and conclusions will be considered at this time in disposing of the issue.

5. The Review Board's MO&O also found that subsequent to the release of the I.D., the Commission granted a construction permit to Hall Broadcasting Co., Inc. (Hall), licensee of Station WIYD-FM at Palatka, Florida. The Hall construction permit authorized increased electrical coverage for Station WIYD-FM. This increased coverage appeared to effectively eliminate the so-called "white" and "grey" coverage areas claimed by Alachua which were a key element in the award to Alachua of a Section 307(b) preference. The sole reason for the remand of the 307(b) issue for further evaluation was the changed circumstances resulting from the Hall construction permit. By letter of March 13, 1980 and filed with the Commission on March 17, 1980, the President of Hall requested the Commission to cancel

[1] Issue 2 was added because it appeared from the Review Board's remand MO&O that the Board wished to make a record on both Social Security and wages withheld from employees for income tax purposes.

the Hall construction permit for WIYD-FM. Accordingly, it was concluded in a *Memorandum Opinion and Order* released June 23, 1980 (FCC 80M-1045), that the cancellation of the Hall WIYD-FM construction permit returns the status of this hearing record to facts already part of the record upon which the first I.D. was prepared. Based upon this finding, it was concluded that the hearing record is full and complete on the Section 307(b) issue and further consideration of the 307(b) issue was not required. Accordingly, Judge Dennison's conclusions on 307(b) remain unchanged.

6. Hearing conferences were held on May 15, 1979, June 20, 1979 July 24, 1979, November 14, 1979 and April 22, 1980. The hearings were held on July 8, 1980, July 9, 1980, September 16, 1980, February 26, 1981, February 27, 1981 and April 1, 1981. The record was closed on April 1, 1981. All parties filed proposed findings and conclusions on July 27, 1981 and Country and Alachua filed replies on August 10, 1981.

Findings of Fact

7. Before proceeding to the facts relevant to Issues 1, 2 and 3, it is appropriate to briefly review the basis for the issues and their relationship to each other. Prior to the remand, Country had submitted copies of five liens for taxes filed by the Internal Revenue Service (IRS) against Great Southern Music Hall (GSMH) and Young American Clothiers, Inc. (YAC). James E. Forsman is the Secretary-Treasurer, Director and 45% owner of Alachua and the 100% owner and Director of YAC and Vice-President, Director and 33% owner of GSMH during the time periods under examination (Alachua Remand Exhibit 1). The Board found that the possible violation of the fiduciary responsibility to the IRS on the part of companies owned or controlled by Forsman required evidentiary examination. The Board thus added Issue 1 in the instant proceeding. Because the language of Issue 1 appeared to limit any evidentiary examination to questions relating only to the withholding of wages under the Federal Insurance Contribution Act (FICA or Social Security) payments, Issue 2 was added to include examination into the question of wages withheld from employees for income tax purposes.

8. In an attempt to avoid enlargement of issues in the prior proceeding, James Forsman executed an affidavit which sought to remove him personally from all activities involving the payment of income tax and FICA payments. Forsman swore that the failure to remit funds to the federal government was not "contemporaneously" brought to his attention (Country Remand Exhibit 3; also see paragraph 128 of the first I.D.). Information was then brought to the attention of this Presiding Judge based on depositions and an affidavit in support of a petition to enlarge issues, that three former bookkeepers/comptrollers of GSMH and YAC substantially differed

with Forsman's version of these events. Based on this showing, Issue 3 was added.

Issues 1 and 2

Withholding and FICA Taxes

9. In 1971, James E. Forsman began operating a retail clothing business under the name of Young American Shops (YAS) in Gainesville, Florida. Eventually, the operation of this business came under ownership of three corporations, Young American Clothiers, Inc. (YAC), Young American Shops, Inc. (YAS) and the J&M Forsman Corporation (J&M) (Alachua Remand Exhibit 1, p. 1). For convenience, these three corporations will sometimes be collectively referred to as "Young American".

10. From 1975 to at least February 27, 1981, Forsman was President, Director and controlling stockholder of both YAC and YAS. At one time, Forsman owned 100% of the stock, but 10% went to Forsman's father, Dr. Marion E. Forsman (Dr. Forsman) in July, 1977. Dr. Forsman served as Vice-President and a Director of both YAC and YAS until his resignation on June 2, 1978. Forsman's wife, Diantha Forsman, served as Treasurer until August 1, 1976. She also served as Secretary and Director resigning on June 2, 1978. Ralph Childs served as Treasurer from August 1, 1976 to August 31, 1977. James D. Riley, Sr. served as Treasurer from August 31, 1977 and as Secretary from June 2, 1978 (Alachua Remand Exhibit 1, p. 1; Tr. 1242, 1439).

11. Young American was Forsman's primary source of business income for most of the period from 1971 through 1978. His role was for the most part supervisory. Forsman hired managers for the retail clothing stores and to the extent possible, allowed those managers to operate independently. The managers were, however, subject to review and oversight from the main office, but, Forsman planned the stores, computed pricing and profit margins, supervised the purchase of merchandise and arranged for the financing of the corporations when necessary (Alachua Remand Exhibit 1, pp. 1–2).

12. It is Forsman's testimony that it was not his practice to involve himself in the review of the financial matters of YAC and YAS. His responsibilities did not include maintaining the books and records for these companies, nor did he review such records as a part of his regular supervisory duties. Forsman was authorized to sign checks on behalf of YAC, as were Dr. Forsman, Childs, Riley and Diantha Forsman. Forsman did not assume the responsibility for drawing checks. However, he did write checks for personal withdrawals, for COD shipments when the person who normally wrote the checks was not present and for other payments on the same basis as he at times prepared checks for COD shipments. The issuance of checks to the Internal Revenue Service (IRS) was the responsibility

of Dr. Forsman, Childs and Riley (Alachua Remand Exhibit 1, pp. 2–3). However, on at least one occasion, Forsman signed a check for $4,658.22 made payable to the IRS (Alachua Remand Exhibit 14; Tr. 1621).

13. From 1971 through early 1976, Dr. Forsman was responsible for managing the finances of Young American. He deposited the receipts in an appropriate bank account and wrote checks against those receipts to pay corporate obligations. Generally, each month, Dr. Forsman reviewed at one time the accounts payable and paid those accounts which he knew were the most pressing, such as the withholding and Federal Insurance Contribution Act (FICA) taxes and other "priority" payments. Dr. Forsman also paid certain suppliers which he knew had to be paid each month. Dr. Forsman began reviewing the payable list with James Forsman because of cash flow problems[2] and conducted this review only when there were insufficient funds to pay all current bills and decisions were made where to allocate the remainder of the income received that month. They would discuss the "open" accounts payable, the amount of money available and decide what creditors would receive what amounts. Following such discussions, Dr. Forsman completed his monthly payment of bills, taking into account the decisions which had been reached (Alachua Remand Exhibit 2, pp. 1–2, Alachua Remand Exhibit 1, p. 3; Tr. 1777–79).

14. In addition to the checkbook and corporate finances, Dr. Forsman also prepared, signed and filed IRS Forms 940 and 941 (Alachua Remand Exhibit 2, p. 2). Form 940 covers the employee's contribution to the federal unemployment compensation fund. The form is filed annually and is due by January 31st of the year following the tax year. Form 941 covers the employee's withholding tax and the employee and employer's portions of the FICA taxes. The 941 form is required to be filed for each calendar quarter and is due on the last day of the month following the end of the quarter. If the liability for the month is less than $2,000, monthly deposits are permitted and must be made within seven days of the end of the quarter. Anytime the liability reaches $2,000, it must be paid in certified funds within three banking days. In any event, at the end of a quarter, the total liability must be less than $200, and must be remitted with Form 941 (Tr. 1531–32). According to Forsman, he had no direct supervisory responsibility concerning these tax returns and he did not review or sign federal withholding or FICA returns for YAC or YAS at any time (Alachua Remand Exhibit 1, p. 33).

15. Dr. Forsman left Young American for an extended vacation in August, 1976. Dr. Forsman returned to Young American in the last week of 1976 (Alachua Remand Exhibit 2, p. 2).

16. Ralph Childs was the bookkeeper/treasurer of YAC from

[2] The cash flow problem began at the end of 1974 (Tr. 1778–79).

August, 1976 through 1979, who was hired for that purpose by Forsman (Alachua Remand Exhibit 1, p. 2; Tr. 1241–42, 1655). According to Dr. Forsman, his last week at work was Childs' first week at work (Alachua Remand Exhibit 1, p. 2). Dr. Forsman stated that during that week, he spent parts of two or three days with Childs explaining to him what his responsibilities would entail, including the maintenance of the corporate checkbooks for YAC and YAS, the preparation and filing and making payments on the Forms 940 and 941 (Alachua Remand Exhibit 2, p. 2; Tr. 1265–66, 1269, 1769–72). According to Childs, it was Forsman and not Dr. Forsman who instructed him as to these duties and responsibilities. Childs testified that Dr. Forsman was out of town when he arrived at Young American (Tr. 1257, 1265–66, 1269–71, 1354–55, 1360, 1380–81). Forsman denied giving any detailed instructions to Childs concerning Childs' duties at Young American (Tr. 1656–63).

17. The cash flow problem at Young American was serious and continuing and payments were not made to IRS in a timely manner (Tr. 1291). Forsman was aware of this (Tr. 1291). Thus, Forsman established priorities as to payments (Tr. 1323–24). In Childs' case, Forsman stated that Childs was to pay the bills absolutely necessary to keep the doors open (Tr. 1324, 1326–28, 1330–31 and 1391–94). As a result, the weekly and monthly IRS payments were not made and it was not until the quarterly payment became due that the IRS payment became a "priority" payment (Tr. 1323, 1329, 1333, 1335–36 and 1393–94). According to Childs, he spoke to Forsman four to five times daily concerning business (Tr. 1379). Also, Childs testified that he was absolutely certain that Forsman was aware that payments to the IRS were not being timely made because Childs personally informed Forsman at the time (Tr. 1291, 1312, 1325–26, 1328, 1337, 1339–40, 1344). In addition, Childs claims he told Forsman about the failure to make IRS payments in monthly reports (Tr. 1387–88). Childs states he was never admonished because the IRS payments were not timely filed (Tr. 1395). Childs testified that when he left Young American, he had a good relationship with Forsman and that Forsman had never indicated that Childs was doing a bad job[3] (Tr. 1377, 1380, 1383).

18. When Dr. Forsman returned to Young American at the end of 1976, his functions were more limited than they had been previously. Dr. Forsman was responsible for the payroll checking account and he wrote the payroll checks and delivered them to Childs, or, to Childs' successor, Riley, along with a notation of total amount which was to be taken from the general checking account and deposited into the payroll account. Beginning with the last quarter of 1976, Dr. Forsman was also responsible for preparing and

[3] Childs testified that he left voluntarily to enter the law enforcement field (Tr. 1308).

signing IRS Forms 941. He would complete the forms, except for Lines 20 and 21, sign them and deliver them to Childs. Line 20 reflects the total deposits of Form 941 taxes which have been made during the quarter, and Line 21 reflects the balance of the Form 941 taxes due to the IRS. This procedure was followed because Dr. Forsman had not managed the checkbook during the period of his absence and Dr. Forsman left those lines blank, to be filled in by Childs, whose responsibility it had been to make the deposits[4] (Alachua Remand Exhibit 2, pp. 2–3; Tr. 1286, 1440).

19. Dr. Forsman, also during the period after his return in 1976, filled out the computer-printed IRS tax deposit forms which were used with Form 941 tax deposits during the course of the quarter. These deposits were to be made at a local bank. Dr. Forsman calculated the amount due and inserted that amount on the card. The card was then delivered to Childs, whose responsibility it was to issue a check making the appropriate payment to the IRS (Alachua Remand Exhibit 2, p. 3).

20. Forms 941 for YAC bearing the following dates were filed with the IRS by either Dr. Forsman or Childs: March 31, 1975, July 15, 1975, October 15, 1975, January 14, 1976, April 14, 1976, July 14, 1976, October 5, 1976, January 28, 1977, April 21, 1977, July 28, 1977, October 17, 1977 and January 31, 1978 (Alachua Remand Exhibit 3, pp. 1–18; Tr. 1783, 1787–88).[5]

21. Forms 941-M for YAC were filed by Dr. Forsman for the months ending January, March and April, 1978 (Alachua Remand Exhibit 3, pp. 19–21, Alachua Remand Exhibit 4).

22. Forms 941 for YAS bearing the following dates were filed with the IRS by either Dr. Forsman or Childs: March 31, 1975, July 15, 1975, October 15, 1975, January 14, 1976, April 14, 1976, July 15, 1976, October 5, 1976, July 28, 1977 and January 30, 1978 (Alachua Remand Exhibit 5, pp. 1–8, 10–17).

23. Forms 940 for calendar year 1975, 1976 and 1977 were filed on behalf of YAC.[6] Form 940 for calendar year 1976 was filed on behalf of YAS. Form 940 for calendar year 1976 was also filed on behalf of J&M (Alachua Remand Exhibits 6 and 7).

24. Riley replaced Childs in August, 1977 and assumed responsibility for much of the financial management of Young American. Riley remained in this position until January, 1978. During the Riley

[4] Dr. Forsman's signature and certification on Form 941 was under penalty of perjury that the form was complete when he signed his name (Tr. 1782–85, Alachua Remand Exhibit 3, pp. 14–16).

[5] According to the IRS, no record of 941 forms for the quarters ending June 30, September 30 and December 31, 1978 could be located (Alachua Remand Exhibit 8, p. 17).

[6] Form 940 for 1978 could not be located by the IRS (Alachua Remand Exhibit 8, p. 22.

period, Dr. Forsman retained the responsibility for completing and signing the Form 941 (Alachua Remand Exhibit 2, p. 3; Tr. 1439).

25. It is Riley's testimony that during the period he maintained the YAC books, payments to the IRS were not always made on time (Tr. 1440–41). Riley states that when this occurred, it would be discussed with both Forsman and Dr. Forsman (Tr. 1440–41). Cash flow problems continued to be the cause of delinquent payments to the IRS (Tr. 1444–45).

26. Riley stated that he would prepare a monthly list of payables for Forsman which would include money owed to the IRS (Tr. 1442). Riley further stated that the cash flow problem was well known to Forsman and Dr. Forsman and he discussed with both men his inability to pay current bills (Tr. 1453–55). It is Riley's testimony that the failure to pay the IRS was specifically discussed with Forsman (Tr. 1461). On a monthly basis, Forsman would review all payables, including the money due the IRS with Riley so that Forsman was fully aware of the IRS problem (Tr. 1455, 1461, 1465–69).

27. It is Forsman's testimony that any decision not to pay the IRS in a timely manner was the decision of Childs (Tr. 1658) and Forsman never discussed priorities with Childs (Tr. 1664). Forsman stated that Childs never brought the IRS problems to his attention (Tr. 1665–66) and that he never had any direct or supervisory responsibility over the payments to the IRS (Alachu-Remand Exhibit 1, p. 3).

28. It is Forsman's testimony that he first became aware of the problems with IRS in mid-1977 (Alachua Remand Exhibit 1, p. 4). Forsman's first knowledge of the IRS problem was during a meeting at the IRS office in Gainesville, Florida with IRS Agent Peter M. Dobbins on September 8, 1977. Riley was with Forsman on this occasion. At this meeting, Forsman signed an IRS Installment Agreement for YAC (Alachua Remand Exhibit 1, p. 4). The IRS placed two liens against YAC for delinquent tax payments on September 16 and October 24, 1977 (Alachua Remand Exhibit 1, p. 5). It appears that during July, 1977 and perhaps other times during this period, the IRS had sent letters or a letter to Young American about an irregularity in its 940 or 941 returns. It is Forsman's testimony that he has no recollection of ever seeing such communications until he began to prepare for this proceeding (Alachua Remand Exhibit 1, p. 4). It is Forsman's position that while he conducted the day-to-day business affairs of YAC and YAS, the authority with respect to the payment of all bills was delegated to Dr. Forsman, Ralph Childs and James E. Riley and the three individuals had the final word on what bills of YAC and YAS would be paid (Alachua Remand Exhibit 1, p. 3).

29. Ralph Childs admits that although it was his responsibility to make weekly payments or deposits for the YAC Form 941 taxes,

he did not do so for the quarter ending December 31, 1976 (Tr. 1283–84, 1287). Rather, Childs wrote a single check in the amount of $4,226.77 dated February 2, 1977, for the payment of those taxes (Alachua Remand Exhibit 9, p. 15; Tr. 1283–84). Childs states that during the last quarter of 1976, Young American was experiencing cash flow problems and there were insufficient funds to satisfy the Young American current debts (Tr. 1291, 1309). Because of the insufficient funds, Childs did not write the weekly checks to the IRS for Young American's 941 taxes for the last quarter of 1976 (Tr. 1310). Childs states he informed Forsman of this fact (Tr. 1309). However, Childs could not recall whether he specifically advised Forsman each week, or any week, that the Form 941 payments were not being made (Tr. 1313).

30. Again for the quarter ending March 31, 1977, Childs prepared a single check in the amount of $4,658.22 dated April 27, 1977, for the payment of those taxes. Forsman signed this check (Alachua Remand Exhibit 3, p. 14, Alachua Remand Exhibit 14, Alachua Remand Exhibit 30, p. 99; Tr. 1321–22, 1621). This check was not accepted by the bank and IRS sent YAC a "Notice of Check not Accepted by Bank" (Form 2287). The notice requested payment by certified check, cashier's check or money order. Subsequently, these taxes, plus penalties and interest became the subject of the September 16, 1977 tax lien (Alachua Remand Exhibit 2, p. 5, Alachua Remand Exhibit 8, p. 1, Alachua Remand Exhibit 14, Alachua Remand Exhibit 30, p. 99; Tr. 1621).

31. According to Childs, Young American continued to experience cash flow problems which required that priorities[7] be given to various obligations. Such priorities changed from day-to-day. The test was to pay those bills necessary to keep the business operating, for example, COD payments for merchandise, utilities, telephone and other day-to-day items. Childs said payments to IRS were priority items, but, they were not given the highest priority until the quarterly Form 941 payments became due. Childs stated that the non-payment of the 941 taxes during the quarter was necessary to keep the doors to the business open, i.e., he would not have been able to pay other outstanding bills. Childs states that he and Forsman discussed these priorities on several occasions, and that Forsman was informed by Childs on more than one occasion that Young American did not have sufficient funds to pay the IRS and that Forsman was informed throughout the tax quarter that the weekly IRS payments had not been made (Tr. 1322–29, 1339–41, 1343–44, 1351–53, 1384–85, 1391–94). Childs was never admonished by Forsman for not making the payments to IRS (Tr. 1395). However, Childs

[7] Terms such as priorities, door closers and door openers have approximately the same meaning, i.e., use available cash to pay only such bills as are necessary to avoid the business being shut down.

was never told not to make the payments to IRS Forsman (Tr. 1244, 1311).

32. Forsman denied having any discussions with Childs with respect to the priorities in which Young American obligations were to be paid (Tr. 1659, 1664). Forsman also denied that Childs ever brought to his attention the fact that Young American did not have sufficient funds with which to pay the IRS (Tr. 1665–66). It is Forsman's position that if late tax payments were made to IRS by Young American, it was Childs' decision, not his. In January, 1978, YAC and YAS closed the business (Tr. 1453).

Great Southern Music Hall

33. Great Southern Music Hall (GSMH) was a corporation which operated a multi-purpose entertainment center at Gainesville, Florida. Using a defunct movie theater, an entertainment center was fashioned including a small concert hall, a theater, a restaurant, a bar and amusement areas (Alachua Remand Exhibit 1, p. 5). GSMH began operation in 1974 and was the idea of Forsman, who was Vice-President, Director and 33% stockholder (Alachua Remand Exhibit 1, pp. 5–6). Forsman also arranged the original and subsequent financing, promoted the music hall, oversaw the physical plant and was involved in decisions on personnel, promotion, decor and entertainment (Alachua Remand Exhibit 1, p. 5). Forsman was the GSMH director most involved in the day-to-day operation and was viewed as the Chief Operating Officer of this company (Tr. 1530; Country Remand Exhibit 4, para. 7). However, at this time, 1974, Forsman's "primary endeavor" was Young American and he approached GSMH as a part-time responsibility (Alachua Remand Exhibit 1, p. 5).

34. Forsman retained his interest in GSMH until October, 1978 at which time he sold his stock interest and severed all other relationships with the corporation. At various times during this period, while Forsman held an interest, Jeffrey Meldon, Peter Laird and George Elmore also held an interest in the corporation. Meldon, Laird and Elmore were also officers and directors of GSMH. Harvey Budd, a certified public accountant, was a Director of GSMH. Michael Bryant, an attorney was an officer and director of GSMH. Neither Budd nor Bryant held any stock in GSMH (Alachua Remand Exhibit 1, pp. 6–7, Alachua Remand Exhibit 31; Tr. 1600, 1794–95, 1802).

35. Meldon drafted corporate papers, prepared annual reports to the Florida state government and counseled GSMH on legal and tax matters. He is a full-time attorney in private practice at Gainesville. He worked with GSMH matters on a part-time basis as time permitted, sharing the legal responsibilities with Bryant, another attorney/principal (Alachua Remand Exhibit 1, p. 7).

36. Bryant, who is a full-time attorney practicing in Gainesville,

called meetings, kept books and provided legal counsel to GSMH. He was President of GSMH from early 1974 to June, 1980 but between 1974 and 1980, Bryant held no stock in GSMH (Alachua Remand Exhibit 1, p. 7, Alachua Remand Exhibit 31; Tr. 1794–95).

37. Laird, another full-time practicing attorney in Gainesville, was responsible for booking movies into the GSMH theater and for working on a cash flow analysis for the corporation. He moved to California in 1976. Budd did not take an active role in managing the corporation and Elmore was a "passive" investor in GSMH (Alachua Remand Exhibit 1, p. 7).

38. The regular financial records of GSMH consisted of payroll records, checkbooks and daily income reports. The responsibility for maintaining these records belonged to William H. O'Byrne, Ralph Childs and James D. Riley, Sr. (Alachua Remand Exhibit 1, p. 7). O'Byrne worked for GSMH as bookkeeper and general manager from 1974 to February, 1977. In addition to keeping the financial records, O'Byrne oversaw the entire operation of the Music Hall, including personnel, maintenance, purchasing and merchandising (Country Remand Exhibit 4, p. 2; Tr. 1512, 1573). Childs worked for GSMH as bookkeeper from January, 1977 through the end of August, 1977 (Tr. 1236–37, 1341, 1376–77). Riley worked for GSMH from July, 1977 to September 30, 1978 (Tr. 1428, 1447).

39. Forsman did not have the responsibility for keeping the books and records of GSMH. On occasion, Forsman reviewed "daily income statements", which were daily reports compiled by the manager showing the income of GSMH. It is not Forsman's general practice to review the checks and payroll records of GSMH (Alachua Remand Exhibit 1, pp. 7–8; Tr. 1601, 1719).

40. Forsman, Meldon, Laird, Bryant, O'Byrne and Riley were authorized to sign checks for GSMH. Normally, the comptroller of the corporation would write and sign all checks for routine payment of regular accounts. Officers of GSMH were also authorized to write checks in order to enable them to handle unusual situations, or instances in which the comptroller was absent (Alachua Remand Exhibit 1, p. 8). In the routine operation of GSMH, the authority to direct or control the payment of funds was held by O'Byrne, Childs and Riley, in succession (Alachua Remand Exhibit 1, p. 8). According to Forsman, as an officer and part owner of GSMH, he held this authority in a technical sense only (Alachua Remand Exhibit 1, pp. 8–9).

41. Forms 941 for GSMH bearing the following dates and signatures were filed with the IRS:

April 1, 1975	Bonnie Savant[8]
July 21, 1975	O'Byrne

[8] She signed this form as "Secretary" (Alachua Remand Exhibit 16, p. 1; see also Tr. 1550, 1677).

October 30, 1975	O'Byrne
January 28, 1976	O'Byrne
April 27, 1976	O'Byrne
August 5, 1976	(See paras. 55 and 56, *infra*)
April 28, 1977	Forsman
July 26, 1977	Childs
November 8, 1977	Riley
January 31, 1978	Riley
April 19, 1978	Riley
July 11, 1978	—

Two additional Form 941s were filed by GSMH for the tax periods ending September 30 and December 31, 1976. These forms were filed unsigned and undated and were received by the IRS on February 11, 1977 (Alachua Remand Exhibit 16, pp. 1–14, Alachua Remand Exhibit 17, pp. 3–6; Tr. 1622–24).

42. Forsman signed the Form 941 for the tax period ending March 31, 1977 (Alachua Remand Exhibit 16, p. 11). Forsman stated that this form was prepared by the comptroller for his signature and that he was told by the comptroller that the information on the form was correct. According to Forsman, he did not personally prepare this form (Alachua Remand Exhibit 1, p. 8).

43. GSMH also filed Forms 941-M for the months ending January, February, March, April, May, June, July, August, September and October, 1978. All but the April and May forms bear the signature of Riley. The April and May forms were undated and unsigned and were both received by the IRS on July 18, 1978 (Alachua Remand Exhibit 16, pp. 15–24, Alachua Remand Exhibit 17, pp. 1–2).

44. Forms 940 for calendar years 1977 and 1978 were filed on behalf of GSMH. These forms were signed by Riley (Alachua Remand Exhibit 18).

45. The "issuance" of checks to the IRS for tax payments was the responsibility of O'Byrne, Childs and Riley. Forsman did not have this general responsibility (Alachua Remand Exhibit 1, p. 8). Although Childs did not have the authority to sign checks on behalf of GSMH, he prepared checks for Forsman's signature (Tr. 1238, 1366). Checks to or on account of the IRS bearing the following dates and in the amounts shown were signed by Forsman:

June 28, 1977	$1,278.12
June 28, 1977	$1,283.20
July 25, 1977	$1,298.54
July 25, 1977	$1,510.74
August 1, 1977	$ 500.00
March 2, 1978	$3,026.83
March 14, 1978	$1,000.00

(Alachua Remand Exhibit 25, pp. 7–12, 19–20).

46. According to Forsman, in the latter part of 1976, at or about

the time O'Byrne handed in his resignation from GSMH, he (O'Byrne) advised the Board of Directors that GSMH owed tax money to the IRS. However, O'Byrne did not have available a complete accounting of these obligations (Tr. 1646–47, 1651–52). In January, 1977, O'Byrne presented a report to the Board of Directors containing a list of GSMH's accounts payable (Tr. 1647). Thus, Forsman stated that, although there was a general awareness in late 1976 that a problem existed, the Board did not know the exact amount of money involved until 1977 (Tr. 1726). In addition, in late December, 1976 or early January, 1977, according to Forsman, O'Byrne first made the officers of GSMH aware that tax forms had not been filed in a timely manner (Tr. 1692).

47. According to O'Byrne,[9] GSMH began to have problems with Form 941 as early as 1975 (Alachua Remand Exhibit 4, p. 2). O'Byrne believed that GSMH timely filed the Form 941, but failed to remit the taxes due. O'Byrne stated that he told the Board of Directors, including Forsman, of that fact (Tr. 1524–25). According to O'Byrne, GSMH, at that time, was not doing well financially. The corporation was suffering "huge operating losses" and paid whoever had to be paid to keep the doors to the Music Hall open. O'Byrne stated: "We had to pay the rent, pay the employees. We could always let the IRS slide for awhile". (Tr. 1521).

48. O'Byrne explained that based upon his experience at GSMH, when the IRS realized a taxpayer like GSMH had not paid its taxes it sent a letter demanding payment. If the taxes remained unpaid, the IRS sent another letter giving the taxpayer 30 days in which to pay or the matter would be put into collection. This was known as a "30-day letter." The IRS then sent another letter stating that the taxes must be paid within 10 days or the matter would be put into enforcement. This was known as a "10-day letter." At that time, the taxpayer usually received a telephone call from the local IRS office. If no response was received by the IRS to the 10-day letter, a lien letter was sent stating that if the taxes were not paid within 10 days, a lien would be filed. Before that 10 days expired, the taxpayer received a visit from an IRS field agent (Tr. 1519–20).

49. There was at least one meeting with representatives of the IRS in the latter part of 1975 at which both Forsman and O'Byrne were present. However, there are different versions of what took

[9] Although Mr. O'Byrne was called to support Country's direct case, he did so under subpoena and in response to an Order of the U.S. District Court for the Northern District of Florida and following the obtaining of a grant of immunity from personal self-incrimination pursuant to Title 18 USC 6004 (Tr. 1508–09; Order FCC 80M-2524, released December 5, 1980; Memorandum Opinion and Order, FCC 80M-1818 released September 26, 1980). As a result, Mr. O'Byrne was designated as an advsere witness to Country (Tr. 1511). In addition, O'Byrne testified that Roy Kinsey, Alachua's President, Director and other 45% owner was his primary source of income at this time (Tr. 1516).

place at the meeting. The procedures outlined in paragraph 48 had taken place before this meeting. According to O'Byrne, both O'Byrne and Forsman met with IRS Agent A.E. Davis. It is O'Byrne's version that Forsman was in the meeting with the IRS agent the whole time. This belief is supported by O'Byrne's knowledge that an IRS agent will not conduct an interview with a corporation about a tax problem unless an officer of the company is present at such a meeting and O'Byrne was not an officer. According to O'Byrne, both he and Forsman were fully appraised of the tax problem by IRS Agent Davis. O'Byrne stated this tax problem was cleared up promptly and that Forsman offered no resistance to paying the taxes due (Tr. 1517–20, 1523–24, 1536–37, 1545–48, 1602–03, 1679–80 and 1703).

50. According to Forsman, he had no contemporary knowledge of the nature of the 1975 IRS problem (Alachua Remand Exhibit 1, p. 9). Forsman stated that he was called into O'Byrne's office, that the IRS agent was there, that Forsman was told GSMH owed approximately $5,000 in taxes and that O'Byrne verified the IRS' calculations. Forsman said he suggested and the IRS agent agreed, to pay these taxes the next week (Tr. 1602–03, 1684, 1703). Forsman did not know why the taxes had not been paid earlier and he thought it was an "oversight" on the part of O'Byrne. Forsman further stated that O'Byrne did not contemporaneously advise either the Board of Directors or Forsman that the tax money was due (Tr. 1685–86).

51. Prior to Forsman's testimony in this remand proceeding (Tr. 1602–03, 1679–80, 1703), Forsman testified in the prior proceeding (Tr. 550–53), in sworn statements in response to interrogatories (Bureau Remand Exhibit 3 at para. 10, Ans. 15(a)(i) and p. 22, Ans. 44) and exchanged testimony (Alachua Remand Exhibit 1 as originally exchanged), that he had no knowledge of the nature of the problem. It was not until O'Byrne testified at the hearing that Forsman recalled the 1975 meeting including the name of IRS Agent Davis (Tr. 1602–03, 1679–80, 1703). Also, Forsman had testified earlier that he had no recollection or knowledge of a tax lien being placed against GSMH Delicatessen, in response to both Bureau and Country interrogatories, Forsman now states the 1975 tax problem could have been the result of the delicatessen operation (Bureau Remand Exhibit 3 at p. 10, Ans. 15(a)(i) and p. 22, Ans. 44).

52. A federal tax lien was filed by the IRS against GSMH on October 15, 1975. The lien specified an unpaid balance totalling $5,456.01 for Form 941 taxes owed for the tax period ending June 30, 1975. A release of this lien was filed on March 19, 1976 (Alachua Remand Exhibit 28, pp. 1–2). Forsman stated that he did not know that a lien had been filed (Tr. 1684). After the late 1975 meeting with IRS, O'Byrne stated that GSMH handled its tax matters correctly in that all tax forms and payments for the last quarter of 1975 and the first quarter of 1976 were filed and paid on time (Tr. 1525, 1550). However, O'Byrne stated that by the end of the second quarter for

1976, GSMH "got real tight for cash . . ." The tax forms were timely filed but no payment was made on the $8–10,000 then due. Rather, GSMH reverted to taking advantage of the IRS regulatory lag, i.e., the 30- and 10-day letter notices (Tr. 1525).

53. In the last few months of 1976, according to O'Byrne, the IRS realized that GSMH had not paid its taxes for the second quarter of 1976. An IRS agent again called at the corporation on October 14, 1976 in an attempt to collect the taxes (Tr. 1737–38). At this time, the IRS agent was given a check for $11,037.95, which covered GSMH's Form 940 taxes for the fourth quarter of 1975 and the second quarter of 1976, plus interest and penalties. At this meeting, according to O'Byrne, both O'Byrne and Forsman were present during the visit by the IRS agent (Tr. 1537–38, Alachua Remand Exhibit 25, p. 7; Tr. 1589–90).

54. Forsman stated he did not recall the 1976 meeting with the IRS. Forsman said he knew O'Byrne had written a "large" check to the IRS, i.e., one that was greater than $5,000, but he did not know the specific amount of the check until he began preparation for this hearing (Tr. 1681–83, 1688, 1705, 1709). Forsman said the fact that GSMH owed a large amount to the IRS was not surprising to him as GSMH owed hundreds of thousands of dollars and the tax money involved did not seem significant to him (Tr. 1703–04). Forsman testified that he did not question O'Byrne as to the size of the $11,000 payment to the IRS (Tr. 1705), even though he had initially planned on using those funds for capital improvements (Tr. 1688–89).

55. The GSMH Form 941 for the tax quarter ending June 30, 1976 is dated August 5, 1976 which bears the handwritten signature "James Forsman" "Owner" written in the spaces on the form for the signature and title. Forsman said the handwriting was not his and he did not sign the form (Alachua Remand Exhibit 1, p. 8). O'Byrne admitted that he signed this form with Forsman's name as the owner of GSMH. O'Byrne had decided that he could no longer sign Forms 941 on behalf of GSMH as he was afraid he could be held personally liable for the taxes due IRS but not paid. Thus, according, to O'Byrne, he prepared the Form 941 for the second quarter of 1976 and gave it to Forsman to sign. Forsman, again according to O'Byrne, said he was not going to sign any tax forms so O'Byrne signed Forsman's name to the form (Tr. 1540–41, 1557–59). However, according to Forsman, there was no discussion with O'Byrne about the form (Form 941) and O'Byrne did not bring the form to him prior to its being filed and O'Byrne never asked Forsman to sign the Form 941 (Tr. 1602). It is Forsman's testimony that he never refused to sign any IRS forms that were presented to him by O'Byrne (Tr. 1720). O'Byrne admitted that he did not timely file the GSMH Form 941 for the third and fourth quarters of 1976. He said he did this because GSMH had no funds to pay these taxes and "if you don't file the return, they [the IRS] have to catch up with their own inefficiency

before they know you haven't paid the money." (Tr. 1556) O'Byrne stated that Jeffrey Meldon, a member of the GSMH Board of Directors, in a hallway conversation after a Board of Directors meeting in July or August, 1976, told him (O'Byrne) not to file the Forms 941 in order to take advantage of the IRS' inefficiency (Tr. 1554–57, 1584).

56. O'Byrne further testified that at the time he prepared the Forms 941 for the third and fourth quarters of 1976, he asked the GSMH officers to sign them (Tr. 1560). Forsman denied that he refused to sign IRS forms presented to him by O'Byrne (Tr. 1720). Forsman stated that he was not aware that these two forms had not been filed earlier (Tr. 1647–48). It is O'Byrne's position that he did have discretion and authority at GSMH to decide which bills to pay. But while he had the authority to pay IRS, he did not have the required funds. Thus, O'Byrne stated that he would have lost his job if he had paid the IRS (Tr. 1562–63). O'Byrne explained:

> The business would have shut down. The place would have been dark. It would have no power. In other words, my instructions from the Board of Directors were to keep the doors open, and that entails keeping the power turned on and keeping liquor on the shelf and keeping employees in the place . . . . [My] first priority of payments were the people that could close the door—the landlord, utilities, the employees, the product for resale.

(Tr. 1564; see also Tr. 1567–68).

An example of the need to avoid so-called "door closers" is found in the State of Florida laws with respect to sale of wholesale liquor. Once GSMH ordered liquor from the wholesaler, the state acted as the collection agent for the wholesale vendor, and gave 10 days from the invoice date to pay the bill, or, have its liquor license suspended. Nevertheless, according to O'Byrne, even these bills were paid late, but never by more than two or three days (Tr. 1521–22). Michael L. Bryant, a member of the Board of Directors of GSMH stated he could recall no question about the corporation's liquor license being revoked for non-payment of its wholesale liquor bills (Tr. 1830).

57. Again according to O'Byrne, the Board of Directors met at least monthly on a non-scheduled basis during the first half of 1976. However, with the financial problems, the Board met more frequently, sometimes two or three times a week (Tr. 1575). During the last six months of 1976, O'Byrne estimated the Board met eight or twelve times. O'Byrne stated he was present at each of these meetings (Tr. 1575, 1577). At the 1975 and 1976 Board of Directors meetings, which O'Byrne attended, he submitted and gave a report at such meetings of accounts payable and funds available. O'Byrne's list was in no particular order or format but he could not show up at a Board meeting without such a list (Tr. 1575). O'Byrne stated that IRS was "almost always" on the list of payables (Tr. 1565, 1575–76). According to O'Byrne, the Board spoke of the IRS as "the problem" (Tr. 1576). During the Board meetings, according to O'Byrne, he was

advised which bills to pay in various ways. Sometimes he was told to pay "regular household bills", i.e., bills required to keep the doors open such as the electrical bill and rent. Other times the Board would help O'Bryne decide which bills to pay and which bills to be delayed. O'Byrne stated that Forsman was present at all such meetings (Tr. 1564–65). O'Byrne could not recall ever having been told not to pay the IRS at a Board of Directors meeting, but he was placed in a position where if he paid the bills the Board instructed him to pay, he could not pay the IRS (Tr. 1586). It is O'Byrne's testimony that he "personally presented" the reports, i.e., the lists of accounts GSMH owed money, to Forsman (Country Remand Exhibit 4, p. 3; Tr. 1530) and that both he (O'Byrne) and Forsman would go through the listing of accounts payable and decide whom to pay (Tr. 1526–28). O'Byrne states that both he and Forsman knew how much money was available and the list of payables was reviewed with that in mind (Tr. 1528–29) and that when the available funds were exhausted, both knew that no further bills could be paid (Tr. 1527). O'Byrne was able to "swear" that Forsman never told him not to pay the IRS (Tr. 1548, 1526). But, O'Byrne does state that Forsman knew the IRS was listed on the accounts payable list, knew the taxes were unpaid, yet never told him to pay the IRS (Tr. 1526–27).

58. O'Byrne denied that he, of his own volition, ever made the decision not to timely make payments to the IRS or not to timely file any of the tax forms in question on behalf of GSMH (Country Remand Exhibit 4, p. 4; Tr. 1568, 1584). All such decisions, according to O'Byrne, were made by the Board of Directors, which included Forsman (Country Remand Exhibit 4, pp. 3–4).

59. Forsman denies that the Board of Directors received any list of accounts payable as described by O'Byrne prior to 1977. Forsman said that during the last part of 1976, the Board requested many times that O'Byrne furnish it with a list of accounts payable, but, O'Byrne produced such a list only "occasionally", perhaps every six months (Tr. 1648–49, 1652, 1689–90, 1696, 1710–11, 1728). Forsman states that during 1976, he and the Board of Directors received and reviewed only partial lists of accounts payable (Tr. 1710, 1712–13, 1715). These partial lists of bills were prepared by O'Byrne or a secretary and contained the "worst thing[s]" (Tr. 1710). Forsman said that " . . . there were informal, little pieces of paper that went around, or conversations that would indicate certain bills that needed to be paid" but he could recall no mention of IRS obligations on these listings (Tr. 1711, 1715). Forsman stated that he could not understand how O'Byrne could have claimed to have placed the IRS obligations on the accounts payable list when O'Byrne did not complete the forms for the last two quarters of 1976 until January, 1977 (Tr. 1711).

60. The record shows that O'Byrne was away from the GSMH from September or October, 1976 through December. During this

period of time, GSMH was building a similar franchise GSMH at Orlando, Florida and O'Byrne was responsible for setting up the business and supervising the construction. When this project was first started, he spent seven days a week at Orlando. Thereafter, he spent two days a week at Orlando, usually Tuesday and Thursday (Tr. 1550–51, 1747–48). Forsman acknowledges that during this period O'Byrne was spending "considerable time" in Orlando, (Tr. 1721–22). In addition, the GSMH was experiencing "tremendous growth" and O'Byrne was involved with that and thus Forsman admits that O'Byrne was overworked (Tr. 1720) and overlooked "his real job" which was doing the accounting work for GSMH (Tr. 1653). Forsman stated: " . . . I think he just didn't do it." (Tr. 1653). It was also Forsman's testimony that O'Byrne did not provide GSMH with any accounting for the last six months of 1976. Rather, such accounting was finished in January, 1977 (Tr. 1644–45). Forsman denies that either he or the Board of Directors ever instructed O'Byrne not to file IRS forms or pay FICA and withholding taxes in a timely manner. Forsman states that O'Byrne did this on his own without direction from the officers or directors of GSMH and that O'Byrne must have noted the financial problems of GSMH but this would have nothing to do with the timely filing of the IRS forms (Tr. 1649–52, 1714, 1717).

61. Michael L. Bryant was a witness in this proceeding and he was a member of the Board of Directors of GSMH from June, 1974 to June, 1980 (Alachua Remand Exhibit 31; Tr. 1791–1834). Bryant stated that he attended virtually every meeting of the Board of Directors during the period he was a member (Tr. 1795–96). Bryant stated that the Board did not receive "comprehensive" financial reports on the business activities of GSMH during the last half of 1976, until an informal annual report for 1976 was produced in February, 1977 (Alachua Remand Exhibit 31, p. 1). By "comprehensive", Bryant meant monthly profit and loss statements, monthly balance sheets and a year-end summary (Tr. 1806–07). Bryant stated that he had telephone O'Byrne on a number of occasions during his tenure to inquire as to the whereabouts of the monthly profit and loss statements for GSMH. According to Bryant, O'Byrne would promise such reports by a deadline which was missed and he would explain that he had other duties and insufficient time to prepare the reports (Alachua Remand Exhibit 31, p. 2). Thus, at no time prior to late 1978 did the Board see regular monthly profit and loss statements within 30 days from the end of an accounting period for more than two months at a time (Alachua Remand Exhibit 31, p. 1).

62. However, Bryant did recognize that although "comprehensive" reports were not received, there were some reports on the business activities of GSMH which were prepared by O'Byrne (Alachua Remand Exhibit 31, p. 1; Tr. 1806–07). Thus, Bryant did see profit and loss statements from "time to time" and he received

balance sheets and lists of payables "from time to time" (Tr. 1805). Bryant recalled that IRS was among the list of payables "on at least some of the documents", and the IRS was on more than one of the creditor lists that he saw (Tr. 1805, 1809). Bryant did not know if the IRS was "continually" one of the listed creditors of GSMH (Tr. 1809). During Bryant's association with GSMH, he conferred with Forsman and O'Byrne "dozens" of times (Alachua Remand Exhibit 31, p. 1; Tr. 1797–98). During such conversations, at one time or another, virtually every aspect of the business affairs of the corporation was discussed (Tr. 1798). Many of such discussions did involve creditors of GSMH and "certainly the IRS would have been one of those creditors [discussed] . . . " (Tr. 1799). Bryant stated that O'Byrne came to Board meetings as a "resource person" and would respond to inquiries by Board members (Tr. 1810) and at such meetings the Board would question O'Byrne as to the current status of GSMH with respect to its creditors, including the IRS (Tr. 1814). The Board would review the list of payables as submitted by O'Byrne and would give O'Byrne its "advice" as to how to discharge the debts of the corporation as well as "general instructions" as to how O'Byrne should deal with new monies coming to the corporation and O'Byrne "would take it from there" (Tr. 1810–11). The Board also gave general instructions to O'Byrne as to the priority in which creditors were to be paid (Tr. 1811). Byrant stated that the high priority items were taxes, rent, utilities and liquor, i.e., the so-called "door closers". Low priority items were suppliers (other than liquor), repairmen, construction workers, advertisers and movie companies (Tr. 1828–29). The Board, according to Bryant, knew there were times when there were insufficient funds even to pay the so-called "door closer" bills. When this happened, it was "dumped back in the lap of the bookkeeper" with the general instructions outlined above. As far as Bryant was personally concerned, he expected O'Byrne "to juggle things and pay them with the priorities that [the Board] had given him [as] . . . best [as] he could" (Tr. 1831–32). According to Bryant, whenever the subject of IRS payments was brought up at a Board meeting, such payments, i.e., withholding and FICA payments, were afforded the highest priority among the list of payables (Alachua Remand Exhibit 31; Tr. 1809–10, 1815, 1828). However, Forsman testified that the Board never told O'Byrne to pay the IRS first (Tr. 1730–31). Bryant agrees with Forsman to the extent that the Board never told or ordered O'Byrne to pay IRS before any other creditor (Tr. 1827–29). Rather, the Board took steps to insure that payments to the IRS and other priority items were being made (Tr. 1811–13).

63. Bryant could not recall that the Board ever gave an instruction to O'Byrne not to pay IRS or that he should withhold IRS withholding and FICA obligations of GSMH (Alachua Remand Exhibit 31, p. 1; Tr. 1819). Similarly, according to Bryant, O'Byrne was never instructed by the Board not to file timely quarterly or

annual federal unemployment compensation returns (Alachua Remand Exhibit 31, p. 1). It is Forsman's position that it was not until he learned of an IRS problem at GSMH in late 1976 or early 1977 that he began to take a more active role in supervising the management of the Music Hall. He then began attempting to reduce costs in an attempt to reduce the operating budget for GSMH and he sought to generate income for GSMH. Forsman at this time, tried to examine more closely the payment of taxes and other obligations. But he still states he placed reliance on the comptrollers and other officers and directors and that the comptrollers were still delegated the authority to determine which creditors to pay and when to pay them. In addition to Forsman, some of the other GSMH principals began to contribute additional time to the corporation to deal with tax and other fiscal and management problems (Alachua Remand Exhibit 1, pp. 6–9). At this time, meetings of the owners of GSMH were more frequent and discussions were held on the general business condition and the tax problems with GSMH. The other owners of GSMH authorized Forsman to deal with IRS on behalf of the corporation to resolve the tax problem (Alachua Remand Exhibit 1, p. 6).

64. According to Forsman, he then spoke with IRS personnel in July, 1977 "and possibly several times before in that same year". He dealt with IRS Agents Peter M. Dobbins, Earl Davis and L. D. Mathis of the Gainesville office. Forsman said he spoke with these agents over the telephone and there was at least one face-to-face meeting. The purpose of the meeting was to find a means to resolve the GSMH tax problems (Alachua Remand Exhibit 1, pp. 9–10).

65. As a result of these meetings between Forsman and the IRS agents, Forsman signed on July 28, 1977 on behalf of GSMH an "Installment Agreement" (Form 433-D) and a "Proposed Assessment of 100 Percent Penalty" (Form 2751) dated July 27, 1977 (Alachua Remand Exhibit 1, p. 10; Alachua Remand Exhibit 20 and Alachua Remand Exhibit 21; Country Remand Exhibit 2). The Installment Agreement stated the amount of taxes owed was $33,256.84. This amount was assessed for the unpaid balance of Form 940 taxes due for the tax period ending December 31, 1976 and for the unpaid balance of Form 941 taxes due for the tax period ending September 30, 1976, December 31, 1976, March 31, 1977 and June 30, 1977. Pursuant to the Installment Agreement, GSMH agreed to pay this tax liability at the rate of $500 per week beginning August 1, 1977 and two payments of $3,000 each were required to be made September 1 and October 1, 1977. The Installment Agreement required that Forsman on behalf of GSMH execute the Form 2751, i.e., the proposed assessment of the 100 percent penalty (Alachua Remand Exhibit 21).

66. It is Forsman's belief that he signed the IRS Installment Agreement and Proposed Assessment forms as part of an arrange-

ment with the IRS to keep GSMH from being closed down and to permit GSMH to pay its taxes on terms it could tolerate financially. Forsman also believed that if GSMH failed to pay it would be the "business" that would be foreclosed for tax delinquencies (Alachua Remand Exhibit 1, pp. 10–11). It was Forsman's understanding that the IRS could recover unpaid GSMH taxes from the corporate officers, if IRS could determine that the officers were responsible for the non-payment. However, Forsman did recognize that by his signing the Proposed Assessment form, he became, in effect, a guarantor of the corporate liability and that IRS could collect from him personally the unpaid portion of GSMH's taxes, if any (Alachua Remand Exhibit 1, pp. 10–11). It was only because the IRS would not permit the GSMH to enter into the installment agreement for the payments of taxes that Forsman also "voluntarily" signed the Proposed Assessment form (Alachua Remand Exhibit 1, p. 11, Alachua Remand Exhibit 20). It is Forsman's belief that the IRS had made a determination that he was not the individual responsible for the failure of GSMH to remit its 940 and 941 taxes (Alachua Remand Exhibit 1, p. 11; Tr. 1606–07).

67. Two IRS tax liens were filed against GSMH subsequent to Forsman's signing of the Installment Agreement on August 8, 1977 and November 29, 1977. The August 8th lien specified an unpaid balance of $7,543.61 which included $567.44 due on 940 taxes for the tax period ending December 31, 1976 and Form 941 taxes in the amount of $6,976.17 for the tax period ending March 31, 1977. The November 29th lien specified an unpaid balance of $21,087.10 for Form 941 taxes for the tax periods ending September 30, 1976 ($11,780.41) and December 31, 1976 ($9,306.69). The August 8, 1977 lien was released on February 7, 1978. The November 29, 1977 lien was released October 12, 1978 (Alachua Remand Exhibit 28, pp. 3–6; Country Remand Exhibit 1, pp. 1, 3).

68. On November 7, 1978, after Forsman had severed his connection with GSMH, one additional lien was filed by the IRS which was for an unpaid balance of $5,651.37. This included Form 941 taxes from the period ending June 30, 1978 ($613.90) and Form 941-M taxes for the periods ending August 31, 1978 ($1,982.89) and September 30, 1978 ($3,054.58). (Alachua Remand Exhibit 1, p. 12, Alachua Remand Exhibit 28, p. 7). The record does not show if this lien was released. As of February 21, 1981, the Music Hall was still a "going concern" in Gainesville under the ownership of GSMH (Alachua Remand Exhibit 1, p. 6; Tr. 1598–99).

Issue 3 - Misrepresentation

69. Some background information is necessary to a consideration of this issue. After Judge Dennison had released his Initial Decision on the first proceeding (July 20, 1978), Country filed a petition to enlarge issues against Alachua on December 19, 1978. In support of

the requested enlargement of issues were attached copies of the September 16 and October 24, 1977 liens against YAC and the October 15, 1975, August 8, 1977 and November 29, 1977 liens against GSMH. It was Country's position that Alachua's failure to remit funds to the government (the wages withheld for income taxes and FICA) constituted a violation of both YAC and GSMH fiduciary responsibilities to the IRS and reflected adversely on Forsman's character qualifications.[10]

70. On January 31, 1978, Alachua filed its opposition to Country's petition to enlarge issues which included an affidavit of Forsman which stated in part "The failure to remit [taxes] was not brought to my attention contemporaneously with any of these events." Forsman's affidavit was a general denial of any knowledge or responsibility for any of the events which resulted in the tax liens and stated that the failure to remit the taxes was "directly contrary to company policy concerning both corporations in question."

71. Judge Dennison then issued a *Memorandum Opinion and Order*, FCC 78M-343, released March 6, 1978 which denied the petition to enlarge issues. Among other reasons, Judge Dennison stated that the hearings were held on January 9 through 13, 1978 and "the matter was fully explored at that time under the Rule 1.65 issue" (official notice taken). At the hearing before Judge Dennison, Forsman had testified under oath (Tr. 382–98, 544–52, 574–81, 623–35, 782–88) that problems concerning unpaid bills, improper accounting was never brought to the attention of the Board of Directors until a meeting held in January, 1977 (Tr. 381–82). Forsman further testified in the previous proceeding that upon first learning of these problems ". . .the general manager was terminated. ." (Tr. 383). Forsman also referred to this person as "the gentlemen that we let go in January [1977] because of the problems that we found out then. . ." and as "the gentlemen [sic] we let go in January"[11] (Tr. 552). Based upon such sworn testimony of Forsman, Judge Dennison stated as follows:

> However, upon learning of the situation Forsman took voluntary action to rectify the situation and reported this to the Commission. Accordingly, it must be concluded that Alachua violated Section 1.65 in this regard, but no character considerations are raised (Paragraph 128 of Judge Dennison's Initial Decision).

The Review Board in its remand of this proceeding wanted a further exploration of the tax problems (see *Country Broadcasting Company*, 71 FCC 2d 1222, 1223–25 (Rev. Bd. 1979)).

72. After the Review Board's remand of this case, both Country

[10] Official notice is taken of the pleadings filed herein before hearing to the extent required to provide the background for the inclusion of Issue 3 in this proceeding.

[11] As will be seen, the general manager and gentleman referred to by Forsman in his prior testimony, is Mr. O'Byrne.

and the Bureau submitted written interrogatories to Alachua and Alachua filed responses (Bureau Remand Exhibits 1, 2 and 3).

73. The Bureau Interrogatories 15(a) and (b) read as follows:

> 15(a) When did James E. Forsman first become aware of the failure of (i) GSMH and (ii) YAC to remit federal withholding and FICA (Social Security) taxes to IRS?
>
> (b) Describe in detail the circumstances under which he first became aware of the failure to remit.

Alachua answered these interrogatories as follows:

> 15(a)(i). GSMH–Early 1977, perhaps February, There had been an earlier problem in 1975. Mr. Forsman did not know at the time what the nature of the problem was. He knew that a payment was made to IRS because of some federal tax matter. Mr. Forsman believed that the problems stemmed from Great Southern Delicatessen, which for a time operated independently within the Music Hall.
>
> 15(a)(ii). YAC–In the first half of 1977.
>
> 15(b)(i). GSMH–When Mr. O'Byrne left as comptroller, he made the officers aware that tax forms and tax monies had not been paid during his tenure as they should have been. They were told by O'Byrne that the IRS wanted the matter resolved. To Mr. Forsman's recollection, a telephone call ensued in which Mr. Forsman and an agent of the IRS discussed the need for further conferences and consultation.
>
> 15(b)(ii). YAC–Mr. Forsman believed it was a telephone call from IRS, but does not recall the date specifically.

(Bureau Remand Exhibit 2, pp. 10–11).

Country was seeking similar information by way of interrogatories addressed to Alachua.

> 44. When did James Forsman first learn of the failure of Great Southern Music Hall to remit FICA and income tax withholding funds?
>
> 45. When did James Forsman first learn of the failure of Young American Clothiers, Inc. to remit FICA and income tax withholding funds?

(Bureau Remand Exhibit 2, pp. 7–8).
Alachua answered these interrogatories as follows:

> 44. See Bureau No. 15(a)(i).
>
> 45. See Bureau No. 15(a)(ii).

(Bureau Remand Exhibit 3, p. 22).
Forsman answered the interrogatories in question and the answers were subscribed and sworn to by Forsman (Bureau Remand Exhibit 3, p. 27). It is this prior testimony of Forsman, his affidavits and the responses to interrogatories when compared to the affidavits of O'Byrne and the deposition of Childs and Riley (former bookkeepers for either GSMH or Young American) which are examined under this issue.

74. As stated above, Forsman stated that his tax and other problems were caused by a general manager whose services were terminated. Based on the time period involved (1976 and January,

1977) and Forsman's description of the duties of the general manager, it must be concluded that the person involved was O'Byrne (Tr. 382, 552). Forsman admitted at the remand proceeding that O'Byrne had not been fired by GSMH (Tr. 1653, 1702). This fact is corroborated by both O'Byrne (Tr. 1534) and Bryant (Tr. 1821–22).

75. On July 22, 1977, Forsman signed on behalf of GSMH an IRS form entitled "Report of Interview Held with Persons Relative to Recommendation of 100-Percent Penalty Assessments" (Form 4180) (Alachua Remand Exhibit 22). The Form 4180 was prepared for Forsman by Bryant and was typed by Bryant's secretary. Forsman considered this to be an important document and he read it before he signed it, but not thoroughly (Tr. 1631–32).[12] Question 15 and Forsman's answers on Form 4180 read as follows:

> Q. 15. Were meetings of any kind ever held by stockholders, officers, members, or other interested parties, regarding nonpayment of the tax liabilities?
>
> A. Yes.
>
> Q. (a) Date(s) of such meetings:
>
> A. May, 1976. Late January, 1977.
>
> Q. (b) Who was present?
>
> A. Board of Directors.
>
> Q. (c) What was discussed?
>
> A. Financial condition of the corporation including tax liability.
>
> Q. What decisions were reached?
>
> A. Past due taxes were ordered to be paid immediately.

(Alachua Remand Exhibit 22, p. 2).

Also relevant to a consideration of this issue are the previous findings concerning O'Bryne's and Bryant's versions of the events in question. Such findings are not here repeated but will be considered in the conclusions. It was brought out on the cross-examination of O'Byrne that he did have a criminal record. He was convicted of a misdemeanor in Indiana in 1979 on charges having to do with controlled substances and sentenced to six months for this offense. He was also charged with a crime in Florida in 1976, namely, "criminal misconduct, a misdemeanor." O'Byrne entered a guilty plea and was fined $100 (Tr. 1569–71).

Contingent Comparative Issue

76. In its *Memorandum Opinion and Order*, the Review Board

[12] There is a misnumbering on transcript pages 1631 and 1632. Page 1631 should be page 1632 and page 1632 should be page 1631.

directed the Presiding Judge on remand to make findings and conclusions on the contingent comparative issue.[13] Following are the Presiding Judge's findings of fact from the evidence adduced at the initial hearing held by Judge Dennison, and conclusions of law.

Findings of Fact

Maximum Diffusion of Control of the Media of Mass Communications

77. Neither Alachua nor any of its shareholders, officers or directors have or have ever had any other broadcast or other media ownership interests, nor are they or have they ever been an officer or director of any broadcast licensee or any other media entity (Alachua Remand Exhibit 18). Similarly, neither Country nor any of its principals have or have ever had any interest in any broadcast station or other media of mass communications (Country Remand Exhibits 1, 2 and 4).

Best Practicable Service to the Public

Integration of Ownership and Management

78. Mr. Roy E. Kinsey, Jr. is President and a Director of Alachua. He owns 45% of the company stock (Alachua Remand Exhibit 14). Mr. Kinsey will devote such time to the operation of the station as is necessary to fulfill his responsibilities as stockholder, corporate officer and member of the Board of Directors. He is not proposed to be integrated into the day-to-day operations of the proposed station (Alachua Remand Exhibit 9).

79. Mr. James E. Forsman is Secretary-Treasurer and a Director of Alachua. He owns 45% of the company stock (Alachua Remand Exhibit 14). Mr. Forsman will devote such time to the operation of the station as is necessary to fulfill his responsibilities as stockholder, corporate officer and member of the Board of Directors. He is not proposed to be integrated into the day-to-day operations of the proposed station (Alachua Remand Exhibits 15 and 17).

80. Mr. Robert L. Ballantine is Vice-President and a 10% stockholder of Alachua (Alachua Remand Exhibit 14). If the Alachua application is granted, he will terminate his present employment at Radio Station WDVR, Philadelphia and accept employment as the full-time resident General Manager of the proposed station. He wil be fully integrated into the station's operation. He intends to devote at least 50 hours per week to the station's operation, a little more than eight hours a day, six days per week. As Vice-President, a

[13] *Memorandum Opinion and Order*, 71 FCC 2d at 1229, Fn. 12: "In light of the remand and because the Section 307(b) issue may not be dispositive, the Presiding Judge should also make findings and conclusions on the contingent comparative issue."

Director and a 10% shareholder, he will devote such additional amounts of time as are necessary to carry out the duties and responsibilities inherent in these capacities (Alachua Remand Exhibit 8).

81. Mrs Dianne L. Forrester is Secretary-Treasurer and a Director of Country (Country Remand Exhibit 3). Mrs. Forrester is proposed to work full-time at the proposed station as Office Manager.

82. Mr. Baxter Forrester is Vice-President and a Director of Country. He owns 50.1% of the company stock (Country Remand Exhibit 3). He is not proposed to be integrated into the daily operations of the proposed station.

83. Mr. Ray Forrester is President and a Director of Country. He owns 49.9% of the company stock (Country Remand Exhibit 3). If the Country application is granted, he will work full-time as General Manager of the proposed station. He will be fully integrated into the station's operation. He will be responsible for day-to-day programming decisions and will be in charge of all other aspects of station operations (Country Remand Exhibit 4).

Local Residence

84. Mr. Forsman resides at Route 1, Keystone Heights, Florida (Alachua Remand Exhibit 15). Mr. Kinsey resides at Smith Road, East Haddam, Connecticut (Alachua Remand Exhibit 9). Mr. Ballantine presently resides in King of Prussia, Pennsylvania. If the Alachua application is granted, he will move to Alachua (Alachua Remand Exhibits 8 and 17).

85. Mr. Baxter Forrester has lived in High Springs, Florida since 1941 (Country Remand Exhibit 1). Mr. Ray Forrester and Mrs. Dianne Forrester are both life-time residents of High Springs, Florida (Country Remand Exhibits 2 and 4).

Civic Participation

86. Mr. Forsman has been active in civic organizations in Gainesville, Florida. His activities include: member of the Board of Directors of the Gainesville Downtown Redevelopment Advisory Board and the Chamber of Commerce and appointment to the Eight Judicial Nominating Commission (Alachua Remand Exhibit 15).

87. Mr. Ballantine's civic participation activities include the following: 1975 - at Radio Station WGGG - helped arrange and promote the "WGGG and Palm Bowling Lanes Annual Charity Bowl" which helped raise money for the Gainesville United Way; 1976 - arranged public service broadcast time on WGGG for and was the announcer of the Kidney Foundation Charity event sponsored by a Gainesville civic organization and contributed time to write promotional literature and arrange public service air time on local radio stations for several non-profit clubs and charitable organizations in Gainesville (Alachua Remand Exhibit 9).

88. Mr. Ray Forrester has participated in various civic activities in High Springs, Florida, including: 1977–1978 - Vice-President and member, Elementary School PTA; 1976–1978 - Secretary-Treasurer of Volunteer Fire Department - member since 1964; 1976–1978 - Director of Chamber of Commerce and member and Sunday School Teacher at Church of Christ (Country Remand Exhibit 4).

89. Mr. Baxter Forrester has participated in various civic activities in High Springs, Florida, including: member of Board and President of the Chamber of Commerce (Country Remand Exhibit 1).

90. Mrs. Dianne Forester's High Springs civic activities include: membership in the elementary school PTA and Sunday School teacher at the Church of Christ (Country Remand Exhibit 2).

Broadcast Experience

91. Mr. Ballantine began employment as Sales Account Executive with Radio Station WGGG, Gainesville in 1973. He was subsequently promoted to the positions of local and general Sales Manager. In 1977 he became Sales Account Executive at Radio Station WDVR, Philadelphia, where he is presently employed (Alachua Remand Exhibit 8).

92. Mr. Ray Forrester received a Bachelor of Science degree in Broadcasting from the University of Florida in 1975. His studies included writing and reporting daily TV news shows for WUFT-TV and weekly reporting for WRUF-AM or FM. He also served as a paid student announcer on WRUF-FM (Country Remand Exhibit 4).

Past Broadcast Record

93. None of the principals of either applicant have or have ever had any other broadcast ownership interests (Alachua Remand Exhibit 18; Country Remand Exhibits 1, 2 and 4).

94. Mr. Ballantine, 10% stockholder of Alachua, was Sales Account Executive and local and general Sales Manager at Radio Station WGGG, Gainesville from 1973 to 1977. Since 1977, he has been and continues to be employed as Sales Account Executive at Radio Station WDVR, Philadelphia (Alachua Remand Exhibit 8).

95. Mr. Ray Forrester, 49.9% stockholder of Country, served as a paid student announcer at Radio Station WRUF-FM while he attended the University of Florida (Country Remand Exhibit 4).

Special Facilities

96. Alachua proposes to employ an emergency power generator if its application is granted. The generator will be installed at the transmitter site and will have sufficient power to assure operation of the station transmitter and accessory studio equipment during periods of normal power failure (Alachua Remand Exhibit 16).

Comparative Coverage

97. In its Initial Decision, Judge Dennison made findings regarding the comparative coverage of the applicants' proposals. See *ID* at 27. Only to the extent that the 307(b) issue was not dispositive of this case is comparative coverage relevant to the contingent comparative issue. The 307(b) issue would have been dispositive under Judge Dennison's Initial Decision had Alachua not been absolutely disqualified under the 1.65 misrepresentation issue. Therefore, the comparative coverage findings will not be treated in the conclusion of the contingent comparative issue reached herein.

Conclusions

1. In remanding this proceeding for further evidentiary examination under Issue 1,[14] the Board sought facts which would shed light on the personal involvement, knowledge and responsibility of Forsman for failure of GSMH and Young American to remit funds to the federal government (Remand Order at para. 5). In addition, questions were raised as to whether Forsman intentionally misled the Commission with respect to his lack of knowledge about GSMH's tax problems (Memorandum Opinion and Order, FCC 80M-503, released March 25, 1980).

2. The Board also requested that findings and conclusions be made on the contingent comparative issue (Footnote 12, Designation Order) and that the Section 307(b) issue be re-examined in the light of a grant of a construction permit to Station WIYD-FM in Palatka, Florida (Paragraphs 10–12, Remand Order). As indicated *supra*, the construction permit for the Palatka Station WIYD-FM has been deleted and the record made at the first hearing is therefore accurate and complete on this issue and the findings and conclusions as stated in the first Initial Decision will not be further considered herein.

Issues 1 and 2 - Withholding and FICA Taxes

3. It is undisputed that payments to the IRS to remit funds withheld from employee wages for FICA and income tax purposes were not made in a timely fashion on behalf of both Young American and GSMH which resulted in tax liens being placed against both operations. Forsman is the 90 to 100% owner of Young American and 33% owner and Director, Vice-President and Director of GSMH. Forsman is also the Secretary-Treasurer, Director and 45% owner of Alachua.

4. It is apparent from the record that neither Young American

[14] Issue 2, as added by the Presiding Judge, does no more than clarify Issue 1 to reflect that the concerns expressed by the Review Board deal with both the wages withheld for FICA (Social Security) and income tax purposes.

nor GSMH started out with any intention to avoid payments to the IRS. However, all witnesses[15] who testified, agreed these companies were eventually overcome by severe and serious cash flow problems. As a direct result of the cash flow problems, payments to the IRS to remit the withheld funds were not made in a timely manner by both Young American and GSMH. The critical issue here is to what extent can the failure to remit the taxes be chargeable to Forsman. There is a direct conflict of testimony as to Forsman's contemporaneous knowledge of the tax problems. It is concluded that deliberate decisions were made at both Young American and GSMH to allow the IRS payments to slide in favor of door-opener-type payments and that Forsman had contemporaneous knowledge of the tax problem.

5. Forsman acquired knowledge of a failure by Young American to pay its withholding and FICA taxes in the first half of 1977. But Forsman denies all responsibility or either the responsibility of participation in the non-timely payment of the taxes. The conclusion with respect to Forsman's knowledge of Young American's non-timely payment of taxes turns on the credibility of Forsman versus that of Childs. Childs testified that during the first quarter of 1977, because of cash flow problems, priorities were established as to the payment of the Young American creditors. The highest priority was assigned to those bills which had to be paid to keep the business operating. Childs testified that he and Forsman discussed these matters and that he (Childs) informed Forsman that Young American did not have sufficient funds with which to pay its obligation to IRS. Forsman denied having any conversation with Childs concerning priority of payment to creditors and he (Forsman) denied that Childs brought to his attention the fact that Young American did not have sufficient funds with which to pay the IRS. Alachua urges that Forsman is the more truthful witness while Country and the Bureau conclude Childs' testimony is the more credible. Alachua points to the conflict in testimony between Childs and Dr. Forsman (Forsman's father) as to who explained the duties of the job to Childs during his first week on the job. Dr. Forsman states he did the explaining while Childs states it was Forsman. The Presiding Judge observed both Dr. Forsman and Childs as witnesses and finds that Dr. Forsman's version of the initial training of Childs is correct. However, this does not serve as a basis to reject all of Childs' testimony. Childs was a bookkeeper and his functions were essentially ministerial. He had no ownership interest in the business and was paid a salary. It is not reasonable to believe, as Forsman urges, that an individual in this position would take it upon himself to make a decision not to pay the IRS. Childs' version of the events is supported by common sense, logic and everyday experience. Further, the record contains the testimony of two other bookkeepers, Riley and O'Byrne,

[15] O'Byrne, Riley, Childs, Dr. Forsman and Bryant.

whose testimony closely parallels that of Childs as to the circumstances leading to the non-timely payment of taxes and Forsman's knowledge thereof. Neither Childs nor Riley have any interest in the outcome of this proceeding and no motive was shown in the record to testify falsely.[16] Accordingly, it is concluded that the testimony of Childs and Riley is the more credible. See *Prattville Broadcasting Co.*, 5 FCC 2d 601 (Rev. Bd. 1966).

6. Likewise, it is concluded that Forsman's contemporaneous knowledge of a failure by GSMH to remit federal withholding and FICA taxes to the government has been established. Not only did Forsman have such knowledge, but other members of the GSMH Board both participated in and were ultimately responsible for the untimely payment of taxes. The testimony of O'Byrne is accepted that he was instructed by the Board, including Forsman, to pay the so-called "door closers" and the Board again, including Forsman, did nothing to assure that the taxes were being paid. Moreover, Mr. Bryant testified and independently established that taxes were mentioned at the Board meetings, that IRS obligations were not the subject of specific focus and that the Board knew that at times, there were insufficient funds to pay even the "door closers" and O'Byrne was expected to "juggle things" as best he could. Thus, even if the testimony of O'Byrne is discounted, there exists substantial other evidence to demonstrate that Forsman did have contemporaneous knowledge of the tax problems and for the additional reasons that the testimony of Forsman was rejected with respect to Young American, it is also rejected with respect to GSMH. Forsman's repeated explanations of lack of knowledge and the belief that someone else would attend to the matter are simply not acceptable when compared to the testimony of three bookkeepers during this time period (O'Byrne, Childs and Riley). All agree on a pattern of conduct, i.e., there were severe cash flow problems and list of payables would be reviewed and payment made only as required to keep the doors open.[17]

7. It is concluded that Issues 1 and 2 must be resolved adverse to Alachua. Forsman is found to have knowledge of, participated in and was responsible for the failure of Young American and GSMH to remit to the government wages withheld for federal withholding and FICA taxes. The issues (1 and 2) can be considered both on a comparative or basic qualification basis.

8. This Commission, like the IRS, must depend upon the

[16] Alachua suggests that Childs may have believed that Forsman viewed Childs as being personally responsible for the various IRS problems and thus Childs gave false testimony to avoid such blame and liability. This is rejected. The record contains nothing to support such a belief.

[17] O'Byrne's credibility has been attacked throughout this proceeding. First, it took an Order of the United States District Court in Florida to obtain his testimony and a grant of immunity was also provided. Also see footnote 9 *supra*.

voluntary and timely compliance with the Communications Act, and the Rules and policies, applicable to its licensees. Alachua, whose 45% owner is Forsman, seeks to become such a licensee and it has been found and concluded that Forsman must assume a direct responsibility for both the failure to file the necessary tax forms on a timely basis and a failure to remit to the government the money due. To further complicate the matter, the money due in this case represented for the most part funds withheld from employees' wages which Forsman's corporation in effect held in trust for the government to be turned into the government on a voluntary basis on specified dates. Even though Forsman did eventually pay these taxes plus penalties, it was not voluntary and the IRS and the Commission simply cannot function if it requires repeated enforcement proceedings to obtain required information. Accordingly, the Commission does look to the track record of its prospective licensees and licensees with other government agencies as an indication of its possible response to this Commission's reporting requirements. See *Report of Violations by Applicants of Laws of the United States*, 42 FCC 2d 399.

9. This *Report* does not adopt a blanket policy of disqualifying any applicant found to have violated a federal law. Rather, certain criteria should be applied such as was the action wilful or inadvertent, whether the violation was isolated or part of a pattern and the age of the violation. The Forsman conduct is found to be wilful, part of a pattern and recent enough in point of time to conclude that this Commission can expect little more of Forsman and Alachua than was experienced by the IRS. Accordingly, it is concluded that Issues 1 and 2 do go to the basic qualifications of Alachua and Alachua is found on this record under Issues 1 and 2 not to possess the required basic qualifications.

Issue 3

10. The purpose of Issue 3 is to determine whether Mr. Forsman made misrepresentations to the Commission in connection with sworn statements relating to his involvement with and knowledge of the failure of GSMH and Young American to timely remit funds to the federal government. It has been concluded under Issues 1 and 2 that Forsman did have contemporaneous knowledge that timely payments of withholding and FICA taxes were not being made to the IRS. It is further concluded that Forsman did misrepresent to this Commission the time period within which he first became aware of a failure to pay these taxes. Such misrepresentations were made in Forsman's prior testimony in this proceeding, in an opposition to a petition to enlarge issues, in responses to interrogatories submitted to Alachua by both the Bureau and Country and the proceedings on

remand. Such misrepresentations were not insignificant. For example, Judge Dennison refused to enlarge the issues[18] in the prior proceeding based in large part on Forsman's testimony in the prior proceeding and the response to the petition to enlarge issues that he (Forsman) had no responsibility, knowledge or fault for the tax problems. Further, when he found out about the tax matters, according to Forsman, the problem was resolved by firing the manager - O'Byrne. This was not an accurate picture of what actually transpired based on the remand record. It would serve no purpose now to speculate what Judge Dennison or the Review Board may have done had Forsman stated the actual facts. It is concluded that Issue 3 is resolved adverse to Alachua and this conclusion, standing alone, would be a basis to disqualify Alachua. The inaccuracies were either deliberate and intentionally deceptive or such statements made by Forsman to the Commission were made with such wanton, gross and callous disregard for the truth as to reflect the equivalent of an affirmative and deliberate intent. See *Big Valley Cablevision, Inc.*, 75 FCC 2d 702, 714 (1980); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978) and *Leflore Broadcasting Co.* v *FCC.*, 636 F 2d at 462.

Contingent Comparative Issue

11. The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), sets forth two primary objectives which the comparative process should attain. The first is the "best practicable service to the public", and the second is "a maximum diffusion of control of the media of mass communications." The Presiding Judge will consider the applicants' proposals under the standard comparative issue in light of these objectives, the guidance established in the *Policy Statement* and interpretive Commission decisions.

Maximum Diffusion of Control of the Media of Mass Communications

12. Diversification is a factor of primary significance since it constitutes a primary objective in the comparative process. *Policy Statement* at 394. None of the principals of either applicant have or ever had any ownership interest in any broadcast station or other media of mass communications. Accordingly, neither applicant will be awarded a preference for exhibiting a greater degree of diversification.

Best Practicable Service to the Public

13. The policy objective of providing the best practicable service

[18] Country's December 19, 1978 Petition to Enlarge Issues.

to the public takes into account several factors. These are awarded preferences according to both their quantitative and qualitative significance and merit.

Integration of Ownership and Management

14. Full-time participation in station operations by owners is of substantial importance. To the extent that participation by *owners* is less than full-time, the credit awarded drops sharply and no credit is given for proposed participation amounting to less than substantial time on a daily basis. *Policy Statement* at 395. The quantitative test for grants of varying measures of preference, therefore, looks to whether applicant owners are proposed to participate on a full-time, or at least substantial-time, basis at the station. Only those individuals with an ownership interest are considered in evaluating the applicant's integration proposal. *Triple C Broadcasting*, 16 FCC 2d 357, 363, 15 RR 2d 515 (Rev. Bd. 1969).

15. The quality of an integration proposal is enhanced by, and decisional significance is attributed to full-time integration of owners in management level positions exercising policy functions. Of first importance is the general manager's position. *Policy Statement* at 395; *East St. Louis Broadcasting Co.*, 29 FCC 2d 170, 172, 21 RR 2d 992 (1971), citing *Grand Broadcasting Co.*, 36 FCC 2d 925, 930 (1964).

16. Each applicant in this proceeding proposes to integrate one stockholder in the daily operation of its proposed station. Country proposes that Mr. Ray Forrester, a 49.9% stockholder, will work as full-time General Manager at the station. Alachua proposes to integrate Mr. Ballantine, a 10% stockholder, as its full-time General Manager. In *East St. Louis, supra*, at 173-174, the Commission concluded that a 30% differential in full-time integration gives the applicant with the greater ownership percentage a moderate preference. Accordingly, the 39.9% disparity in favor of Country merits a moderate preference for that applicant.

Local Residence, Civic Participation and Previous Broadcast Experience

17. The qualitative value of integration is also increased if participating owners have other attributes, including local residence, civic participation and previous experience. *Policy Statement* at 396. Therefore, the final comparative preference awarded to Country and Alachua may be adjusted to the extent that Mr. Ray Forrester or Mr. Ballantine possess and exhibit any measurable degree of these factors.

18. Previous broadcast experience (including activities which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance) is deemed of minor significance. But it may be examined qualitatively upon an offer of proof of particularly poor or good previous accomplishments.

On the other hand, where an owner proposes full-time participation, residence in the principal community to be served is of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future residence is accorded less weight than several years of present residence. Past participation in local civic affairs, as well as any other local activities indicating a knowledge of and interest in the community are considered as a part of a participating owner's local residence.

19. Mr. Ballantine presently resides in King of Prussia, Pennsylvania, where he has been employed as a Sales Account Executive at Radio Station WDVR, Philadelphia since 1977. If the Alachua application is granted, he plans to move to that community. Upon graduation from the University of Florida, Mr. Ballantine began employment at Radio Station WGGG, Gainesville as a Sales Account Executive. He was subsequently promoted to the positions of local and general Sales Manager. While employed at WGGG, he participated in several fund-raising and public service activities for local charitable organizations and national organizations that have Gainesville chapters.

20. Mr. Ray Forrester is a life-time resident of High Springs, where he has been active in numerous civic affairs and organizations. While an undergraduate at the University of Florida, he studied broadcasting and was a paid student announcer at WRUF-FM.

21. The moderate preference already accorded Country for integration of ownership and management is moderately enhanced by the qualitative attributes of Mr. Forrester's life-time residence in High Springs and the extent of his participation in local civic activities. Mr. Ballantine's intention to reside in Alachua if the application is granted deserves slight credit. There is no evidence that his accomplishments in the broadcasting field are meritorious.

Past Broadcast Record

22. Past broadcast record includes past ownership interests and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance in the comparative process if the past record exceeds the bounds of average performance.

23. None of the principals of either applicant have or have ever had any other broadcast ownership interests. Mr. Ballantine, 10% stockholder of Alachua, significantly participated at Radio Station WGGG, Gainesville as a Sales Account Executive and local and general Sales Manager. Furthermore, he is presently employed at Radio Station WDVR, Philadelphia as a Sales Account Executive. However, there is no evidence that his past broadcast record exceeds average performance levels. Therefore, neither applicant deserves a preference.

Special Facilities

24. In 1966, the Commission issued an *Addendum to Policy Statement*, 2 FCC 2d 667, 6 RR 2d 861, adding the acquisition and proposed use of auxiliary power equipment as a factor of decisional significance in comparative AM and FM broadcast proceedings. No absolute value was designated to be awarded proposals for emergency power. In *Seaborn Rudolph Hubbard*, 22 FCC 2d 30, 39, 18 RR 2d 625 (I.D. 1969), a slight preference was granted for an applicant's proposal to install emergency power facilities.

25. The provision of special facilities deserves a slight preference regardless of any showing of a history of power outages in the community to be served. The Commission's *Addendum* recites that auxiliary equipment was added as a comparative criterium in light of the northeast power failure experience, which demonstrated that the availability of emergency facilities was essential to providing radio service to the public during power failure emergencies. The frequency of power failures in individual communities was not balanced with the value to be accorded proposals for special facilities. The policy is to weigh this factor in light of the Commission's two primary comparative process objectives.

26. Alachua proposes to install and employ at its transmitter site an emergency power generator with sufficient power to assure station operations during periods of normal power failure. Accordingly, Alachua deserves a slight preference for these special facilities.

Conclusions on the Contingent Comparative Issue

27. The quantitative merit of Alachua's proposal to integrate a 10% owner as a full-time General Manager is slightly enhanced by qualitative credit for future residency and the minor significance accorded previous broadcast experience. On the other hand, the value of Country's basic quantitative proposal to integrate an owner as a full-time General Manager is substantially heightened by the qualitative factors of life-time residency, civic participation and a 39.9% differential in the ownership interests of Mr. Forrester and Mr. Ballantine in their respective companies. Thus, combining the respective quantitative and qualitative attributes of the Country and Alachua integration proposals, County is awarded a substantial preference.

28. In conclusion, because neither applicant deserves a preference for diversification or past broadcast record, and because Alachua deserves a slight preference for its special facilities and because Country is awarded a substantial preference for integration of ownership and management, the Country application is awarded a moderate preference for assuring the best practicable service to the public.

Ultimate Conclusions

The 307(b) Issue

29. If this proceeding were decided solely on Section 307(b) grounds, Alachua would prevail based upon the facts and conclusions of Judge Dennison. No new facts have been shown which would warrant any revision of Judge Dennison's prior conclusion.

Issues 1, 2 and 3

30. These issues are considered as a group since all involve Forsman's activities with respect to tax matters. It is concluded that either on the basis of the facts as found on Issues 1 and 2[19] or Issue 3 would each be a grounds to disqualify Alachua. Accordingly, it is not possible to reach a conclusion on Section 307(b) considerations as Alachua is found to be disqualified.

The Contingent Comparative Issue

31. It has been concluded that because Alachua deserves a slight preference for its special facilities and because Country is awarded a substantial preference for integration of ownership and management, the Country application is found to be preferred on the basis of a moderate preference for assuring the best practicable service to the public.

32. Accordingly, IT IS FOUND that the findings and conclusions on Issues 1, 2 and 3 dictate that the application of Alachua be denied and that of Country granted.

33. So unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Country (File No. BPH-9937) IS GRANTED and the application of Alachua (File No. BPH-10269) IS DENIED.[20]

FEDERAL COMMUNICATIONS COMMISSION
BYRON E. HARRISON *Administrative Law Judge*

[19] Issues 1 and 2 are actually one issue other than to make clear that both withholding and FICA taxes are involved.

[20] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Candor, See also Character or Misrepresentation
Character Qualifications, Effect of Misrepresentation
Character Qualifications, Lack of Candor
Misrepresentation, Situations Defining

Commission modified Review Board Decision. Findings or misrepresentation or lack of candor, while analogous to violations of 18 U.S.C. Sec. 1001, do not depend on technical violation of statute having occurred. Both misrepresentation and lack of candor involve deceptive intent. Applicant's misstatements here *de minimis*, warranting only slight demerit overcome by overall comparative advantage.
–*Fox River B/cing, Inc.*
BC Docket No. 80–310

FCC 83–49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FOX RIVER BROADCASTING, INC. De Pere, Wisconsin	BC Docket No. 80–310 File No. BPH-780828AB
Jon A. Le Duc d/b/a AMERICAN COMMUNICTIONS COMPANY De Pere, Wisconsin	BC Docket No. 80–312 File No. BPH-780831AI
For Construction Permit for New FM Broadcast Station	

ORDER

(Adopted: January 27, 1983; Released: February 2, 1983)

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

1. The Commission has before it applications for review, filed March 3, 1982, by Fox River Broadcasting, Inc. (Fox) and the Broadcast Bureau, an erratum filed March 17, 1982, by the Bureau, and an opposition, filed March 18, 1982, by American Communica-

tions Company (American). Review is sought of a Decision by the Review Board[1] granting American's application for a new FM station in De Pere, Wisconsin and denying Fox's mutually exclusive application. The Board reversed an Initial Decision by Administrative Law Judge Walter C. Miller, which had disqualified American.[2]

2. Principally at issue here is whether American should or should not be disqualified or assessed a comparative demerit because its sole owner, Jon A. LeDuc, committed misrepresentations or lacked candor in his dealings before the Commission. The Board concluded that only a slight comparative demerit was warranted, whereas the Administrative Law Judge had concluded that American should be disqualified. The applicants for review also assert that American should be disqualified.

3. The alleged misrepresentations or lack of candor involve Le Duc's statements concerning the roles that two individuals—Janet Gollnick and Loretta David—would play at the proposed station.[3] Gollnick and David are significant because they participated in conducting American's ascertainment survey and because allegations were made that Gollnick and her husband would be undisclosed principals of American. Le Duc represented in a July 27, 1979 amendment to American's application, and subsequently, that Gollnick and David were prospective employees of American's proposed station for the purpose of conducting the ascertainment survey. However, in testimony at an October 1, 1980 deposition, Le Duc denied that Gollnick was a prospective employee. Questions have also been raised as to whether David was a prospective employee.

4. We are fully in accord with the Board's result in this case and with the Board's discussion of the specific facts. However, we find the Board's discussion of Le Duc's deposition testimony somewhat cursory. Le Duc's testimony goes beyond merely denying that Gollnick intended to be "involved" with the proposed station as stated by the Board.[4] A fair reading of Le Duc's testimony suggests that he failed to exercise due care in making his statements. On the other hand, the circumstances surrounding Le Duc's testimony tend to mitigate the adverse inferences that might otherwise be drawn. Le Duc appears to have been testifying under the pressure of cross examination intended to show that Gollnick and her husband were undisclosed principals of American.[5] At the time of Le Duc's

[1] 88 FCC 2d 1132 (Rev. Bd. 1982).
[2] 88 FCC 2d 1145 (Admin. L.J. 1981).
[3] 88 FCC 2d at 1138–43, 1146–53, 1156–57.
[4] 88 FCC 2d at 1139, 1141 n. 20.
[5] Fox Exh. 8A, 8C.

testimony, all parties clearly understood that Gollnick had been proposed as a prospective employee[6] making it highly unlikely that Le Duc could have consciously intended a deception by stating at the deposition that Gollnick was not a prospective employee. The discrepency was not called to Le Duc's attention during the deposition session, and when it was in a subsequent pleading, Le Duc corrected himself.[7] These factors tend to indicate that Le Duc, under the pressure of cross examination, made a spontaneous misjudgment, which he later rectified.[8] Although Le Duc's attempts to explain this apparent misjudgment may have appeared to the ALJ as "glib" they do not establish any overt or intentional deception. In sum, we concur in the Board's imposition of a slight comparative demerit against American based on Le Duc's lack of care in making his statements, but we are convinced that the record does not support a finding of significant misconduct.

5. Although we agree with the Board's treatment of the specific facts of this case, we believe comment on a further aspect of the Board's Decision is also warranted. The Board prefaced its consideration of the facts of this case with a general discussion of misrepresentation and lack of candor with which we do not wholly agree.[9] This discussion does not affect the validity of the Board's disposition of this case, but we will modify it in order to avoid possible confusion in the consideration of similar matters in the future.

6. We believe the Board's discussion overstates the distinction between misrepresentation and lack of candor. Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form. We therefore disavow the Review Board's suggestion that lack of candor may involve failures to provide information in the absence of any deceptive intent.[10] We also disavow the suggestion that lack of candor is inherently less serious than misrepresentation. The seriousness of either offense depends on the facts and circumstances of the particular case.[11]

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[6] *See, e.g.*, Notice to Take Deposition Upon Oral Examination, filed August 11, 1980, by Fox.

[7] Fox Exh. 9A.

[8] *Cf. Janus Broadcasting Co.*, 78 FCC 2d 788 (1980); *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973).

[9] 88 FCC 2d at 1133–38.

[10] In particular we disagree with the Board's interpretation of *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974 (1974). Our reading of the court's opinion indicates that the court recognized the element of deception present there. *Compare* 88 FCC 2d 1135 n.4 with 670 F.2d at 230–31.

[11] *Compare RKO General, Inc.* v. *FCC*, *supra* note 10 (lack of candor results in denial) *with Janus Broadcasting Co.*, *supra* note 8 (misrepresentation results in short term renewal).

7. We also disavow the Review Board's reference to 18 U.S.C. § 1001[12] as a guideline for Commission proceedings involving misrepresentation and lack of candor. Our concern with misrepresentation and lack of candor stems from the necessity of relying on licensees' representations to the Commission.[13] The criminal statute clearly deals with misconduct analogous to misrepresentation and lack of candor and may form the basis for a specific issue, such as perjury. However, we reserve judgment as to the relevance, if any, of the specific requirements of the statute to findings of misrepresentation and lack of candor in general.

8. ACCORDINGLY, IT IS ORDERED, That the Applications for Review, filed March 3, 1982, by Fox River Broadcasting, Inc. and the Broadcast Bureau ARE DENIED; and that FCC 82R-3, released February 1, 1982, 88 FCC 2d 1132 IS MODIFIED as indicated above.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: Applications for Review in the DePere, Wisconsin, comparative FM radio proceeding (BC Docket Nos. 80–310 and 80–312)

I believe that we should overrule the Review Board and affirm the Administrative Law Judge's Initial Decision in favor of Fox River Broadcasting, Inc. for two reasons.

First, it seems to me that in finding that LeDuc's descriptions of Gollnick's and David's employment status did not "stretch" so far beyond "exaggeration", "puffing", or "mired memory" as to constitute misrepresentation (88 F.C.C. 2d 1143), the Review Board simply substituted its judgment on this question for that of the ALJ. However, it is clear from the ID that the ALJ based his finding that LeDuc had misrepresented the facts (i.e., lied) in part on his conclusion that LeDuc, when called on at the April 7, 1981, hearing session to reconcile his apparently inconsistent prior representations on the employment status of these two women, "displayed a chamelon-like (sic) glibness" and was "both unsuccessful and unconvincing." (88 F.C.C. 2d 1157). In deciding the always elusive question

[12] Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[13] *See Leflore Broadcasting Co., Inc.* v. *FCC*, 636 F.2d 454 (D.C. Cir. 1980), citing *inter alia FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

of truthfulness, the ALJ had the benefit both of the record of LeDuc's apparently inconsistent statements and his observation of LeDuc's demeanor while attempting to reconcile them. The Board, and in turn we, have only the lifeless record. In this situation, it seems to me that the ALJ's finding that LeDuc had lied should be affirmed unless it is clear from the record that it was wrong, and in my judgment that is not the case.

Second, it seems to me that even if the Commission affirms the Review Board's finding that LeDuc merely lacked candor, and that American was therefore not basically disqualified as a potential licensee, it should reverse the Board's decision on comparative grounds. To my mind, award of any preference for integration of a person found to have lacked candor in the very same proceeding is simply illogical. Logically, LeDuc's integration should count against American to at least some degree. At best, it should be ignored. And if LeDuc's integration is counted as a demerit, or even ignored, it seems clear that the ALJ was correct that Fox River should win this proceeding on comparative grounds. (88 F.C.C. 2d 1158.)

I therefore respectfully dissent.

Fairness Doctrine, Licensee Obligation
Personal Attack, Broadcaster Obligations Regarding

Application for review denied. If a complainant is aware of a licensee's willingness to afford an opportunity to present contrasting viewpoints and he conveys this awareness to the licensee, the licensee has satisfied its Fairness Doctrine obligation to provide a reasonable opportunity for the presentation of contrasting viewpoints.
–Henry W. Maier

FCC 83–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
Honorable Henry W. Maier
Mayor of the City of Milwaukee
against
WTMJ, Inc.

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 25, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on September 1, 1982, by Henry W. Maier, Mayor of Milwaukee, Wisconsin, of the Broadcast (now Mass Media) Bureau's ruling of July 29, 1982. On September 15, 1982, WTMJ, Inc. licensee of stations WTMJ(AM), WKTI-FM and WTMJ-TV, Milwaukee, Wisconsin, filed an Opposition to the Application for Review.

The Complaint

2. The complaint was based upon 15 editorials broadcast on the licensee's three stations from March 2 through May 6, 1981, by Mr. Ed Hinshaw, the licensee's Manager of Public Affairs, and Mr. Michael McCormick, president of WTMJ, Inc. These editorials concerned the manner in which the City of Milwaukee managed its garbage collection system and dealt with its labor disputes involving fire, police and garbage collection employees. The contents of these broadcasts are set forth in the Bureau's ruling (attached as an Appendix to this ruling).

3. Mr. Maier, in his original complaint received June 5, 1981,

had claimed that in the editorials the licensee falsely stated and suppressed "basic facts"; that the language in the editorials constituted an attack upon his honesty, character, integrity and like personal qualities during the discussion of a controversial issue of public importance; and that the licensee did not meet its obligations under the personal attack rule (§ 73.1920(a) of the Commission's rules) to notify him within seven days, provide a tape or accurate summary of the broadcast, and present him with an opportunity to reply. Mr. Maier also alleged that the licensee violated the Fairness Doctrine by not presenting contrasting viewpoints on the controversial issues of public importance, which he defined as "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers."

4. Mr. Maier's initial complaint was denied by the Bureau in a letter dated August 18, 1981, because he failed to establish a *prima facie* Fairness Doctrine or personal attack complaint, and to furnish extrinsic evidence of deliberate news distortion.[1] In response to the Bureau's denial of Mr. Maier's original complaint, he submitted an amended version, received September 16, 1981.

5. Mr. Maier's amended complaint was premised upon the allegations and arguments raised in his original complaint. He also submitted voluminous documentation on the controversiality and public importance of the subject issues. The Bureau then requested the licensee to submit its comments on the complaint.

6. On December 16, 1981, the licensee filed a response to the Bureau's letter of inquiry. The licensee agreed with the complainant that the issues were controversial and of public importance at the times of the broadcasts. It maintained that it "has utilized a variety of methods to encourage debate and to present both sides of the issues being discussed in compliance with the Commission's Fairness Doctrine." These methods include:

(a) closing each editorial with the following statement:
This comment is a statement of opinion on the part of the management of Channel 4 WTMJ Radio and WKTI for the purpose of stimulating thought and consideration of matters which are of concern to the public. Any expression on your part will be welcome. Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201;

[1] The Bureau informed Mr. Maier that the Commission will act appropriately to protect the public interest against the rigging or slanting of the news where we have received extrinsic evidence of such actions. *Hunger in America*, 20 FCC 2d 143 (1969). By "extrinsic evidence" we generally mean evidence outside the content of the program. Mr. Maier has not submitted nor purported to submit such evidence.

(b) maintaining an extensive mailing list of people who are interested in a particular issue, to whom both a copy of and an invitation to respond to the editorial are sent;

(c) maintaining a permanent mailing list of people to whom a copy of and an invitation to respond to *all* the editorials are sent.

In this context, the licensee asserted that Mr. Maier received not one but at least two copies of the editorials with corresponding invitations to respond, because he was on two lists, one to receive copies of all editorials and one to receive copies of every editorial dealing with city matters. Furthermore, the licensee maintained that Mr. Maier made special requests for immediate copies of the subject editorials, which were promptly accommodated. The licensee also stated that it made a direct on-the-air invitation to Mr. Maier to respond, in addition to a written invitation to him to debate the Governor on the impact of the new state budget, which Mr. Maier, himself, asserted would have an important effect on city services such as those at issue here.

7. The licensee also denied that it failed to meet its Fairness Doctrine obligation to present contrasting viewpoints on the subject controversial issues of public importance. It argued that although it was unsuccessful in getting Mr. Maier to respond, contrasting viewpoints were presented on the stations by others who did accept its invitations to respond. Additionally, the licensee maintained that its news coverage of the two subject issues, including news interviews with Mr. Maier and other city officials and two of Mr. Maier's press conferences that dealt specifically with the subject editorials, produced a balanced presentation.

8. With respect to the personal attack segment of Mr. Maier's complaint, the licensee argued that none of the statements in the subject editorials attacked the "honesty, integrity or like personal qualities of an identified person or group," and therefore did not constitute a personal attack under Section 73.1920(a) of the Commission's rules. Although the licensee acknowledged that the subject editorials may have voiced a strong disagreement with the manner in which Mr. Maier handled the aforementioned situations, it argued that the editorials did not contain any attacks upon Mr. Maier's character or integrity. Furthermore, even though the licensee denied that the personal attack rule was applicable, it stated that as a matter of routine station policy it nevertheless satisfied the requirements of the rule to notify the person attacked within seven days, provide a tape or accurate summary of the broadcast, and offer a reasonable opportunity to reply over its facilities.

9. On February 1, 1982, Maier filed a reply to the licensee's response. Mr. Maier contended that under the Fairness Doctrine a licensee must assure that in its overall programming it has not left the public uninformed as to the other viewpoints on a controversial

issue of public importance. Within this framework, he argued that the licensee could not have met its Fairness Doctrine obligation by merely adopting a general policy of broadcasting opposing views. Furthermore, Mr. Maier denied ever receiving a specific invitation to reply from the licensee and questioned both the licensee's allegation of having provided a balanced news coverage of the subject issues and the validity of the licensee's news log.

10. In the personal attack segment of Mr. Maier's reply he argued that "accusations of illegal conduct which imply improper or corrupt motives on the part of the attacked party" were made in the subject editorials. He also argued that the licensee must substantiate its claim that it mailed transcripts of the editorials to him within seven days of each broadcast.

Bureau Ruling

11. The Bureau denied Mr. Maier's complaint on several grounds. Although both parties acknowledged the controversiality and public importance of the issues, based on the record the Bureau could not find that the licensee had violated the Fairness Doctrine. According to the Bureau, the facts indicated that Mr. Maier was aware of the licensee's willingness to afford him on opportunity to reply to the editorials, and Mr. Maier conveyed this awareness to the licensee. The Bureau noted that, according to the licensee, Mr. Maier told a WTMJ reporter that he was not interested in availing himself of the normal reply opportunity. In this context, the Bureau cited *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 59 FCC 2d 1317 (B/c Bur. 1976), where it stated "the network is not required to make extraordinary efforts to present opposing points of view, only those which are reasonable under the circumstances." *Id.* at 1319. Therefore, the Bureau concluded, "in the circumstances here we believe that the efforts the licensee made to procure contrasting views were reasonable."

12. In addressing the personal attack aspect of Mr. Maier's complaint the Bureau relied on *L. E. White, Jr.*, 11 FCC 2d 687 (1968). There, the Commission ruled that its action is not warranted on a personal attack complaint if an offer of time to the complainant is still outstanding.

Application for Review

13. Mr. Maier reiterates his complaint. He alleges that the licensee did not satisfy its Fairness Doctrine obligation "to encourage and implement the broadcast of all sides of the controversial issues." Moreover he maintains that he was never specifically offered an opportunity to respond to any of the 15 editorials. With respect to the licensee's announcement at the end of each editorial, which states, "any expression on your part will be welcome, Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201," Mr. Maier

contends that this is not an invitation to present contrasting viewpoints on the licensee's facilities. Mr. Maier questions the Bureau's characterization of "the unspecified mailing" as containing an invitation. He maintains that the Bureau was wrong in concluding that on at least three different occasions, there was direct communication between the licensee and Mr. Maier's office offering him an opportunity of respond to the editorials.

14. With respect to the personal attack aspect of Mr. Maier's complaint, he argues that the personal attack rule has specific requirements with which there must be strict compliance. Finally, Mr. Maier reasserts his objections to the "claimed use of a mailing list for [licensee's] editorial announcements."

15. The licensee filed an Opposition to Application for Review on September 15, 1982. In its reply the licensee maintains that Mr. Maier failed to establish that the conclusions drawn by the Bureau were inaccurate. Furthermore, the licensee asserts that Mr. Maier had the burden of establishing that its offers of reply time either were not broadcast or mailed to him personally. The licensee also argues that the precedents in cases such as *Mid-Florida Television Corporation*, *CBS*, and *L.E. White, Jr.*, cited above, "all support the Bureau's conclusion that the methods employed by WTMJ to solicit opposing viewpoints satisfied its obligations under the Fairness Doctrine and Personal Attack Rules." (Footnote omitted.) In conclusion, the licensee maintains "Maier's Application for Review satisfies none of the requirements of Section 1.115 of the Commission's Rules."

Discussion

16. Having carefully examined the pleadings before us, we cannot conclude that Mr. Maier has presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that, in the context of this case, the licensee "diligently sought to present contrasting views." The Bureau notes that according to the license there was *"direct communication"* between the station and Mr. Maier's office. As an example of these direct communications, the licensee referred to its conversation with Art Strickland of Mr. Maier's staff during which he indicated that Mr. Maier's office was aware of Mr. Maier's opportunity to reply. Another example involved a station news reporter and Mr. Maier. The record indicates that upon being asked if he intended to reply, Mr. Maier responded, "When I respond, it will be on my own terms." Mr. Maier provides no evidence to refute this information. Therefore, we agree with the Bureau that Mr. Maier was in fact aware of the licensee's willingness to afford him an opportunity to reply to the editorials and that Mr. Maier conveyed this awareness to the licensee. The announcement at the end of the editorials, "Any expression on your part will be welcome," and the

various offers of reply time clearly are acceptable ways of encouraging the broadcast of differing viewpoints on controversial issues of public importance. The burden is on a complainant to show that in its handling of a controversial issue of public importance a licensee has acted unreasonably.[2] In this case, Mr. Maier has furnished no persuasive evidence to refute the licensee's claim that its offers of reply time were broadcast and that copies of the editorials were mailed to him personally.

17. With respect to the personal attack aspect of the complaint, we agree with the Bureau, that *L.E. White Jr.*, cited above, governs. There we stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time . . . to respond to the broadcast in question." Therefore, the Bureau correctly held that, based on the record, Mr. Maier was clearly aware of his opportunity to respond, and that he rejected all the offers made to him, claiming that he would respond only "on [his] own terms." Under these circumstances the licensee could not be found to be unreasonable.

Conclusion

18. Mr. Maier states that the Fairness Doctrine imposes an affirmative duty on licensees to encourage and implement the broadcast of contrasting viewpoints of controversial issues of public importance. Although this is correct, broad discretion is afforded licensees in program selection and presentation, including the spokesperson and the content and duration of the broadcast. The Commission reviews a broadcaster's decision to determine whether it has acted reasonably and in good faith, and we will not substitute our judgment for that of the broadcaster. In this instance, whether or not the Fairness Doctrine and personal attack rule were applicable to the editorials, the licensee provided numerous opportunities for Mr. Maier to respond to the editorials, every one of which he rejected. The Fairness Doctrine and personal attack rule require nothing more from broadcast licensees. We agree with the Bureau that we cannot find the licensee acted unreasonably in this matter.

19. Accordingly, in view of the above considerations, the Application for Review filed by Henry W. Maier IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[2] *Fairness Doctrine and Public Interest Standards ("Fairness Report")*, 48 FCC 2d 1, 17 (1974).

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL 29 1982

IN REPLY REFER TO:
8330-L
C1-621

Honorable Henry W. Maier
Mayor of Milwaukee
Room 201 City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

Dear Mr. Maier:

This is in further reference to your Fairness Doctrine complaint against WTMJ, Inc., licensee of stations WTMJ(AM), WKTI-FM and WTMJ-TV, Milwaukee, Wisconsin.[1]

Your complaint is based upon 15 editorials broadcast from March 2 through May 6, 1981, by Mr. Ed Hinshaw, the licensee's manager of Public Affairs, and Mr. Michael McCormick, president of WTMJ, Inc., on the licensee's three stations. You allege that these editorials falsely misstated and suppressed "basic facts." You also argue that the subject editorials contained information which attacked your honesty, character, integrity and like personal qualities during the discussion of a controversial issue of public importance. You define the controversial issues of public importance as "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers." Furthermore, you allege that the licensee has failed to meet its obligations under the Personal Attack Rule (§ 73.1920(a) of the Commission's rules) by failing to notify you within seven days, provide a tape or accurate summary of the broadcast and present you with an opportunity to reply. You also assert that the stations violated the Fairness Doctrine by devoting "approximately twenty-one minutes of air time to their editorial position without devoting any air time to opposing viewpoints."

On November 17, 1981, we informed the licensee of your complaint regarding the aforementioned editorials, and requested that it comment on its merits. However, we limited the inquiry to the Fairness Doctrine and personal attack aspects of your complaint, and did not request the licensee's comments on your factual suppression and misstatement allegations.[2]

---

[1] Your original complaint, received June 5, 1981, was denied by the Bureau in a letter dated August 18, 1981, because you failed to submit a *prima facie* Fairness Doctrine or personal attack complaint. In response to our denial of your original complaint you submitted an amended version, received September 16, 1981, which is the subject of this action. The licensee filed a response to a Commission inquiry on December 16, 1981; you filed a reply to that response on February 1, 1982.

[2] In our letter of August 18, 1981, we informed you that the Commission will act appropriately to protect the public interest against the rigging or slanting of the news where we have received extrinsic evidence of such actions. *Hunger in America*, 20 FCC 2d 143 (1969). By extrinsic evidence the Commission generally means evidence outside the content of the program. You have not submitted such evidence.

The licensee filed a response to our letter of inquiry on December 16, 1981. In its response the licensee acknowledges that the editorials referred to in your amended complaint presented views on controversial issues of public importance. Regarding the Fairness Doctrine aspect of your complaint, the licensee states that it "has utilized a variety of methods to encourage debate and to present both sides of the issues being discussed in compliance with the Commission's Fairness Doctrine."[3] In this context, the licensee asserts that you received a copy of and an invitation to respond to every editorial dealing with city matters. Further, the licensee maintains that you are on its permanent list to receive copies of *all* editorials and therefore were sent an additional copy of and invitation to respond to each editorial cited in your complaint. The licensee declares that your special requests for immediate copies of the subject editorials were promptly accommodated and your office indicated at that time it was aware of your opportunity to respond. Furthermore, the licensee states that it made both a direct on-the-air invitation to you to respond and a written invitation to you to debate the Governor on the impact of the new state budget, which you asserted would have an important effect on city services such as those at issue here.

The licensee argues that although all of its offers to you were fruitless, contrasting viewpoints were presented on the stations by others who did accept its invitation to respond. In addition, the licensee maintains that its news coverage of the two issues cited in your amended complaint, which included interviews with you and other city officials, produced a balanced presentation. Within this framework, the licensee states that in mid-March 1981, two of your press conferences, in which you specifically expressed your opinions about the subject editorials and about recent developments in the fire fighters' strike, were carried live by the licensee's television station (and excerpted by its radio stations).

With respect to your allegations that the licensee violated the Personal Attack Rule, it argues that none of the statements in the subject editorials constituted an attack upon the "honesty, integrity or like personal qualities of an identified person or group," and therefore cannot be considered a personal attack under Section 73.1920(a) of the Commission's rules. Although the licensee acknowledges that the subject editorials voiced a strong disagreement with your statements and actions regarding the aforementioned situations, it argues that the editorials did not contain any attacks upon your character or integrity. Even though the licensee believes that the Personal Attack Rule was not applicable, it states that it nevertheless satisfied the requirements of the rule to notify the person attacked within seven days, provide a tape or accurate summary of the broadcast and offer a reasonable opportunity to reply over its facilities as a matter of routine station policy.

On February 1, 1982, you filed a reply to the licensee's December 16, 1981 response to your complaint. You maintain that under the Fairness Doctrine a licensee must assure that in its overall programming it has not left the public uninformed as to the other viewpoints on a controversial issue of public importance. In this context, you argue that the licensee has not satisfied its Fairness Doctrine obligation. Your claim that "the adoption of a general policy to broadcast opposing views does not satisfy WTMJ's affirmative obligation to encourage the broadcast of contrasting views." You also assert that none of the licensee's stations issued a specific invitation to reply to the subject editorials. Further, you question both the licensee's allegation of having provided a *balanced* news coverage of the subject issues and the validity of the licensee's "news log," which you refer to as "someone's out-of-order summary of selected news items."

In the personal attack segment of your reply you state that the licensee in its editorials made allegations regarding the motives for your statements and actions towards the fire fighters' union and your complicity in illegal activities. Therefore,

[3] For further details see the *Discussion* portion of this letter, *infra*.

you conclude that these editorials constituted "accusations of illegal conduct which imply improper or corrupt motives on the part of the attacked party." You allege that the licensee has failed to meet its obligations under the Personal Attack Rule since no specific offers of time to reply were made to you. Furthermore, you maintain that the licensee has failed to substantiate its claim that it mailed a transcript of the editorials to you within seven days of each broadcast.

Discussion

As we advised you in our letter of August 18, 1981, the complainant has the burden of setting forth specific information necessary to establish a *prima facie* case of a violation. *Fairness Report*, 48 FCC 2d 1 (1974). Within this framework, you define the controversial issues of public importance as: "whether the City of Milwaukee was properly managing its garbage collection system along with other matters," and "whether the City of Milwaukee, including the complainant herein, was dealing properly with labor disputes involving fire and police employees and city garbage workers."

The licensee acknowledges that the subject issues are controversial and of public importance. However, it maintains that it has satisfied its Fairness Doctrine obligation to afford a reasonable opportunity for the presentation of contrasting viewpoints in a number of ways. The licensee lists three methods by which it solicits opposing viewpoints:

(1) by closing each editorial with the following statement:
This comment is a statement of opinion on the part of the management of Channel Four, WTMJ Radio and WKTI for the purpose of stimulating thought and consideration of matters which are of concern to the public. Any expression on your part will be welcome. Write to: WTMJ, Inc., P.O. Box 693, Milwaukee, Wisconsin 53201;

(2) by maintaining an extensive mailing list of people, who are interested in a particular issue, to whom both a copy of and an invitation to respond to the editorial are sent; and

(3) by maintaining a permanent mailing list of people to whom a copy of and an invitation to respond to *all* the editorials are sent.

As we previously informed you, a licensee's announcement at the beginning or end of a program that opportunity will be made available for the expression of contrasting views upon request is an acceptable way of encouraging the broadcast of differing viewpoints on a controversial issue of public importance. *Mid-Florida Television Corporation*, 40 FCC 620, 621 (1964). Moreover, a licensee's policies of mailing out copies of and invitations to respond to editorials have also been held by the Commission to be viable alternatives for fulfilling a licensee's obligations under the Fairness Doctrine. *Id.*; *CBS (KNX)*, 34 FCC 2d 773 (1972). The question here is whether, under the facts of this case, the language, "any expression on your part will be welcome," fulfills the licensee's affirmative obligation to provide a reasonable opportunity to reply. Also, the record here shows that in addition to the over-the-air announcements and the mailings, on at least three different occasions there was *direct communication* between the station and your office offering you an opportunity to respond to the editorials.

Notwithstanding your contention that the licensee's aforementioned invitations were insufficiently specific, it appears that you were in fact aware of the licensee's willingness to afford you an opportunity to reply to the editorials and that you

conveyed this awareness to the licensee. For example, the licensee states that you told a WTMJ reporter that you were not interested in availing yourself of the normal reply opportunity, saying, "When I respond, it will be on my own terms." Under these circumstances, and especially given your clear awareness that an opportunity to reply was available, we conclude that the licensee was not required to issue more specific invitations to you and, therefore, that it diligently sought to present contrasting views. *See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 59 FCC 2d 1317 (B/c Bur. 1976). There, the Bureau stated, "The network is not required to make extraordinary efforts to present opposing points of view, only those which are reasonable under the circumstances." *Id.* at 1319. As to responding on your own terms, please note that although the Commission is authorized to license broadcast stations and to regulate their operations in some respects, under our Constitution's First Amendment and the prohibition against censorship in the Communications Act, neither this nor any other governmental agency can direct broadcasters to present or not present specific material (except, of course for political candidates' rights). The licensee has wide discretion in determining the format and content of programs, including those which fulfill its fairness obligations. Thus, the licensee can place whatever restriction it wishes upon such programs, as long as the end result is a reasonable opportunity to respond. The Communications Act also states (in Section 3(h)) that the broadcaster is not a "common carrier"; this means that stations are not required to present all matter that is offered or recommended to them for broadcast.

Accordingly, in the circumstances here we believe that the efforts the licensee made to procure contrasting views were reasonable. We also note that you have neither responded to the licensee's invitations, nor have you specifically requested and been denied air time by the licensee. Had you, unlike the Teamsters, accepted offers made to you by the licensee and "thereafter complained that [you were] not afforded a reasonable opportunity to respond to the issues," we then could have considered your complaint in a different context. *Id.* However, in light of your refusal to accept the licensee's offers to respond to the editorials, you cannot persuasively claim that you were denied an opportunity to present your views for purposes of the Fairness Doctrine.[4]

In addressing the personal attack aspect of your complaint we believe the Commission's decision in *L.E. White, Jr.*, 11 FCC 2d 687 (1968), applies. There, the Commission stated, "There is no need to engage in lengthy analysis as to whether or not a personal attack occurred, since in any event the station has an outstanding offer of time to Reverend Hargis to respond to the broadcasts in question." As we mentioned above, the record here shows that you did not accept the licensee's offers to respond to the editorials, claiming that you would respond only "on [your] own terms." However, the licensee has discretion in this area, and you have not shown how any offers it made to you were unreasonable.

In view of the foregoing, we do not believe that any further Commission action is warranted. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission's rule 1.4(b)(2)) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to

[4] We are not here saying that the use of the language "any expression, etc." at the end of the editorials would in all instances constitute a clear invitation to the public "to respond" to the editorials. However, in this case, we cannot find the licensee unreasonable in its conclusion that you were invited to respond to various programming.

the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

JEFFREY W. MALICKSON *Assistant Chief*
Complaints and Compliance Division
Broadcast Bureau

Comparative Hearing
FM Station, Authorization
Minority Ownership
Ownership and Management, Integration of
Review by Review Board

Review Board affirms Initial Decision, grants FM broadcast application proposing 100% full-time participation of ownership in management (plus slight qualitative enhancement for broadcast experience), and denies competing application proposing 45% full-time participation only (plus significant qualitative enhancement for 100% minority ownership).
–HLD & M Communications
BC Docket No. 81–429

FCC 83R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HLD & M COMMUNICATIONS Cape Charles, Virginia	BC Docket No. 81–429 File No. BPH-800508AA
RONALD SMITH Cape Charles, Virginia	BC Docket No. 81–430 File No. BPH-800827AI
For Construction Permit for a New FM Station	

APPEARANCES

Louis J. Ebert and *Robert B. McKenna* for HLD&M Communications; *Ray R. Paul* for Ronald Smith; and *Norman Goldstein* for Chief, Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: March 11, 1983; Released: March 17, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. A comparative hearing was held in this case because two applicants proposed to establish a new FM station in Cape Charles, Virginia and only one could be granted. See *Policy Statement on*

Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). In an Initial Decision, FCC 82D-64, released September 10, 1982, Administrative Law Judge Frysiak, after applying the Commission's *Policy Statement*, *supra*, and precedent, *WPIX, Inc.*, 68 FCC 2d 381, 409–12 (1978), found that Ronald Smith's application was superior and entitled to a grant. The losing applicant, HLD & M Communications, filed a brief and exceptions on October 12, 1982 but did not request oral argument. Additional pleadings were filed on October 12, November 5, 8, December 13 and 28, 1982; January 6 and 11, 1983. After reviewing the record in the light of the parties' contentions the Review Board will affirm the Initial Decision. We need not write at length because the ALJ's basic findings are largely undisputed, firmly supported by the record, and his conclusion accords with past and recent Commission precedent. See *WPIX, Inc.*, *supra*; *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982).

2. *Background*: The basic facts are accurately set out in the ALJ's findings, ID paras. 1 to 28. Prior to the hearing HLD & M Communications (Communications) was found financially qualified by the ALJ in a summary decision. ID para. 2. Based on the record and the findings of fact, ID paras. 3–7, Communications was awarded two slight demerits which were not considered decisional by the ALJ; the first for failing to timely report its filing of 14 applications for lower power television stations. No motive to deceive was perceived, and the information was finally reported some five months after the applicant became aware of its obligation to file, even though the Commission's rules required that such information must be filed within 30 days. See 47 CFR 1.65. A second slight demerit was awarded because for more than six months Communications' application was not on file in the community of Cape Charles for public inspection as then required by the Commission's rules. However, this fault was not found to be attributable to intentional misconduct or wanton neglect. ID para. 34.

3. Neither applicant received a preference for diversification of control of the media of mass communications. ID para. 30. Thus, the case turned on the extent of proposed participation of each applicant's ownership in management of the station. Communications proposed a full-time participation of 45% of its ownership in management, and 16.95% part time. Mr. Monroe, a 45% stockholder, was to act as full-time general manager and Mr. Hudson, a 16.95% stockholder, was to participate to the extent of holding monthly meetings with Mr. Monroe. Communications did not explain Mr. Hudson's role or what activities he would perform for the proposed station. Since no concrete duties were specified, his monthly participation was found to be consultative in nature, and no credit for this type of part-time participation could be awarded under established Commission policy and precedent. Communications was awarded credit for Mr. Monroe's 45% full-time participation, and

this credit was enhanced because Mr. Monroe is the member of a minority group. ID paras. 31–32, 8–18.

4. Robert Smith is the sole proprietor of the competing application. Mr. Smith will serve as the station's general manager on a full-time basis. Thus, the Smith application was awarded 100% full-time credit which was enhanced because of his broadcast experience. ID paras. 35, 23–26.

5. Communications had claimed that its proposal was entitled to a decisive preference because its 100% Black ownership will provide the first Black-owned station to a county which is more than 50% Black. In his Initial Decision the ALJ found that this contention "does not comport with any of the Commission's comparative criteria. For comparative purposes, the minority element is tied to the applicant's integration proposal. *WPIX, Inc., supra.*" Communications was credited with 45% integration, and that 45% credit was qualitatively enhanced by virtue of Mr. Monroe's minority status. ID para. 32. In his final comparative evaluation, the ALJ did not fault Communications for the two slight demerits. He concluded that Communications' 45% credit, even when enhanced for its qualitative superiority, was not enough to outweigh Smith's clear (55%) quantitative difference which was enhanced for broadcast experience. ID paras. 37–38.

6. *Discussion*: The major point advanced by Communications is that it should have received a decisive comparative preference because of its 100% minority ownership even though only 45% will participate in the management of the station. (Br. 5–8.) We agree with the ALJ that this claimed preference does not comport with any of the existing comparative standards. That conclusion is supported by the Commission's decision in *WPIX, Inc., supra*, as well as recent Commission and Review Board decisions. See *Waters Broadcasting Corp., supra*, 52 RR 2d at 1066–67, see also *Las Misiones De Bejar Television Co.*, FCC 83R-10, 53 RR 2d 119 (Rev. Bd. 1983). We need not belabor this point because in *Las Misiones* a contention very similar to that now advanced by Communications was found to conflict with established Commission policy and precedent. See 53 RR 2d at 121–22.

7. Several of the ALJ's evidentiary rulings are challenged by Communications which maintains that its principals will be more sensitive to the special needs of Cape Charles than its competitor. Br. 3–4. Before they filed their applications both applicants were required to ascertain the community's needs and to design programs to serve those needs. See Commission's *"Programming Policy Statement,"* 44 FCC 2303, 20 RR 1901 (1960). Here the showing of both applicants apparently satisfied the basic Commission requirement since an issue was not designated regarding this matter. Thus, under well established Commission comparative practice an applicant claiming sensitivity to the community's special programming needs

and interests had to seek and justify a special issue prior to hearing. See *Policy Statement*, *supra*, 1 FCC 2d at 397–398; *Nuance Corp.*, 85 FCC 2d 412, 421 (Rev. Bd. 1981), and cases cited therein. Here a specific issue was not sought, and the ALJ's rulings, see *e.g.* Tr. 290–293, were mandated by Commission policy and practice as was his refusal to award a special preference for special sensitivity to the community's needs.

8. Finally, both applicants have made several arguments which are peripheral to the case. Communications argues that the ALJ should have faulted Smith's erroneous representation that he put a station on the air in 1973 instead of in September of 1974 so that he in fact operated that station for less than two years instead of three. Br. 9–10. Smith, on the other hand, argues that the ALJ should have faulted Communications not only for its reporting and filing violations, para. 2 above, but also for defects in its financial and transmitter site showings. The ALJ exercised sound judgment in regarding Smith's erroneous representation as of no decisional significance. But even if we were to award Smith a demerit for his error, Smith's demerit would more than be offset by the demerits which Communications received for its own errors. Moreover, the ALJ rejected Smith's claim that Communications was not financially qualified and did not have reasonable assurance that its transmitter site was available. Now Communications has had to file an amendment correcting the location of its transmitter site, which we hereby grant. All of these minor errors by the two applicants, which unfortunately we've come to expect in the litigious comparative process, are of no decisional significance as the ALJ wisely concluded. We affirm his exercise of sound judgment and common sense. See *Las Misiones*, *supra*, Note 1.

9. *Summation*: Since 1965, the *Policy Statement*, *supra*, and cases applying it have established that comparative credit for ownership participation will be awarded in proportion to the quantity of ownership which will participate full time in the management of the proposed station. Communications' credit for 45% ownership participation means that less than controlling interest will be involved full time in the management of the station. When an owner does not have ultimate control he is far less likely to respond with dispatch to changing circumstances, *Policy Statement*, *supra*, 1 FCC 2d at 395–96. Thus the benefit of such participation in management is naturally lessened. On the other hand, Smith's 100% ownership proposal is entitled to a substantial preference, even when viewed against Communications' significant weight for minority ownership. Minority enhancement credit cannot overcome the very participation preference of which it is a part, although an important one. Compare *Waters Broadcasting*, *supra*. Smith's quantitative superiority is also slightly enhanced because of his broadcast experience.

Policy Statement, 1 FCC 2d at 396. We therefore affirm the ALJ's grant of Smith's application.

10. ACCORDINGLY, IT IS ORDERED, That HLD & M's petition to amend and reopen the record filed December 13, 1982 and its petition for leave to file reply filed January 11, 1983, ARE GRANTED, and its motion to strike opposition filed January 6, 1983, IS DISMISSED as moot;

11. IT IS FURTHER ORDERED, That the Mass Media Bureau's Motion to Dismiss filed on November 8, 1982 IS DENIED, and its Contingent Reply to Exceptions IS ACCEPTED;

12. IT IS FURTHER ORDERED, That the application of HLD & M Communications, File No. BPH-800508AA, IS DENIED, and the application of Ronald Smith, File No. BPH-800827AI, IS GRANTED.

JOSEPH A. MARINO *Chairman, Review Board*

FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-64

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HLD & M COMMUNICATIONS Cape Charles, Virginia	BC Docket No. 81–429 File No. BPH-800508AA
RONALD SMITH Cape Charles, Virginia	BC Docket No. 81–430 File No. BPH-800827AI
For Construction Permit for a New FM Station	

Appearances

Louis Ebert, Robert B. McKenna and *Leon T. Knauer* on behalf of HLD&M Communications; *Ray R. Paul* on behalf of Ronald Smith; and *Norman Goldstein* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge Jonn M. Frysiak

(Issued: September 2, 1982; Released: September 10, 1982)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of HLD&M Communications (HLD&M) and Ronald Smith (Smith) for authority to construct and operate a new FM station on channel 241 at Cape Charles, Virginia. By *Order* (BC 001941) released July 8, 1981, the captioned applications were designated for hearing on the following issue:[1]

1. To determine with respect to HLD&M Communications:
   (a) the source and availability of funds to meet anticipated costs; and
   (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified to construct and operate the proposed FM facility.

2. To determine whether HLD&M had maintained a public file in the community of Cape Charles as required by the Commission's

[1] Issues 2 and 3 were added by *Memorandum Opinion and Order* FCC 81M-3144, released October 5, 1981.

Rules, and, if not, whether such failure to maintain a public file in the community adversely reflects upon the comparative qualifications of HLD&M.

3. To determine whether HLD&M properly amended its application for the FM station at Cape Charles, Virginia in File No. BPH-800508AA in accordance with the requirements of Section 1.65 of the Commission's Rules to reflect its pending applications for low power television stations in Houston, Texas, Detroit, Michigan, Atlanta, Georgia, Tampa, Florida, St. Louis, Missouri, or any other applications for other cities, and, if not, whether the failure to file such amendments in accordance with the requirements of Section 1.65 of the Commission's Rules adversely reflects upon the comparative qualifications of HLD&M.

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

The *Order* provided that "for the purpose of comparison, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to either of the applicants" (para. 5).

2. A prehearing conference was held on October 1, 1981. By *Orders* FCC 82M-0987 and FCC 82M-1003, released March 29, 1982 and March 31, 1982, respectively, summary disposition of HLD&M's financial issue was rendered. Hearing sessions were held in Washington, D.C. on March 30 and 31, 1982 and April 14, 1982. Proposed findings of fact and conclusions of law were filed by the applicants on June 1, 1982 and replies were filed on June 14, 1982 by HLD&M and on June 15, 1982 by Smith.

Findings of Fact

Section 1.65 Issue Directed Against HLD&M

3. At the time of filing its application, HLD&M had on file four applications for low power television stations on an experimental basis. These applications were duly reported to the Commission in the Cape Charles construction permit application. The applications were withdrawn when it was learned that the Commission would not grant low power applications on an experimental basis. Low power applications in the fourteen cities specified in a March 5, 1982 amendment to HLD&M's application were then filed under the Commission's interim processing guidelines for low power stations.

These applications were filed in November and December 1980 and January and February 1981. Mr. Early Monroe testified that HLD&M's failure to amend its permit application to reflect the withdrawal of its experimental applications and the filing of the low power applications was based on his misconception of the Commission's reporting rules. He averred that he felt that having applied for the experimental stations with the same agency at which the application for a construction permit was filed, no additional notification was required. HLD&M Exh. 1, p. 5.

Local Public File Issue Directed Against HLD&M

4. On page 9 of its Exhibit 1, through the written direct testimony of Mr. Monroe, HLD&M reports that a copy of its application for Cape Charles, Virginia has been on file for public inspection since May 1980 at the Northampton Service Station in Cape Charles. Mr. Raymond Spady, the owner of the Northampton Service Station, testified on direct that on or about May 15, 1980, Mr. Monroe delivered to him a copy of the HLD&M application and that it was maintained and available for inspection at his station during regular business hours. HLD&M Exh. 5. On cross-examination, he stated that there was one occasion that the application was not in the public file and that he asked his brother two or three days later about it and was told that his brother had given it "to the people for them to see" (Tr. 224); that it was then that he "knew that the files were gone and [he] didn't misplace the files, and then [he] had to get some more." Tr. 240.

5. In her rebuttal testimony, Ms. Frances Shepherd testified that she is an employee at WHAG-TV and that on September 29, 1981 she was requested by Mr. Smith to inquire of Mr. Spady by phone whether the public file was available. She made the call and was told by a person who identified himself as Mr. Spady that he didn't know what she referred to, but after being told what it was, he remembered that it was received the previous week. Tr. 97–98.

6. On January 4, 1982, Mr. Earl Gerhart, an employee of WQZQ, Chesapeake, Virginia, at the request of Mr. Smith, personally visited the Northampton Service Station and requested to see the file. He was told by Mr. Spady that he did not have it and had not seen it for several months. On January 6, 1982, Mr. Gerhart called the station to speak with Mr. Spady and was informed that he was not in. A person who identified herself as "Dorothy" had said, when asked about the file, that someone else had been there and it had not been seen for several months. On March 17, 1982 Mr. Gerhart called again, spoke with Mr. Spady and was told that the file had been found and that "they also brought down another duplicate file." Tr. 104–09.

7. In late September or early October 1981, Mr. George B. Sterling, a reporter for *The Eastern Shore News*, which has circula-

tion in Cape Charles and Northampton County, went to the service station to inspect the file. The attendant did not know what he requested to see. In December 1981, Mr. Sterling made a second trip to inspect the file, and again on this occasion the person did not know of the file and did not locate it. On Mr. Sterling's third trip to the service station during March 1982, the public file was there and he had an opportunity to inspect it for the first time. Tr. 274–77.[2]

The Applicants

HLD&M Communications

8. HLD&M is a general partnership as follows:

Name	*Office Held*	*Percentage of Ownership*
James L. Hudson	President	16.95
Willie L. Leftwich	None	16.95
Chester C. Davenport	Secretary/Treasurer	16.95
Keith Seay	None	4.15
Early D. Monroe, Jr.	Vice President	45.00

All of the partners of HLD&M are black. With the exception of Mr. Monroe, the partners are also partners in the law firm of Hudson, Leftwich & Davenport, located at 1101 15th Street, N.W., Washington, D.C. HLD&M Exh. 1, p. 3; Exh. 2, p. 1; Tr. 52–54, 297.

9. Mr. Monroe, who currently resides in Arlington, Virginia, testified that if HLD&M's application is granted, he would move to the Cape Charles area to personally manage the station on a full-time basis. HLD&M Exh. 1, p. 5; Tr. 44.

10. Mr. Monroe participated in graduate studies at Howard University and George Washington University in Washington, D.C. in engineering and telecommunications management, respectively. HLD&M Exh. 1, p. 1.

11. From 1966 to 1979, Mr. Monroe was employed by the Federal Communications Commission. In 1966–1968, he worked as an Audio Broadcast Engineer in the Broadcast Bureau, concentrating on low power radio stations. From 1968 to 1970 he worked as a Television Broadcast Engineer, concentrating on, *inter alia*, conventional television stations and low power television stations (*e.g.*, translators and Instructional Fixed Television Stations). In 1970 he became the Commission's Cable Television Task Force Engineer where his primary duties included writing and modifying the Cable Antenna Relay Service (CARS) rules, processing CARS applications and writing the cable television technical standards, a position he held until 1974. In 1974 Mr. Monroe became Senior Engineer for the

[2] Mr. Sterling appeared as a witness for Smith under subpoena "against [his] wishes." Tr. 281.

Cable Television Bureau, responsible for technical matters in the Policy Review and Development Division. He researched and coordinated the Commission's policy decision to allow energy efficient small diameter satellite earth terminals by cable television systems and spearheaded the research concerning energy leakage from cable television systems which resulted in federal energy leakage rules for the cable industry. He remained in this position until he left the Commission in 1979. HLD&M Exh. 1, pp. 1–2.

12. From 1972 to 1978, Mr. Monroe was an adjunct professor at Howard University's School of Communications, where he taught New Communications Technology, Cable Television and Urban Communications. HLD&M Exh. 1, p. 2.

13. In 1978–1979, Mr. Monroe founded the National Organization of Telecommunications Engineers and Scientists (NOTES) for the purpose of promoting and supporting technological developments and energy conservation in telecommunications. HLD&M Exh. 1, p. 2.

14. Mr. Monroe is chairman of the board and president of NOTES, a member of IEEE and former vice president of its Washington, D.C. broadcast chapter. He is also a member of the Society of Professional Engineers, the Society of Cable Television Engineers and co-chairman of the National Conference of Black Lawyers Communications Task Force Broadcast Group. He was a member of the Commission's Teletext/Viewdata Committee which is responsible for monitoring developments and coordinating activities in this spectrum and energy efficient mode of telecommunications transmission. He is also a member of the Kentucky Educational Television TeleCom Planning Committee, a group established to prepare a report identifying a more current energy efficient telecommunications system for the state of Kentucky. He is a member of the Congressional Black Caucus Brain Committee, which is responsible for drafting reports to the caucus on legislation affecting the black community, a member of the NAACP and the National Urban League, where he serves on the Consumer Affairs Committee. HLD&M Exh. 1, pp. 2–3.

15. Mr. Monroe is the author of a number of technical and nontechnical policy, educational and instructional papers on telecommunications, the most recent of which are: "Studio and Control Equipment—Technical Aspects," published as a chapter on the educational textbook, *Television Broadcasting*, edited by Dr. Robert Hillard, Hasting House, 1978; "Interfacing Cable Television and Broadcast Subscription Television," published in *Cable 78 Technical Papers 27th Annual NCTA Convention*, NCTA, Washington, D.C.; "Deregulating the Cable Technical Standards," published in *Annual NOTES Technical Papers*, 1980. HLD&M Exh. 1, p. 3.

16. Currently, Mr. Monroe is president of EDM and Associates, Inc. EDM specializes in broadcast, cable, common carrier and

microwave services. In addition, he is vice president of HLD&M Communications. HLD&M Exh. 1, p. 3.

17. James L. Hudson is a graduate of Morehouse College and the Boston University Law School. He has been a senior partner of the law firm since its inception in 1969. He is a member of the Board of Directors of the Washington Council for Equal Business Opportunity, the Executive Committee of the Lawyers Committee for Civil Rights Under Law, the Executive Committee of the World Peace Through Law Center, the Economic Development Bureau Steering Committee of the Washington, D.C. Board of Trade, the National Tenants Rights Organization, the Washington Planning and Housing Association, Model Cities Clean Services, Inc., Health and Welfare Council United Givers Fund, the Municipal Finance Forum of Washington, D.C., the Advisory Board of the District of Columbia National Bank, and the District of Columbia General Hospital Commission. Additionally, he has been active in national and local politics. In 1972 Mr. Hudson was Michigan State Coordinator for Senator Edmund S. Muskie's presidential campaign. In 1976 he was a member of the Carter-Mondale Steering Committee District of Columbia. In 1974 he was the vice chairman of the Walter E. Washington mayoral campaign. HLD&M Exh. 2, p. 2.

18. As president of HLD&M, it is Mr. Hudson's intention that if the license is granted, he will have monthly meetings with the general manager, Mr. Monroe, as to all aspects of station management, programming and policies. Although he has no previous broadcast experience, he believes that his management experience developed in running Hudson, Leftwich & Davenport, particularly in determining salaries, balancing revenues against outlays, collecting accounts receivable and assigning workloads, will enable him to participate effectively in the management of the radio station. He also believes that his sensitivity to the needs of the minority community will assist the station to fulfill some if not all of the needs of the local population expressed in the ascertainment study conducted by HLD&M. HLD&M Exh. 2, p. 3. Although part-time credit for Mr. Hudson's integration into management is sought, no work schedule was specified.

19. Willie L. Leftwich has a B.S.E.E. from the Howard University School of Engineering and a J.D. and LL.M. from the George Washington University School of Law. Between 1971 and 1973, Mr. Leftwich was an associate professor at the George Washington University School of Law and the University of the District of Columbia. From 1968 to 1969, Mr. Leftwich was employed at the Federal Aviation Administration, U.S. Department of Transportation, as a patent attorney. Between 1963 and 1968, he was a research electro-optical engineer for the Naval Air Systems Command and a research aeronautical instrumentation engineer for the National

Aeronautics and Space Administration between 1960 and 1963. HLD&M Exh. 2, p. 3.

20. Mr. Leftwich's civic participation includes: Director, Neighborhood Legal Service Program (1973–1974); Secretary of the Commerce Technical Advisory Board (1974–1976); Federal Energy Administration Wholesale Consumer Panel (1974–1976); District of Columbia Law Revision Commission (1978); Director, Pennsylvania Avenue Development Corporation (1973–1976); Director, District of Columbia Redevelopment Land Agency (1971–1976); Member, District of Columbia Judicial Nomination Commission (1975–1980); Member, Defense Science Board Task Force on Revision to Acquisition Directives (1979). Furthermore, in 1972 Mr. Leftwich was the Chairman of the District of Columbia Committee to Re-elect the President of the United States, Richard M. Nixon. HLD&M Exh. 2, p. 4.

21. Chester C. Davenport joined Hudson, Leftwich & Davenport in 1973 after a federal government career with the U.S. Department of Justice and as a legislative assistant to United States Senator Alan Cranston. In 1976 Mr. Davenport temporarily left the firm to be a coordinator for the Carter-Mondale Presidential Campaign Policy Planning Group. He then served from 1976–1977 as a member of President-Elect Carter's Transition Team. From 1977–1979, Mr. Davenport served for President Carter as Assistant Secretary of Transportation for Policy and International Affairs, U.S. Department of Transportation. In this position, he was responsible for the analysis, development, articulation and review of all policies and plans for domestic and international transportation. He then rejoined the law firm in 1979 as a senior partner. HLD&M Exh. 2, pp. 4–5.

22. Keith A. Seay is also a partner with Hudson, Leftwich & Davenport and is head of its real estate division. Mr. Seay's expertise in the area of real estate acquisitions, leases and zoning will prove valuable to the station. HLD&M Exh. 2, p. 5.

Ronald Smith

23. Ronald Smith is the sole proprietor of his application. He was born in Baltimore, Maryland in 1939 and was graduated from Catonsville High School in 1957. While in high school, he was the school's representative to Boy's State in Annapolis in 1956 and was elected treasurer of the Student Council in his senior year. After graduation from high school, he attended Baltimore Junior College for one year while working in broadcasting. His non-broadcast employment consists of a position as production manager for Langsdale Advertising in Baltimore from 1960 to 1962 and as vice president and production manager for Art Associates, Inc., a division of Merkle Press. In 1961 Mr. Smith attended the University of Baltimore where he took special courses in advertising, copyrighting

and layout. In 1970 he moved to Hagerstown, Maryland, where he was employed by Adler Communications Corporation, and has resided in Hagerstown since that time. He has been a member of the Hagerstown-Washington County Chamber of Commerce, the Hagerstown Lions Club, and has served on the Board of Directors of the Washington County Council on Alcoholism. Smith Exh. 2, pp. 1–2.

24. While in high school, Mr. Smith worked part time as a junior disc jockey on Saturday mornings at WITH in Baltimore, Maryland. Upon graduation from high school, Mr. Smith was employed as production assistant at WJZ-TV in Baltimore on a "Dick Clark" type dance program, two and a half hours a day, six days a week. During this period of time, he was on the air delivering commercials, supervising teenagers who danced on the program and assisting the director. In 1959 he moved to the eastern shore and worked as office manager and announcer at WICO, Salisbury, Maryland. His duties in this position included a daily four-hour radio program, writing copy and typing logs. In 1960 he moved from Salisbury to Pocomoke City, Maryland, where he was employed at WDVM as program director and announcer. In addition to his duties as program director, he performed a four-hour daily radio program, wrote copy and did general office work. During the latter part of 1960, he was forced to leave broadcasting because of a physical problem with his vocal cords which caused his voice to crack after he had talked for a few hours on the air. Smith Exh. 3, p. 1.

25. In 1967 Mr. Smith was one of the founders of and minority stockholders in Adler Communications Corporation. This company purchased WHAG AM-FM, Hagerstown, Maryland, in 1967; WAYE, Baltimore, Maryland, in 1968; and put WHAG-TV, Hagerstown, Maryland, on the air in 1970. Mr. Smith was employed as executive vice president of Adler Communications Corporation and was responsible for the entire operation of each broadcast facility, including programming, sales, production, traffic, promotion and engineering. At one time or another between 1967 and 1973, Mr. Smith worked on a day-to-day basis as general manager of all the Adler stations. In 1973 WHAG-TV was sold, at which time Mr. Smith resigned from Adler. He continued to serve in a sales capacity at WHAG-TV from 1972 to the present. From 1970 to 1976, Mr. Smith was president and majority stockholder in Community Broadcasters, Inc. This company put WAAT-FM, Johnstown, Pennsylvania, on the air in 1974. Due to financial difficulty, the station was sold in 1976. Smith Exh. 3, pp. 1–2; Tr. 183–4.

26. Mr. Smith is currently a resident of Hagerstown, Maryland. Smith Exh. 2, p. 2. In the event that his application is granted, he will move to the Cape Charles area of the eastern shore of Virginia and will serve as the station's general manager on a full-time basis, devoting at least 40 hours per week to the station's operation and whatever additional time is necessary to fulfill the responsibilities

and duties inherent in the position of general manager. Mr. Smith will make the day-to-day programming decisions and other managerial decisions of the station. Smith Exh. 4.

Emergency Power Generator

27. Both applicants propose to install an emergency power generator to supply power in the event of a power failure. HLD&M Exh. 1, p. 9; Smith Exh. 6.

Comparative Coverage

28. Although the applicants do not propose the same transmitter site, a distance of approximately 500 feet separates the two sites and the areas and population to which the proposed stations would render service will be the same, *i.e.*, 716,790 persons residing in 1,174 square miles. HLD&M Exh. 8.

Conclusions of Law

29. This proceeding involves the mutually-exclusive applications of HLD&M and Smith to construct a new FM station at Cape Charles, Virginia. The issues to be resolved in this proceeding are the standard comparative issue and the special comparative issues designated against HLD&M, which include a Section 1.65 issue for its failure to report by amendment its 14 applications for low power television permits and a public file issue for its failure to maintain a local file containing its application in accordance with Section 73.3580(f)(9) of the Commission's Rules. The applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement*, 1 FCC 2d at 394.

Diversification of Control of the Media of Mass Communications

30. Neither of the applicants, nor any of HLD&M's principals, has present interests in the media of mass communications. None of HLD&M's low power television applications has been granted and none, therefore, is attributable to HLD&M for comparative purposes.

Best Practicable Service

31. HLD&M proposes 45% full-time integration of ownership and management and 16.95% part-time integration. Mr. Monroe, a 45% shareholder and vice president of HLD&M, is proposed as a full-time general manager. Mr. Hudson, a 16.95% shareholder and president, will hold monthly meetings with Mr. Monroe. Mr. Hudson has no previous broadcast experience and has no specific duties in the management of the station. Although it has been stated that Mr.

Hudson's management skills acquired in the management of a law firm will assist him in the management of the radio station, there is no evidence as to what activities Mr. Hudson will perform, if any. Since no duties are delineated, Mr. Hudson's participation is deemed to be of a consultative nature. Furthermore, there is no indication of what duration Mr. Hudson's monthly meeting with Mr. Monroe will be. In *Midwest Broadcasting Company*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979), the Review Board, stating that the *Policy Statement* (*supra*) makes it quite clear that while the Commission is primarily interested in full-time participation, it set a cut-off point of 20 hours a week below which no credit will be given for part-time integration proposals. Since Mr. Hudson's work hours have not been specified, no credit for his part-time participation can be given.

32. HLD&M's proposal is qualitatively enhanced by the participation of Mr. Monroe, who is a member of a minority group. *WPIX, Inc., New York*, 68 FCC 2d 381, 43 RR 2d 278 (1978). HLD&M contends that its proposal is superior to Smith's because it is 100% black-owned and will provide the first black-owned communications outlet to a county more than 50% black. This statement does not comport with any of the Commission's comparative criteria. For comparative purposes, the minority element is tied to the applicant's integration proposal. *WPIX, Inc., New York, supra*. HLD&M can only be credited with 45% integration, and that 45% integration is qualitatively enhanced by virtue of Mr. Monroe's status as a black.

33. *Section 1.65 Issue*. Item 17(b) on page 5 of Section II (Legal Qualifications) of FCC Form 301 requires the reporting of an applicant's interest in any applications pending before the Commission. The findings of fact demonstrate that HLD&M did not amend its application to include 14 applications for low power television stations. Although HLD&M appears to be in technical violation of the Commission's reporting rules, there is no evidence of any motive to withhold the information. The record does indicate that HLD&M made such a report on March 5, 1982, some five months after it was alerted to the omission[3] HLD&M will be assessed a slight demerit.

34. *Public File Issue*. The record shows that on occasions between September 1981 and early March 1982, the application of HLD&M was not on file in the community of Cape Charles for public inspection. There is no evidence of intentional misconduct or wanton neglect. Nevertheless, the application was not available for public examination when certain members of the public attempted to see it. A slight demerit against HLD&M will be assessed.

35. Ronald Smith is the sole proprietor of his application. He will serve as the proposed station's general manager of a full-time basis. Smith is entitled to a 100% integration of ownership and manage-

[3] The comparative issues against HLD&M were enlarged on October 5, 1981 to include the Section 1.65 issue.

ment credit. This credit is qualitatively enhanced by virtue of his past broadcast record.

36. *Other Comparative Factors.* Neither of the applicants is entitled to a comparative coverage preference since there is essentially no difference in the areas or populations proposed to be served by HLD&M and Smith. In addition, both of the applicants receive a preference for proposing to install an auxiliary power generator.

Final Comparative Evaluation

37. HLD&M is entitled to 45% quantitative integration credit. Smith is entitled to 100% integration credit. The grant, therefore, must go to Smith since it is settled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981).

38. In any event, the Smith proposal is qualitatively superior to that of HLD&M. HLD&M's proposed integration of a 45% owner who is black is outweighed by Smith's 100% integration enhanced by past broadcast experience.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Ronald Smith to construct a new FM broadcast station at Cape Charles, Virginia (File No. BPH-800827AI) IS GRANTED and the application of HLD&M Communications (File No. BPH-800508AA) IS DENIED.[4]

JOHN M. FRYSIAK *Administrative Law Judge*

FEDERAL COMMUNICATIONS COMMISSION

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Common Carrier, Data Processing Service
Common Carrier, Interconnection
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, International Record Carrier
Tariff, Regulation of

Under Section 222 of the amended Act, record carriers are required to interconnect facilities with one another. Order resolves interconnection to store-and-forward and service conversion facilities. Also, the Commission clarifies that interconnection is required to "traditional" record services, even if they are enhanced services which otherwise would be unregulated.
–*Interconnection Arrangements*
CC Docket No. 82–122

FCC 83–85

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Interconnection Arrangements Between and Among Domestic and International Record Carriers: Store-and-forward and TWX/Telex Conversion	CC Docket No. 82–122

MEMORANDUM OPINION AND INTERIM ORDER

(Adopted: *March 3, 1983*; Released: *March 14, 1983*)

BY THE COMMISSION:

I. *Introduction*

1. In the Record Carrier Competition Act of 1981 (RCCA), P.L. 97–130, 95 Stat. 1687, Congress amended Section 222 of the Communications Act to establish a new structure for full and fair participation in the provision of international and domestic record services. Included is a requirement that facilities for teletypwriter-based (and other traditional) record services by record carriers be made available for interconnection with facilities of other record carriers. The RCCA contemplated that the affected carriers meet and reach interconnection agreements to implement interconnection for others which is equal in type and quality to that provided their own operations, and if they were unable to do so, that the Commission prescribe appropriate tariff, compensation, technical and operational arrangements for such interconnection.

2. The Commission sponsored meetings among the carriers thereafter, but the carriers were unable to reach such agreements. Thus, the Commission was forced to prescribe appropriate arrangements in an April 8, 1982 *Interim Order* [1] and in a June *Memorandum Opinion and Order (Rejection Order)*[2], employing a tariff prescription mechanism to ensure that the prescribed arrangements were effectuated. Pursuant to these orders, the vast bulk of domestic and international teletypewriter-based record services are now fully interconnected.

3. Although the carriers had been unable themselves to reach comprehensive interconnection agreements, and had forced the Commission to embark upon the prescription path, the Commission sponsored additional meetings subsequent to adoption of the *Interim Order* in an effort to promote voluntary resolution of the non-compensation technical and operational details of interconnection. As is summarized in the *Rejection Order*, many such issues were resolved during the course of these meetings, and formed the basis for prescription in the *Rejection Order*. However, the parties were unable to do so with respect to store-and-forward and TWX/Telex conversion interconnection because of their technical complexities and the need for additional Commission guidance.

4. For this reason, contemporaneously with release of the June order, the Chief, Common Carrier Bureau released a *Tentative Decision* [3] which summarized the carriers' discussions of the store-and-forward and TWX/Telex interconnection issues at the meetings and proposed resolution of these issues. Comments filed in response showed that several carriers were prepared to implement the proposals in the *Tentative Decision*. However, one carrier, TRT, claimed that it was unable to do so without extensive and time-consuming facilities modifications. And, two carriers, WUI and ITT, argued in favor of additional meetings among the carriers to discuss these issues further. In these circumstances, the Chief, Common Carrier Bureau concluded that it would be desirable to sponsor additional meetings to resolve the store-and-forward and TWX/Telex conversion interconnection issues, and by *Order* released July 6, 1982, CC5003, convened such meetings July 13 and 14, 1982 (hereafter the July meetings). At the July meetings, the carriers drafted consensus language, but they reserved the right to assent or dissent thereto subsequently. However, their language utilized principles which were inconsistent with those advanced in the *Tentative Decision*, and for that reason by letter to each of the carriers dated July 21, 1982, further comment was requested on the

[1] 89 FCC2d 988 (1982).
[2] *91* FCC2d *483*, FCC 82-264, released June 11, 1982.
[3] Tentative Decision, CC4563, released June 11, 1982.

necessity for the arrangements addressed in the carriers' consensus language.

5. In view of the comprehensive comments before us, filed pursuant to the *Tentative Decision* and in response to the Bureau Chief's July 21, 1982 letter, we are prepared to resolve on an interim basis the store-and-forward and TWX/Telex interconnection issues.

6. However, a related matter has arisen which also must be addressed, namely the relationship of this proceeding to Section 64.702(a) of our rules, which became effective January 1, 1983 as the result of the *Second Computer Inquiry* [4]. In Transmittal No. 7992, Western Union has sought to detariff certain store-and-forward and service conversion offerings heretofore tariffed on the theory that these are enhanced services and therefore not properly the subject of tariffs. Certain of the offerings within the scope of Western Union's filing are within the ambit of the store-and-forward and TWX/Telex conversion issues of this proceeding, and we therefore must resolve whether the tariff mechanisms employed to implement the RCCA appropriately may be employed for such store-and-forward and service conversion offerings.

II. *The Tentative Decision*

7. The *Tentative Decision* identified and proposed resolution of significant complications which foreclosed the ability of the record carriers themselves to resolve interconnection to store-and-forward and TWX/Telex conversion facilities. We briefly summarize the proposals in the *Tentative Decision* below.

A. Proposed Treatment of Store-and-Forward Interconnection

8. The *Tentative Decision* addressed solely interconnection of one carrier's switched telegraph services with the input of another carrier's store-and-forward facilities, the latter of which are integral to the second carrier's telegraph-based and traditional telegraph service offerings. It did not address the correlative possibility that the output of store-and-forward facilities might be connected to another carrier's facilities, as this matter had not been raised or addressed during the course of the carriers' meetings[5].

9. Several issues were identified in the *Tentative Decision* which,

[4] 77 FCC2d 384, 84 FCC2d 50 (1980), 88 FCC2d 512 (1981), *aff'd sub. nom*, C.C.I.A. v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982), *petitions for certiori filed*, —USLW— (U.S. Feb. 9 and 10, 1983, Nos. 82-1351 and 82-1352).

[5] We similarly do not propose to address this case in this order, but without prejudice to whether carriers may, or should, themselves arrive at suitable procedures for interconnecting the outputs of store-and-forward facilities to other carriers' facilities. As was noted in the Tentative Decision, para. 4 note 2, outputs from Western Union's "Infomaster" appear currently to be interconnected to other carriers' international facilities for international handling. Similarly, outputs of international record carriers' store-and-forward facilities may already be connected to other carriers' facilities for message handling on a transit basis. In

because of controversy among the carriers, foreclosed their ability to resolve store-and-forward interconnection. These were: discrepancies in actual input time and output time when store-and-forward messages are handled; disparate treatment by the Commission and the carriers of international and domestic minutes; and identification of which carrier is the "originating carrier" (i.e., the carrier which bills the subscriber and which compensates the interconnected carrier for use of its facilities). A further issue concerned whether a store-and-forward transmission should be treated as two calls (i.e., one to the store-and-forward facilities, and a second from these facilities to the destination) or as a single call (i.e., a single call from the originator to the destination, ignoring the intermediate storage), and whether the carrier compensation arrangements should be consistent with such a two call or one call treatment. And finally, there was an attempt in the *Tentative Decision* to address the claims of several carriers that a unified treatment of store-and-forward interconnection for all carriers alike would be infeasible, as various carriers had claimed that they could not implement various options which had been discussed at the meetings preceding release of the *Tentative Decision*.

10. The *Tentative Decision* proposed that the carrier bringing messages to another carrier's store-and-forward facilities should be compensated on the basis of input time to the store-and-forward facilities, as such time represents the actual usage of the interconnecting first carrier's facilities. One way of achieving this result would be to place such calling on a subscriber-paid basis, i.e., that the subscriber would compensate the first carrier no differently than it would compensate this carrier for any other domestic call. While it appeared that Western Union was able to implement such an arrangement for calls toward its store-and-forward facilities from other carriers' subscribers, the other carriers sought to avoid such a subscriber-paid approach in calling toward their own store-and-forward facilities as they claimed that such an approach could not be implemented using the same interconnection arrangements used for realtime services. The ability of their customers to access their store-and-forward and real-time services alike, using the same carrier-paid access ports, would be foreclosed under a subscriber-paid interconnection arrangement. Moreover, many international store-and-forward calls start as real-time calls and revert to store-and-forward if they cannot be completed real-time (for example, if a busy signal is reached). It would be difficult to permit such reversion if different access arrangements were required for the two types of calls.

11. To meet these concerns, the *Tentative Decision* proposed an additional carrier-paid interconnection option, with compensation by

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sum, this form of interconnection appears already to exist, at least to some extent, and may raise no special problems requiring further FCC action.

the store-and-forward carrier to the interconnecting carrier for use of the latter's facilities, but subject to certain constraints. First, the Commission had to receive adequate assurance that reporting of usage minutes would be accurate and verifiable in such arrangements. And second, to ensure that subscribers would be treated alike regardless of which of the two arrangements might be selected, *Tentative Decision* proposed non-application of a carrier interconnection discount to the carrier-paid option. Under this latter constraint, the carrier bringing traffic to another carrier's store-and-forward facilities would receive the same compensation regardless of which option might be selected.

12. In sum, both options would achieve domestic treatment of the compensation of the interconnecting carrier (the subscriber's carrier bringing traffic to another carrier's store-and-forward facilities) based on the actual time the interconnecting carrier's facilities are used in interconnected store-and-forward service, that is, based on input minutes. The *Tentative Decision* concluded that such an approach would best comply with the directive in the RCCA that we establish an "equitable allocation of revenues . . . based on the costs of the record communications service or facility *employed*", Section 222(c)(2) [emphasis added], on the theory that such actual time represents the time in which the interconnecting carrier's facilities are "employed." Furthermore, the *Tentative Decision* noted that many store-and-forward messages are common text multiple-address messages (so-called "book" messages) in which input time often is far less than output time. In such circumstances, any compensation approach for the interconnecting carrier based on store-and-forward output time might result in excessive compensation to the interconnecting subscriber's carrier. We noted that while the carriers themselves might not be particularly concerned over such potential overcompensation, it is subscribers who would provide the funds and not the carriers. Thus, even if the carriers might not perceive a competitive disadvantage from such rate practices, it was unclear whether such practices could be reconciled with the substantive requirements of Sections 201(b) and 202(a) of the Act.

B. Proposed Treatment of TWX/Telex Conversion Interconnection

14. TWX/Telex conversion presented different problems. For purposes of this discussion we are focusing on real time conversion issues, and not conversions which might be performed as part of a store-and-forward offering[6].

[6] Store-and-forward facilities do not necessarily store and subsequently deliver messages unchanged. They also often change the outputs into different forms than those received at their inputs, and are capable of performing TWX/Telex and other conversions on a store-and-forward basis. We address this latter type of conversion offering in connection with our resolution of store-and-forward interconnection.

15. Historically, TWX has been offered solely in the United States and Canada as a teletypewriter exchange service. Telex has been offered worldwide (including the United States and Canada). The two services differ both in speed and in code. TWX operates at 110 baud using the ASCII character set and code, while Telex operates at 50 baud using an older and less versatile character set and code, the so-called "Baudot" code, which does not include many characters found in the ASCII set. While TWX may be a more useful service domestically, for TWX users to be able to send and receive international messages, speed and code conversions are required for crossover between the two services. Such conversions have been performed both by international record carriers (for international calling to TWX subscribers) and by Western Union (for domestic calling as part of its integration of TWX and Telex domestic services). Conversion equipment is in place for these services and is being used.

16. While Western Union sought to continue to offer interconnection to TWX using its normal ASCII coding and 110 baud speed for international interconnection[7], in its interconnection tariff filings it sought to limit interconnection to TWX for domestic service solely to the Telex-based speed and Baudot code, thereby retaining the TWX/Telex conversion function for domestic interconnection[8]. Western Union did not propose to make any domestic interconnection offering of TWX using the TWX code and speed. This failure to make an actual domestic TWX interconnection offering proved controversial, both to carriers which were contemplating the future offering of competitive domestic TWX services (which argued that the absence of direct TWX interconnection could serve as a barrier to their entering the domestic TWX market), and to at least one other carrier, Graphnet, which claimed already to be offering TWX service. It was argued that by limiting domestic TWX interconnection to the Telex speed and character set, Western Union was nullifying the speed and character set benefits of TWX over Telex through unnecessary and inefficient double conversions (from another carrier's TWX, to Western Union's Telex-like interconnection interface, and back to Western Union's TWX).

17. A number of proposals were made by the carriers during their meetings, and in the *Tentative Decision* we proposed interim adoption of one of Western Union's proposals, without prejudice to determination of broader TWX interconnection issues should controversy remain. Specifically, we proposed acceptance of Western

[7] This offering would continue to allow the international record carriers to perform the TWX/Telex conversions which they have long performed for international calling by TWX subscribers.

[8] The international carriers had not performed such conversion prior to enactment of the RCCA.

Union's proposal that it continue to offer interconnection to its domestic TWX facilities using the Telex code and speed, and that it additionally offer interconnection to its domestic TWX facilities using TWX code and speed, but "without restraint"[9].

18. The effect of such an interconnection offering would be to permit other carriers' subscribers with TWX terminals to receive the full advantages of TWX interconnection, including avoidance of double conversions of TWX to Telex and back to TWX, but to frustrate the ability of other carriers themselves to perform TWX/Telex conversion in lieu of Western Union if their subscribers are using lower-speed non-TWX terminals to receive messages originating at Western Union's TWX subscribers' terminals.

19. We tentatively concluded that, as a practical matter, the only carrier which might immediately be affected by this proposal is Graphnet (which apparently today offers service to subscribers with TWX terminals), and that a "without restraint" offering by Western Union would be usable for direct domestic TWX interconnection between the TWX facilities of Western Union and Graphnet. We concluded that adoption of Western Union's proposed "without restraint" arrangement would not foreclose provision of additional TWX interconnection "with restraint" in the future should an appropriate showing be made, and we proposed that the "without restraint" interconnection offering be made effective without prejudice to the resolution of the "with restraint" issues under the RCCA and the Communications Act generally.

III. *Comments*

20. Comments were filed on the *Tentative Decision* which were divided on the proposed treatment of store-and-forward interconnection, but which generally supported adoption of the TWX/Telex conversion proposals (as interim measures, and without prejudice to the "with restraint" issue). Since the latter were not controversial, they are prescribed at para. 70 below, for reasons stated in the *Tentative Decision*, and are not discussed further herein.

A. Comments on the Tentative Decision

21. Two carriers, Western Union and RCA, were prepared to implement the store-and-forward proposals of the *Tentative Decision*, although Western Union argued that any implication that the store-and-forward carrier unbundle the access component (under a carrier-paid access arrangement) for fully domestic calling is not required under the RCCA[10]. CCI and IRI supported the technical and

[9] "Restraint" is a technical term which refers to the ability of a facility periodically to stop a higher speed signal source. *See* Tentative Decision, para. 35.

[10] Western Union argued that the equal in type and quality provisions, and the

operational proposals for store-and-forward interconnection, claiming that their facilities are fully capable of capturing and utilizing input minutes in calling towards their store-and-forward facilities, but they argued that a carrier-to-carrier interconnection discount should apply in the event that the carrier-paid option of the *Tentative Decision* is selected.

22. TRT and WUI opposed adoption of the store-and-forward interconnection proposals (with ITT specifically concurring in WUI's comments on this point), and argued in favor of utilization of output minutes as a basis for compensation of an interconnecting carrier, an approach which was tentatively rejected in the *Tentative Decision*. They did so on rate structure grounds[11], and TRT argued further that to implement the *Tentative Decision* it would be required to make major modifications to its facilities (requiring at least one year of effort, at a labor cost exceeding $150,000)[12]. WUI noted several ambiguities inherent in the proposals of the *Tentative Decision*, and argued in favor of additional carrier meetings (or an additional round of comments) to resolve these ambiguities. Finally, WUI argued that the disruptive effect of the store-and-forward interconnection proposals was disproportionate to the traffic actually involved[13].

B. The July Meetings

23. In view of the congressional preference for agreement among the carriers rather than FCC regulatory solutions as a means of effectuating the interconnection requirements of the RCCA, and in view of the specific request for additional meetings by WUI with the concurrence of ITT, we scheduled meetings on July 13 and 14, 1982 to afford the carriers a further opportunity, under our sponsorship, to reach agreement on the store-and-forward interconnection issues.

24. At the meetings, the carriers generally continued to advance positions advanced previously in their filed comments, and TRT and

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Commission's requirement that the benefits of carrier-to-carrier interconnection discount be passed along to subscribers, apply only to domestic-to-international interconnection, and not to wholly domestic interconnection.

[11] *I.e.*, that anomalies might be created through an establishment of different rates for the real time and store-and-forward calling to the same point. *See* paras. 10 and 22 of the Tentative Decision.

[12] WUI also argued that certain offerings now available to its store-and-forward subscribers, namely departmental billing (billing disaggregated among a subscriber's departments and functional units) could not be performed if the proposals of the Tentative Decision were implemented.

[13] WUI claimed that store-and-forward traffic is approximately 10% of its total traffic, and that common text multiple-address ("book") messages, which raised policy problems addressed in the Tentative Decision, are only about 10% of the store-and-forward traffic. Thus, the messages that create problems with output-based compensation—the preferred approach of WUI, TRT and ITT—are only about 1% of total traffic. In WUI's view, such a *de minimis* problem should not be dealt with in a way which disrupts ratemaking for all of its traffic, real time and store-and-forward.

WUI discussed in more detail why facilities modifications would be necessary for implementation of the proposals of the *Tentative Decision* (or, failing that, why existing service features might be affected or curtailed). TRT explained that if interconnection of its store-and-forward services alone were involved, it could implement these proposals without facilities modifications. But, in TRT's view, the RCCA requires equality between the store-and-forward offerings made to its own subscribers and the store-and-forward offerings made to interconnecting carriers. If compensation for carriers' interconnection to its store-and-forward facilities were to be based on input minutes, in TRT's view similar two call treatment would be required for offerings to its own subscribers of store-and-forward services; this latter rate pattern cannot be implemented on TRT's existing facilities.

25. WUI did not specifically claim an inability to implement the proposals of the *Tentative Decision*. Rather, it claimed that there would be subscriber confusion as a consequence of the inability to line up specific input-based access charges with specific store-and-forward (output) messages on subscriber bills, and for that reason argued in favor of allowance of an output-based compensation option. FTCC and ITT also argued in favor of output-based compensation, primarily on the basis that a change to input-based compensation would disrupt existing rate structures.

26. The remaining participating carriers did not disagree in principle with the TRT, WUI, FTCC and ITT position that output-based compensation should be permitted as an option, so long as the input-based compensation options of the *Tentative Decision* remained available. And, the relatively recent entrants, CCI and IRI, continued to argue that an input-based carrier-paid option (with the store-and-forward carrier providing the total subscriber bill, and compensating the interconnecting carrier for access) should be treated as a carrier-to-carrier interconnection with an appropriate discount. The more traditional carriers argued against such a discount.

27. TRT then proposed creation of a new option which might to some extent create a mechanism for CCI and IRI to utilize input-based compensation in conjunction with an ability for them (rather than the interconnecting carrier) to bill subscribers for the totality of interconnected store-and-forward service, but which in TRT's view would not specifically be classified as a through service justifying a carrier-to-carrier interconnection discount. Under TRT's proposal, the interconnecting carrier's subscriber would make a collect call towards the store-and-forward carrier's facilities; the store-and-forward carrier would be treated as a called party by the interconnecting carrier; but as is the case of any collect call, the called party (i.e., the store-and-forward carrier) would be billed for the call rather than the originator. Since in TRT's view this would be a species of a

subscriber-paid approach, no discount would apply. Furthermore, since this would be a domestic call to the interconnecting subscriber's carrier, this approach would largely implement the carrier-paid option of the *Tentative Decision*, but on an end-on-end basis.

28. Not surprisingly, CCI and IRI were unsatisfied with this proposal in view of their strenuous argument that an interconnection discount should apply if the store-and-forward carrier performs full subscriber billing in interconnected store-and-forward calling. However, because of rounding effects they were willing to discuss further the merits of TRT's proposal[14].

29. Furthermore, CCI and IRI noted that much of their traffic is "book" message traffic, where output times are often greater than input times. If CCI and IRI were to opt for the TRT-proposed approach, while other carriers opted for an output-based compensation approach, CCI and IRI would provide less compensation to the interconnecting carrier for "book" messages independent of the rounding up effects described previously. In sum, both for individual store-and-forward messages, and for "book" messages, a carrier opting for TRT's subscriber-paid-collect proposal, even without a carrier-to-carrier interconnection discount, would be providing less compensation to interconnecting carriers (and could therefore make its prices more competitive) than a carrier opting for an output-based compensation approach. Since ITT, TRT, WUI and FTCC were specifically advocating the output-based compensation approach, it appeared that many (if not all) of the competitors of CCI and IRI would be subject to the higher compensation costs associated with the output-based compensation approach, thus it appeared that CCI and IRI might have a competitive advantage (at least for a time).

30. In view of this discussion, the carriers agreed to draft language embodying the approaches discussed. Their language proposed that a store-and-forward carrier might select "one or more" of the following options: (1) an output-based compensation option

[14] Specifically, the other carriers noted that international timing includes a rounding up process under which message durations for international messages are rounded to the next whole minute. Because of such rounding, even if a 15% discount is applied to treatment of output-based compensation under the existing principles applicable to real time interconnection, for average length messages carriers selecting the TRT-proposed subscriber-paid-collect option would still be providing less compensation to interconnecting carriers for average-length messages than carriers utilizing an output-based compensation option.

An average length store-and-forward message was claimed to be 2.9 minutes at the input of store-and-forward facilities, and 2.4 minutes at their output. Under an output-based compensation approach, the 2.4 minutes would be rounded to 3, multiplied by 1.3 (the current international to domestic conversion factor) and by 0.85 (the current 15% discount) for an international call—the case of interest to CCI and IRI—resulting in 3.315 minutes of compensation to the interconnecting carrier. By contrast, under TRT's proposal, the interconnecting carrier would receive 2.9 minutes of compensation (without a discount).

under which compensation of the interconnecting carrier would be based on the store-and-forward message outputs (under the factoring and discount principles applicable to real time calls); (2) a subscriber-paid access option under which the interconnecting carrier would place a call to a store-and-forward carrier's facilities no differently than any normal domestic call (with normal domestic billing of the originating subscriber); and (3) a subscriber-paid-collect access option under which the interconnecting carrier would place a call to a store-and-forward carrier's facilities as a domestic call, but would bill the store-and-forward carrier for the call (rather than the originator).

31. Finally, language was drafted to implement an ITT proposal intended to ameliorate the concerns in the *Tentative Decision* about "book" messages if output-based compensation is employed.[15]

32. Specific "agreement" to the drafted language was not reached during the July meetings, inasmuch as several carriers indicated that they would be reviewing the consensus results subsequently. As is noted below in the discussion of the responses filed to the Bureau Chief's July 21, 1982 letter, carriers other than CCI and IRI subsequently expressed satisfaction with the drafted language. Although CCI and IRI had appeared satisfied during the meetings with TRT's subscriber-paid-collect proposal, they subsequently continued to argue in favor of a carrier interconnection discount for such arrangements. Thus, to this extent it is unclear whether "agreement" as such was the result of the July meetings.[16]

C. Responses to the July 21, 1982 Letter

33. On July 21, 1982, the Chief, Common Carrier Bureau addressed a letter to each of the participating record carriers requesting additional information which appeared necessary to ultimate resolution of the issues of the *Tentative Decision*. Questions

[15] Briefly, ITT had proposed that output minutes be divided by an industrywide weighted average of the output/input time ratios for "book" messages, to minimize excessive compensation of the interconnecting carrier in the case of "book" messages, if output-based compensation is otherwise employed. When ITT made this proposal at the meetings, FTCC and WUI claimed that their facilities could not distinguish "book" messages from individual messages, making it impossible for them to identify the outputs to which such a factor could be applied. Western Union and TRT argued that any such industrywide averaging could penalize individual carriers with message patterns significantly different from the industry as a whole. In comments filed subsequently, all commenting carriers urged that this proposal not be adopted.

[16] Under the RCCA, only the primary record carriers (which category does not include CCI and IRI) need reach an "agreement." Since the primary carriers appear to have agreed, the result of the July meetings probably qualifies as an "agreement." However, other carriers are free to seek from the Commission modifications to any "agreement" among the primary carriers, and the Commission may modify an "agreement" on its own motion. In this order, we shall treat the objections of CCI and IRI to the drafted language as a request for Commission modification.

were posed on the following issues: (1) To what extent does the RCCA require a restructuring of a store-and-forward carrier's rates to its own subscribers, if the carrier-to-carrier interconnection proposals of the *Tentative Decision* are adopted, in view of TRT's apparent ability to implement these proposals for interconnection purposes, but not for its own services? (2) What are the bases for TRT's time and cost estimates for modification of its facilities to implement the proposals of the *Tentative Decision*? (3) To what extent would the ability of carriers to perform departmental billing be affected if the proposals of the *Tentative Decision* were made final? (4) What basis is there for distinguishing TRT's subscriber-paid-collect interconnection proposal from other forms of carrier-to-carrier interconnection to which an interconnection discount is applicable, since the interconnection arrangements themselves would appear to be the same as are employed for interconnection purposes? (5) What basis is there for carriers to be able to select "one or more" options simultaneously, rather than a single option, in view of the *prima facie* discrimination which could be the result if multiple options were made available simultaneously?

34. TRT argued that the RCCA requires a direct flow through in its subscriber charges for its payout to an interconnecting carrier connecting with the input of its store-and-forward facilities, and that a different rate structure for its own subscribers would be patently discriminatory and neither at "the same rates and upon the same terms and conditions" nor "equal in type and quality" as required by the RCCA[17]. Western Union argued to the contrary.

35. In Western Union's view, the RCCA would not prevent a carrier from disadvantaging its own subscribers as compared with the service offered other carriers through interconnection. More fundamentally, Western Union took issue with TRT's underlying argument that the RCCA requires that the same rate structure utilized for compensation of interconnecting carriers must be applied to a carrier's own subscribers; in Western Union's view, Section 222(c)(2) gives the rate setting carrier freedom to establish its subscriber rates as it sees fit. While Western Union had previously supported the input-based compensation proposals of the *Tentative Decision*, it had done so in the belief that such a rate structure had no bearing on its subscriber rate structure. If the Commission were to require that the subscriber rate structure conform to the interconnection rate structure, Western Union would be compelled

[17] In response to a question in the Bureau Chief's letter whether the RCCA could properly be construed as intended to prevent prejudice in interconnection offerings, and not advantage, as compared with service offered a carrier's own subscribers, TRT argued that such construction would be inconsistent with the actual language of the statute (i.e., "same" terms and conditions, and "equal" in type and quality).

to select the same output-based compensation approach advocated by TRT and other international carriers.

36. While TRT provided no additional information on the cost estimates provided previously, it provided detailed time and labor estimates for the tasks which, in its view, would be necessary to implement the proposals of the *Tentative Decision*. TRT noted that its systems are unique, that personnel outside of TRT are incapable of performing the requisite modifications, and that even within TRT the number of persons capable of performing such work are limited. Thus, TRT argued that its time estimates could not be shortened. The estimates assumed that the compensation principles of the *Tentative Decision* would govern store-and-forward offerings to its own subscribers[18], and would be the same regardless of which of the two options therein might be chosen. Under a scenario in which all billing (and related) services now performed would continue to be available, task milestones traverse six month to fifteen month periods (with total labor ranging from 41.5 to 51.5 person-months).

37. Alternatively, under a scenario in which full departmental billing capabilities might be lost (i.e., for a component representing input to store-and-forward facilities), task milestones would not exceed six months (with total labor ranging from 18.5 to 23.5 person-months)[19]. It should be noted that not all departmental billing would be lost under the second scenario; departmental billing associated with the outputs of store-and-forward facilities would be unaffected. While we requested information on whether the input (access) portion of overall store-and-forward message billing for typical calls is significant, to determine whether the capabilities which might be lost are important or are *de minimis*, TRT did not provide specific data on this. Rather, it argued that full departmental billing capabilities are important to its subscribers.

38. The fourth group of questions, relating to the rationale for not applying a discount to TRT's proposed subscriber-paid-collect interconnection arrangements, evoked strong argument. TRT argued that discounts should only apply to through service arrangements such as the carrier-paid arrangements employed for real time international services where the second carrier serves as the "originating carrier." TRT's proposal was for an end-on-end service arrangement, on the principle that two calls, rather than a through

[18] As noted, TRT is capable of implementing the Tentative Decision without facilities modification for carrier interconnection purposes. Its time and labor estimates are for the effect required to implement an input-based two-call treatment of store-and-forward offerings to its own subscribers, on the theory that the RCCA would require such a result if such an offering were made for interconnection purposes.

[19] TRT argued strenuously against utilization of the second scenario, claiming that its departmental billing (and related) offerings are desirable to subscribers, and that they represent TRT's competitive edge over other carriers, developed as a result of considerable effort.

call, are involved. CCI and IRI argued that the physical and operational arrangements for implementing TRT's proposal are no different than arrangements already employed for real time services to which a discount applies, and that the same economies which justify a discount for the real time arrangements are available for the store-and-forward arrangements as well.

39. Furthermore, these carriers argued that the stated basis of the *Tentative Decision* for not applying a discount to the carrier-paid proposal—that there should be no rate effects on subscribers regardless of which of the options therein might be chosen—would no longer have any force if the output-based compensation proposal advanced by the other carriers were accepted. In such case there would already be different rates to subscribers if both an output-based compensation option and a subscriber-paid access option were available[20]; an additional interconnection option would not exacerbate the discriminatory effects of such disparities.

40. Western Union acknowledged that such a possibility of discrimination would remain were both input-based and output-based compensation options available, but nevertheless it argued that nonapplicability of a carrier-to-carrier interconnection discount to TRT's subscriber-paid-collect proposal would not affect the analysis of the *Tentative Decision* on this point. ITT argued that the subscriber-paid-collect arrangements proposed by TRT are no different from subscriber-paid (normally billed) arrangements, and therefore should be treated no differently from the latter, i.e., with no discount.

41. Comment on the last question, whether an offering by a single carrier of multiple options simultaneously would raise discrimination problems, was somewhat divided. TRT acknowledged that such an approach would raise "serious questions under Section 202(a)" of the Act, but it argued that the Commission need not rule on this issue unless and until a given carrier sought to do so. In TRT's view, it would be sufficient that the parties are now on notice that such an approach might be considered unlawful. Western Union and ITT argued that such an approach would not be unlawful, and Western Union observed that a carrier's marketing philosophy might cause it to adopt a different approach for access to domestic and international store-and-forward services; in Western Union's view, a carrier's flexibility to do so should not be foreclosed. CCI argued that use of the different options for which language was drafted would be to provide essentially *different* services, therefore such an approach would not be the offering of *like* services at different charges, the usual case of prima facie discrimination. CCI

[20] This would particularly be the case with respect to "book" messages. An output-based compensation approach would generally result in considerably more compensation to the interconnecting carrier than an input-based (subscriber-paid) compensation approach to "book" messages.

argued further that the ability of a carrier to pursue multiple approaches would represent a competitive option in the marketplace, and that the purposes of the RCCA in seeking development of a competitive record service marketplace would better be served if such flexibility were retained.

42. Finally, the commenting carriers addressed the merits of adoption of the language drafted at the July meetings. All commentors argued against adoption of ITT's proposal for factored output-based compensation for "book" messages. ITT, TRT and Western Union argued specifically that the remaining three options should be adopted. CCI and IRI agreed that the technical and operational arrangements embodied in the three remaining options should be adopted, provided that the subscriber-paid-collect option proposed by TRT be recognized as a carrier-to-carrier interconnection option to which a discount is applicable.

IV. *Discussion*

43. We have now received comment on the proposals of the *Tentative Decision*, both in comments filed in response and in the responses to the Bureau Chief's July 21, 1982 letter, and we conclude that we are in a position to resolve the store-and-forward and TWX/Telex interconnection issues now. But first, it is important that we resolve a legal issue which has arisen largely since issuance of the *Tentative Decision*, namely the relationship of implementation of the RCCA to the *Second Computer Inquiry* ("Computer II") which enacted Section 64.702(a) of the Commission's rules.

A. Relationship to Computer II

44. Under Section 64.702(a) of the Commission's rules, enhanced services are beyond the scope of the FCC's Title II regulatory jurisdiction, and for that reason are not properly the subject of tariffs filed pursuant to Section 203 of the Communications Act. The rule defines enhanced services as:

> ". . . services, offered over common carrier facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."

Both the store-and-forward and TWX/Telex conversion offerings which are the subject of this proceeding may, to some extent, be classified as enhanced services within the meaning of Section 64.702(a)[21].

[21] It should be noted that there is a pending FCC proceeding which is broadly addressing protocol conversion issues under Computer II, *Notice of Inquiry on Digital Communications Protocols*, 83 FCC2d 318 (1980). As is developed below,

45. We address first the store-and-forward services. In Computer II, the Commission recognized that store-and-forward technology may be used in a carrier's network for the provision of basic services. In so doing, a distinction was made between the offering of store-and-forward service, and the use of store-and-forward technology, *Final Decision*, 77 FCC2d 384, 421, n. 35 (1980). Use of store-and-forward technology in the provision of basic services is subject to the following parameters:

> ". . . memory or storage within the network is used only to facilitate the transmission of information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system. Thus, in a basic service, once information is given to the communications facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator."

Id. at 420[22]. Record carriers' store-and-forward offerings appear to fall in both such categories.

46. It would appear that many store-and-forward offerings involved in this proceeding are in the nature of use of store-and-forward technology, thus such basic offerings of themselves do not raise Computer II issues. However, many store-and-forward offerings traditionally associated with record services do not necessarily transmit their outputs in the same form as the inputs were received.

47. For example, in the case of "book" messages, a common text is transmitted along with a list of addresses. If the common text alone were transmitted to each addressee, the service probably would represent a use store-and-forward technology to support basic service. But, often, each specific addressee's name and address information is appended to the common text when the message is sent to the addressee. In such case, the message which is delivered is reformatted by the store-and-forward facilities. Subject to pending proceedings (n. 21, *supra*.) this would represent an enhanced service, both by providing "additional, different or restructured information" and by acting on the "format, content, code, protocol or similar aspects of the subscriber's transmitted information."

48. Also, some store-and-forward facilities are employed simultaneously both for store and deliver functions, and for service crossover

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we conclude that the RCCA carves out a limited exception to the broader treatment of such issues in Computer II. Thus, our treatment of such issues herein has no effect on the outcome of this proceeding. Conversely, any order which might be adopted therein will have no effect on the dispositions made in this order.

[22] On reconsideration, we made clear that the phrase "or transmission priorities given by the originator" does not permit the originator or the recipient "to control the progress of information through the network", 84 FCC2d 50, 58 (1980). The phrase was intended to focus on consumer options in obtaining different levels of service quality, and a basic service does not include "the ability of the originator of a message to control storage within the network", *Id.*

functions. For example, Western Union's "Infomaster" facilities accept inputs from TWX and Telex terminals for delivery to high speed printers at Post Offices for Mailgram service. Not only is a store and deliver function performed (which, as noted, of itself would be basic, at least for individual unreformatted messages), but also code and protocol conversion as well. This type of conversion, which is somewhat similar to the TWX/Telex conversions addressed more specifically in this proceeding, i.e. the real time "with restraint" and "without restraint" conversions, is enhanced.

49. Conversion between TWX and Telex, regardless of whether performed at the output of store-and-forward facilities or real time, is a code (and, more broadly, protocol) conversion, as TWX employs the ASCII code, and Telex employs the Baudot code. Thus, the offering of TWX/Telex conversion service is an offering of an enhanced service under our rules.

50. But, while the foregoing forms of store-and-forward service and TWX/Telex conversion are enhanced services within the meaning of Section 64.702(a) of the Commission's rules, they also are arguably traditional record service offerings within the meaning of the RCCA, as they long have been offered in association with switched record services. Thus, we must consider whether, in enacting the RCCA subsequent to adoption of the Computer II rules (and presumably, in full awareness of the otherwise applicable unregulated treatment in Computer II of such offerings), Congress intended to establish a special transitional regulatory regime for traditional record services, including even such enhanced service offerings as otherwise might have been deregulated upon implementation of Section 64.702(a) of the Commission's rules. As is discussed below, we conclude that such was Congress' intent.

51. The RCCA itself establishes a largely self-contained regulatory plan for the treatment of record carriers and record communications services. Other carriers and their services are not addressed under this plan, and not even all record services are encompassed thereby. For example, the legislative history specifically requires that high speed data offerings not be in any way affected by the RCCA[23]. But, conversely, services "commonly provided by telegraph companies" including "telegraph, telex and TWX service"[24] were intended to be embraced by the subject matter definition of the RCCA. Section 222(a)(3) states:

> "The term 'record communications service' means those services traditionally offered by telegraph companies, such as telegraph,

[23] Energy and Commerce Committee Report on H.R. 4927 (House Report), H.R. Rept. No. 97-356, 97th Cong. 1st Sess., Dec. 3, 1981, 10.
[24] *Id.*

telegram, telegram exchange, and similar services involving an interconnected network of teletypewriters."[25]

52. We conclude that the enhanced service offerings by record carriers of certain store-and-forward services associated with TWX and Telex, and TWX/Telex conversion (and other service crossover offerings) are within the subject matter scope of the RCCA if they meet a three-part test as to whether they are encompassed by Section 222(a)(3): (1) the services involved in the offering are switched teletypewriter or telegraph services (and not high-speed data services, or voice services, which were intended by Congress to be excluded from the operation of the RCCA); (2) the offering was made prior to enactment of the RCCA[26]; and (3) if a service crossover offering is involved (e.g., conversion between TWX and Telex, or conversion between either of TWX or Telex and another service) *both* services involved in such crossover, and the crossover offering itself, were offered prior to enactment of the RCCA. Under this three-part test, store-and-forward offerings, the input of which is reached by TWX and Telex, would be covered by the RCCA if their outputs are also TWX or Telex. If their outputs are other traditional telegraph services within the scope of Section 222(a)(3), e.g. public telegraph or Mailgram (the latter of which has been considered as public telegraph-like[27], and the crossover itself was offered prior to enactment of the RCCA, such a service crossover use of the store-and-forward facilities involved, notwithstanding the enhanced nature of the offering, is encompassed by the RCCA. If "book" messages have traditionally (i.e., prior to enactment of the RCCA) been reformatted by appending specific address information to the common text for delivery to individual addressees, this offering too would be encompassed by the RCCA, notwithstanding its enhanced nature[28]. Processing for TWX/Telex conversion also would be encompassed by the RCCA.

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[25] *See also* discussion of the goal of achieving "universal access to teletypewriter networks" to increase both the level of competition and the utilization of record services. *Id.* at 5.

[26] The Commission will pay close attention to carrier attempts to frustrate the objectives of the RCCA by repackaging traditional record services that are subject to the RCCA under the guise of a "new service", or by offering new services that are so similar to traditional record services that such new services are required to be treated within the special regulatory scheme of the RCCA.

[27] United Telegraph Workers, AFL-CIO v. FCC, 436 F.2d 920, 923 (D.C. Cir. 1970); Western Union Telegraph Co. v. FCC, 665 F.2d 1126 (D.C. Cir. 1981).

[28] However, one form of the historic treatment of "book" messages would not, in our view, properly meet this test. Western Union has traditionally offered a form of "book" message service whereby the subscriber transmits to it a list of addressees which are then retained in storage by Western Union for association with messages not transmitted contemporaneously with such a list. In some cases, the stored list might be accessed months and even years after its transmission, for association with common text messages transmitted then. We conclude that such a service offering truly involves the offering of "an information storage system",

53. Given this conclusion, that certain otherwise unregulated enhanced services were intended to be encompassed by the special regulatory plan of the RCCA, we now consider how we shall treat interconnection to the facilities which are used to provide these services. We conclude that use of the regulatory tools employed previously to implement the RCCA, including the use of tariff and prescription mechanisms, is at this time warranted. First, the RCCA was enacted subsequent to adoption of Section 64.702(a) of our rules, and may properly be construed as intentionally carving out a limited, narrow and special treatment for the services and carriers addressed therein. In view of this, there is no legal impediment to the use of tariff mechanisms to address interconnection within the scope of the RCCA, notwithstanding the more general principles under Section 64.702(a) of our rules which were established prior to enactment of the RCCA. Second, it is clear that Congress intended that we initially regulate the pricing and other terms of interconnection to record carrier facilities used to provide teletypewriter-based and other traditional record services. Given our previous experience with RCCA interconnection issues, we conclude that tariffs are the most effective tool which might be used, at this time, to carry out Congress' will. Third, there is language in Section 222(c)(2) (which is subject to "sunsetting" in the future) which suggests that Congress intended that the RCCA be implemented initially through the use of tariffs[29]. And finally, inasmuch as the various traditional record services are often substitutable for one another, there is a danger that a failure initially to treat all RCCA interconnection alike, including interconnection to traditional record services which otherwise are enhanced, could lead to frustration of the objectives of the RCCA.

54. It should be emphasized that Congress viewed many aspects of the special regulatory requirements of the RCCA, as transitional and subject to automatic "sunsetting" in less than two years, Section 222(e)(1). Thus, our decision to subject to continued tariff regulation under the RCCA store-and-forward and service conversion offerings which meet the three-part test of paragraph 52 above will only have effect for the remaining two years of vitality of the entire RCCA. Thereafter such offerings would be controlled by our overall Computer II policies and by those portions of the RCCA which are not subject to "sunsetting," including our specific authority to phase down and forebear from regulation as competition develops[30].

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77 FCC2d at 420, and that it is not sufficiently related to the record carrier communications "services" encompassed by the RCCA to be treated as an exception to Computer II. The distinction is whether the multiple addresses are transmitted contemporaneously with the common text, or not.

[29] See also, House Report, supra. n. 23, 11.

[30] Therefore, traditional store-and-forward offerings which meet the three-part test of para. 52 will be required to be offered on a tariffed basis. Although the RCCA

55. The three-part test of paragraph 52 is intended to ensure that new offerings which may arise during the period of full effectiveness of the RCCA are not unnecessarily subjected to comprehensive regulation. We are willing to interpret the RCCA as specially carving out a limited exception to Computer II for "traditional" record services; we are not willing to extend this exception to non-traditional offerings of otherwise enhanced services, particularly in view of the recognition by Congress that not all services provided by record carriers are to be treated specially under the RCCA (*e.g.*, the exclusion of high-speed data services, as discussed previously).

56. In sum, we conclude that the RCCA establishes a limited exception (for no more than two years) from the otherwise applicable ineligibility for tariffing of enhanced services in Section 64.702(a) of our rules, for certain store-and-forward offerings and service conversion offerings by record carriers, and that such offerings must be regulated using tariff regulation procedures during the period specified in Section 222(e)(1). In this proceeding, we are considering carrier-to-carrier interconnection issues related to interconnection with the facilities which implement these offerings. We conclude that we are free to utilize the tariff regulation mechanisms previously employed in the *Interim Decision* and in the *Rejection Order* for other forms of RCCA-mandated interconnection to achieve the purposes of the RCCA, that such an approach is required to carry out the intent of Congress, and that such an approach comports with the public interest.

B. Prescription of Store-and-Forward Interconnection

57. As noted, during the July 13–14, 1982 meetings the carriers generally agreed to the concept that three options for interconnection to store-and-forward facilities, at the option of the carrier operating these facilities, should be available: two options under which the interconnecting subscriber's carrier would be compensated on the basis of input minutes (treated as domestic minutes, regardless of whether the output messages are domestic or international), and one option under which the interconnecting subscriber's carrier would be compensated on the basis of output minutes (under principles otherwise applied to real time calling, including factoring of international outputs, and discounting of compensation for all

generally requires relatively comprehensive regulation of carrier-to-carrier interconnection, because the costs of interconnection compensation are generally contained in carriers' subscriber tariffs, and because of the requirement that carriers pass along to subscribers the benefits of interconnection savings, subscriber tariffs also have been affected by the RCCA. We therefore are ordering that tariffs for store-and-forward services and service conversion offerings within the boundaries established by para. 52 will be maintained, notwithstanding the provisions of Section 64.702(a) of the Commission's rules.

outputs). Where the carriers parted company was over whether a carrier-to-carrier interconnection discount should apply to one of the first group of input-based compensation options (a subscriber-paid-collect option). Several of the traditional record carriers argue that since an end-on-end service offering is contemplated alike by both of the input-based options (i.e., subscriber-paid, and subscriber-paid-collect), a discount should not be applied to either. The more recent entrants, CCI and IRI, argue that the subscriber-paid-collect case is no different than any other form of carrier-to-carrier interconnection under which the second carrier (i.e., the carrier operating the store-and-forward facilities here) is billing the subscriber for the through call and compensating the first interconnecting carrier. Thus, they argue for a discount.

58. In the *Tentative Decision*, paras. 18–22, we discussed at length our tentative view that output-based compensation is inconsistent both with the terms of the RCCA, and the Communications Act generally. It can lead to overcompensation of an interconnecting carrier in the case of "book" messages, and it does not properly reflect the economies (or costs) associated with use of store-and-forward facilities in lieu of real-time facilities for message completion. We still believe that the analysis in the *Tentative Decision* was correct, and that the compensation principles discussed therein are appropriate.

59. However, in interpreting the RCCA we have applied a "rule of reason" to minimize excessive disruption of carriers' existing operations. While the RCCA requires interconnection which is "equal in type and quality", we previously have utilized the normal Communications Act standard of reasonableness in interpreting this requirement. Here, similar analysis has some bearing upon the result. TRT argues that it cannot implement input-based compensation without extensive facilities modifications; other carriers argue that they can, but only by sacrificing departmental billing capabilities which they are now providing and their subscribers desire.

60. In these circumstances, we are prepared to permit the output-based compensation option to be made available[31]. But, if we do so other problems are created. The *Tentative Decision* proposed two input-based compensation options and, to reach the result that subscribers would be indifferent to which of these options might be

[31] We believe that this result will be transitional. The newer entrants, CCI and IRI, primarily offer store-and-forward international message services. These carriers have made it clear that they will opt for input-based compensation approaches, and under universal interconnection subscribers will be able to access their offerings with relative ease. To the extent that such approaches are more efficient and will result in lower subscriber rates than those of competitors opting for output-based compensation, the new entrants will make competitive inroads. At some point, their more traditional competitors will have incentives to change their facilities to implement the input-based compensation approaches.

chosen by a carrier, it proposed further that compensation to the interconnecting subscriber's carrier be the *same* under either such approach (by proposing that a carrier-to-carrier discount not be applied in one of these approaches). If the new output-based compensation option is made available, compensation will be different under such an approach than under *either* of the input-based compensation approaches previously proposed, regardless of whether a discount is applied to one of the latter approaches or not. Thus, the thrust of the proposal in the *Tentative Decision* that a subscriber be indifferent to which compensation approach might be chosen by the store-and-forward carrier is lost. In these circumstances, there is no basis for not applying a carrier-to-carrier discount to input-based compensation approaches, just as the carriers have proposed to do with respect to the output-based approach which they have requested us to sanction.

61. One of the input-based approaches is a subscriber-paid access approach where a store-and-forward call is literally treated as two separate calls. The subscriber places a domestic call on the interconnecting carrier's network, and that network completes the call to a store-and-forward carrier's facilities the same as it might complete any other domestic call, and it provides timing and billing to the subscriber for the call just as it would for any other domestic call. For such calling, no discount is justified as the store-and-forward carrier is assuming no functions or costs otherwise assumed by the interconnecting carrier.

62. But, the other input-based approach advanced at the July meetings, the subscriber-paid-collect approach, appears to represent end-on-end service in name only. The subscriber does not receive a bill from the interconnecting carrier for a call towards another carrier's store-and-forward facilities; it receives one bill from the store-and-forward carrier for a through call. The store-and-forward carrier in fact is providing compensation to the interconnecting carrier, albeit in lieu of the subscriber, under the proposed "collect" billing arrangements. This is no different than other forms of carrier-to-carrier interconnection where the second carrier is deemed the "originating carrier", except in name. Indeed, it is unclear which carrier would actually perform the timing of such calls. The new entrants argue that the actual physical interconnection arrangements to implement this interconnection would be identical to those employed for carrier-paid real-time interconnection, which suggests that the store-and-forward carrier would provide timing as well as billing in lieu of the interconnecting subscriber's carrier.

63. We conclude that there is much force to the arguments of CCI and IRI that the so-called subscriber-paid-collect option should be deemed a carrier-paid interconnection option to which discounting is applicable. The basis in the *Tentative Decision* for not applying

such discounting is no longer present if the output-based compensation option is made available, and the actual interconnection arrangements appear no different than those for other carrier-paid access interconnection to which discounting is applied. Furthermore, no distinction should be made between international and domestic messages transmitted over such arrangements. The conversion factor (currently 1.3) is not intended to create different compensation for international and domestic messages; it is intended to convert measured international minutes to minutes which represent actual use of the interconnecting carrier's domestic facilties, in circumstances where the actual domestic minutes are not ordinarily measured and captured. Here, such a proxy for the minutes of use of the interconnecting carrier's facilities is unnecessary; the actual minutes are measured when input-based compensation is used.

64. Thus, we shall treat this form of carrier-to-carrier interconnection no differently than other forms of such interconnection are treated, including application of a carrier-to-carrier discount (currently 15%). We recognize that under such circumstances, a given carrier might be placed in the position of interconnecting with another carrier's store-and-forward services on a different basis than it provides domestic service toward its own store-and-forward services. (For example, based on the comments, it is likely that TRT would select an output-based billing arrangement for its own store-and-forward subscribers, while CCI or IRI would select an input-based arrangement for calling by TRT's subscribers toward their store-and-forward facilities.) However, under a "rule of reason" approach, such inequality would be permissible under the RCCA, and we need not resort to a legal fiction of deeming the input-based compensation arrangement a species of subscriber-paid access to avoid this issue. In essence, the proper compensation approach in our view is the input-based one. We are willing to permit carriers to opt for a less desirable output-based one for their own store-and-forward services to avoid major facilities changes. But, we will not permit such carriers—which retain the option of employing the more desirable approach—to use this choice as a basis for denying other carriers the more desirable compensation approach, or for denying them discounts.

65. Furthermore, upon review of the merits of allowing for two forms of "carrier-paid" access and a third "subscriber-paid" access option (as originally was proposed in the *Tentative Decision* and as was retained in the carriers' consensus language), we conclude that the "subscriber-paid" access option need not, and should not, be available. While we are prepared, under a "rule of reason" principle, to allow a given carrier's domestic facilities to be connected with the store-and-forward facilities of another carrier on a different basis than to its own store-and-forward facilities—at the option of the store-and-forward carrier and presumably without prejudice there-

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to—we are unwilling to allow for any more inequality than is absolutely necessary. The RCCA requires interconnection by a carrier with others which is "equal in quality in type" to that used by the carrier in its own operations. Unnecessarily diverse interconnection options would be difficult for carriers and for the Commission to monitor, and may give rise to disputes, particularly if the availability of such options might be manipulated effectively to deny carriers the benefits of the interconnection requirements of the RCCA.

66. In view of the foregoing, we hereby prescribe the following options for carrier-to-carrier interconnection to store-and-forward facilities, at the option of each store-and-forward carrier:

A. The store-and-forward carrier shall compensate the carrier on whose network the call is initiated on the basis of the billable minutes of output from the store-and-forward facility occasioned by the customer's input. The basis of compensation will be the initiating carrier's domestic intra-network rate as discounted by Commission prescription (currently 15%), provided that in the case of international output, the output minutes shall be multiplied by the conversion factor for international-to-domestic billable minutes then in effect between the initiating carrier and the store-and-forward carrier The initiating carrier shall make no charge to its subscriber for such calls, and the store-and-forward carrier shall bill the subscriber for the through call.[32]

B. The store-and-forward carrier shall compensate the carrier on whose network the call is initiated on the basis of the measured minutes of input to the store-and-forward carrier's facilities occasioned by the customer's input. The basis of compensation will be the initiating carrier's domestic intra-network rate as discounted by Commission prescription (currently 15%). The initiating carrier shall make no charge to its subscriber for such calls, and the store-and-forward carrier shall bill the subscriber for the through call.[33]

67. Finally, we must address the desire of certain carriers to be able to select "one or more" options simultaneously. As was acknowledged in TRT's response to the Bureau Chief's July 21, 1982 letter, simultaneous selection by a store-and-forward carrier of multiple options would raise serious questions under Section 202(a)

[32] This language was drafted by the carriers at the July 14, 1982 meeting.

[33] This language, which is patterned after the carriers' option A language above, is ours, and it implements an input-based compensation approach subject to carrier-to-carrier interconnection discounting. The controversial language drafted by the carriers at the July 14, 1982 meeting to implement their subscriber-paid-collect proposal was: "The subscriber of the initiating carrier shall pay the store-and-forward carrier for the entire service. Carrier-to-carrier billing shall be done based on actual domestic connect time times the tariffed domestic intra-network rate. The initiating carrier shall make no charge to its subscriber for such calls."

of the Act. Under either of the options, the same store-and-forward message service would be made available to subscribers through interconnection, but the charges therefor would be different, which certainly raises the spectre that like service at unlike charges (in violation of Section 202(a)) would be involved. Under options A and B above, the store-and-forward carrier providing a bill for through service to the subscriber in interconnected service must pass through to the subscriber the access compensation provided the interconnecting carrier unchanged in the case of an international message. Since the compensation would differ depending upon which of these options might be utilized, it is obvious that different subscriber charges would be involved. And, since the services provided over either option, as perceived by the subscriber, would be identical (except with respect to price), they would be "like."

68. TRT argues that it is sufficient that we place the carriers on notice of these potential problems, and that we face this issue only if a given carrier seeks to utilize multiple options. However, CCI argues that it is free to utilize multiple options now (and that it expects to do so). We hereby conclude that in the clear cases of interconnection for international calling under options A and B, both may not be selected simultaneously; because of the pass along requirement, such simultaneous selection of these options will create offerings of like service at different charges in violation of Section 202(a).

69. In sum, we have prescribed the principles under which carrier-to-carrier interconnection to store-and-forward facilities will proceed, at the option of each carrier operating store-and-forward facilities. We conclude that interconnection to store-and-forward facilities which meet the three-part test established in para. 52 above is required by the RCCA, and that such interconnection is required in the public interest. Accordingly, we order each carrier operating store-and-forward facilities to offer access thereto through interconnection with the facilities of other record carriers, by filing revisions in its tariffs as follows. Each carrier operating store-and-forward facilities must file revisions in its public *international* tariff including: a description of the offering of store-and-forward access through interconnection; an appropriate access code for use by other record carriers and their subscribers; an indication that subscribers will be billed by the store-and-forward carrier for the total end-to-end charge; a domestic component which is unbundled from an international component (the latter of which may include a store-and-forward component); a statement indicating that the domestic component of another record carrier will be applied in lieu of the store-and-forward carrier's domestic charge if the customer is calling from another domestic network, and a reference to the interconnection tariffs of other carriers to facilitate the determination by subscribers of applicable charges; and a single chosen basis for computation of domestic minutes or equivalents thereto in the case

of telegram or similar service (that is, input minutes or factored output minutes). Each carrier operating store-and-forward facilities must file revisions in its public *domestic* tariff including: a description of the offering of store-and-forward access through interconnection; an appropriate access code for use by other record carriers and their subscribers; an indication that subscribers will be billed by the store-and-forward carrier for the total end-to-end charge; and a single chosen basis for computation of message timing or equivalents thereto in the case of telegram or similar service (that is, input minutes or output minutes). The store-and-forward carrier may make a single choice between input-based compensation and output-based compensation, which will apply equally to international and to domestic service.

70. Furthermore, interconnecting record carriers are ordered to revise their interconnection tariffs to reflect compensation for use of their facilities, in interconnected service to store-and-forward carriers' facilities, under both compensation options made available in this decision, as specified in each store-and-forward carrier's public tariffs (as is required in the previous paragraph). Specifically, an output-based compensation option and an input-based compensation option must be specified, as outlined in paragraph 66 above. Since both of these options are "carrier-paid" interconnection options, interconnecting carriers are ordered to ensure that subscriber billing is suppressed during interconnected calling by their subscribers to another carrier's store-and-forward facilities. Moreover, store-and-forward carriers are ordered to maintain accurate and verifiable records of compensation due interconnecting carriers, and to settle with such carriers expeditiously[34].

C. 110 Baud ASCII Access to TWX

71. In the *Tentative Decision* we proposed that "without restraint" domestic interconnection to TWX (using the TWX code and protocol, in addition to the current telex code and protocol access to TWX) be made available, without prejudice to consideration in the future of whether, and to what extent, "with restraint" TWX interconnection also should be made available. The comments support this proposal, although several advert to the possibility that the "with restraint" issue will be required to be faced in the future. Accordingly, we prescribe that domestic interconnection to TWX be made available using the TWX code and protocol but "without

[34] A final matter was resolved by the carriers in their comments. To implement any interconnection to store-and-forward facilties, it is assumed that the store-and-forward carrier will bill the originating subscriber for message outputs, and for access as well. Carriers operating store-and-forward facilities require access to interconnecting carriers' "answerback" data, to identify the subscribers to whom bills may be sent. It was proposed in the Tentative Decision that such information be exchanged among the record carriers without charge. This concept was agreed to by the carriers, and is hereby prescribed.

restraint", in addition to telex-like domestic interconnection to TWX using the telex code and protocol, as proposed in the *Tentative Decision.*

V. *Ordering Clauses*

72. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 203, 205, 222 and 416(c) of the Communications Act of 1934 as amended, That Western Union Telegraph Company, RCA Global Communications, Inc., Western Union International, Inc., FTC Communications, Inc, TRT Telecommunications Corp., and ITT World Communications Inc., SHALL COMPLY WITH THIS ORDER AND FILE TARIFF REVISIONS CONSISTENT THEREWITH no later than twenty days from release of this order, to be effective on no more than ninety days notice.

73. IT IS FURTHER ORDERED, That, the foregoing carriers SHALL NOT DETARIFF any store-and-forward or service conversion offering which meets the three-part test of para. 52 of this order, and which therefore is within the subject matter of the Record Carrier Competition Act of 1981, notwithstanding the provisions of Section 64.702(a) of the Commission's Rules, 47 C.F.R. § 64.702(a), which otherwise might be applicable.

74. IT IS FURTHER ORDERED, That Sections 61.58, 61.59 and 61.74 of the Commission's Rules ARE HEREBY WAIVED TO THE EXTENT NECESSARY to permit the filing of tariff revisions implementing the prescriptive provisions and specific prescribed language as set forth in this order.

75. IT IS FURTHER ORDERED, That the filing of data required by Section 61.38 of the Commission's Rules for the filings necessary to implement this order IS HEREBY DEFERRED until such time as may be required by the Chief, Common Carrier Bureau.

76. IT IS FURTHER ORDERED, That the public interest as expressed in the Record Carrier Competition Act of 1981 and the Communications Act requires that THIS ORDER BE EFFECTIVE IMMEDIATELY upon actual notice to the affected carriers.

77. IT IS FURTHER ORDERED, That this order be printed in the Federal Register.[35]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[35] Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b), IT IS CERTIFIED, That Sections 603 and 604 of that Act do not apply because this prescription will not have a significant economic impact on a substantial number of small entities. The primary economic impact of this order will be upon carriers, not users.

Application, for Review
CATV Carriage, Significant Viewing Test

Request for review of decision of Bureau Chief denying request to utilize county-wide data to establish significantly viewed status denied. No reasons proffered to warrant change in established policy.
–KOIN-TV, Inc.

FCC 83–87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

KOIN-TV, INC. Portland, Oregon

CSR-1860

KING BROADCASTING COMPANY
Portland, Oregon

CSR-1873

Application for Review

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983 Released: March 15, 1983)

BY THE COMMISSION:

1. On December 4, 1981, King Broadcasting Company (hereinafter "KGW-TV"), licensee of Station KGW-TV (NBC, Channel 8), Portland, Oregon, pursuant to Section 1.115 of the Commission's Rules, filed an "Application for Review" of the action taken by the Chief of the Cable Television Bureau pursuant to delegated authority in *KOIN-TV, Inc.* (Portland, Oregon), Mimeo No. 299, 50 RR 2d 715 (1981). KGW-TV's application is opposed by Ponderosa Television, Inc. (hereinafter "KTVZ"), licensee of Station KTVZ (NBC/CBS, Channel 21), Bend, Oregon.[1]

2. On January 23, 1981, KGW-TV filed a petition (CSR-1873) seeking waiver of Sections 76.54(b) and (c) of the Commission's Rules, to allow KGW-TV to establish itself as significantly viewed in Deschutes County, Oregon, utilizing county-wide data. Absent waiv-

[1] On January 4, 1982, KGW-TV filed a "Reply to Opposition to Application for Review." This pleading was not requested by the Commission and will be dismissed pursuant to Section 1.115(f) of the Rules.

er, KGW-TV would have to provide community-specific data for each cable television community in Deschutes County.[2] KGW-TV also sought to consolidate its request with an identical request (CSR-1860) filed by KOIN-TV, Inc. (hereinafter "KOIN-TV"), licensee of Station KOIN-TV (CBS, Channel 6), Portland, Oregon. Both KGW-TV and KOIN-TV argued that county-wide Arbitron data demonstrate that the two stations have been significantly viewed in Deschutes County since 1970, and that such data is sufficient to establish significantly viewed status. In *KOIN-TV, Inc., supra*, the stations' petitions were denied. The Bureau Chief noted that while county-wide data was used to establish the Commission's list of significantly viewed signals,[3] community-specific data was not then available, as it is today. In addition, the Bureau Chief noted that it is Commission policy that an application for an addition to the list be supported by a showing that the required viewing level is attained in the community in question. "[P]etitioners have failed to demonstrate that the necessary surveys are too expensive [or] too burdensome. . . . Furthermore, no financial data whatsoever has been submitted, either with regard to the cost of such surveys or to the ability of petitioners to finance such surveys." *id.* at 719.

3. In support of its "Application for Review," KGW-TV summarizes and reiterates the arguments it submitted in its original petition. In addition, KGW-TV contends that the Commission policy which resulted in the denial of KGW-TV's petition should no longer be followed. KGW-TV asserts that while the Commission's insistence upon community-specific data may have been valid in 1972 in order to proceed cautiously with regard to modifications of the then newly adopted cable television rules, such caution should not overcome a decade of equally reliable Arbitron viewing survey results. KGW-TV contends that denial of its requested relief would defeat the purpose of Section 76.54 of the Rules, which KGW-TV states is ". . . to provide a reliable mechanism for amending the table of significantly viewed signals. . . ." KGW-TV claims that the Arbitron surveys comport with the procedural requirements of the rule, and argues that the Commission has previously awarded significantly viewed status based on such data. In addition, KGW-TV notes that similar surveys have been used by the Commission in impact analyses in various cases, and also that "these surveys and others like them are the basic viewing measures used by the industry itself."

4. In its "Opposition to Application for Review," filed December 21, 1981, KTVZ argues that KGW-TV actually challenges Section

[2] The systems in the county are: Bend Community Antenna Co. (Bend); Key TV Inc. (Redmond); Sisters Cable Co. (Sisters); and Sun Tronics Television System (Sunriver).

[3] *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 378-463 app. B (1972).

76.54(b) of the Rules itself, and that KGW-TV's application is really a petition for rulemaking. KTVZ contends that the Commission's policy in this field remains valid, especially in light of recent regulatory developments. Now that the Commission has lifted its restrictions on the importation of distant signals,[4] and also exempted significantly viewed signals from being blacked out pursuant to the network program nonduplication rules,[5] argues KTVZ, the importance of significantly viewed status in the context of nonduplication protection has been increased. Accordingly, contends KTVZ, a ". . . concern for the viability of local program outlets underscores and reinforces the continuing applicability and relevance of Section 76.54(b)," especially its requirement that surveys and data be community-specific.[6] KTVZ also reiterates its argument that KGW-TV should not enjoy significantly viewed status in Deschutes County because it is not received directly off-air in the county but rather it is retransmitted by translator.

5. The significant viewing rules—Sections 76.5(k) and 76.54 of the Rules—were adopted in 1972 in what was clearly a compromise weighing various considerations. It was recognized that county-wide data might inadequately reflect viewing levels in all parts of a county, but it was also recognized that it would be desirable to provide some degree of certainty as to which signals met the test at the outset and thus avoid the delays and uncertainties associated with individual community surveys. The result was a decision, articulated in the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143 (1972), and in the *Reconsideration of the Cable Television Report and Order, supra*, and reflected in the differences between Sections 76.54(a) and 76.54(b) of the Rules, to make use of county-wide data as it existed in 1972, but thereafter to require both broadcasters and cable television system operators to demonstrate the required audience viewing levels for stations already on the air in 1972 on a community-by-community basis. Community-by-community surveys, moreover, were only permitted after notice to other interested parties so that, to the extent possible, survey methodologies could be agreed on. Separate rules addressed the carriage and

[4] *Report and Order in Docket Nos. 20988 and 21284*, FCC 80–443, 79 FCC 2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York, Inc. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom. National Association of Broadcasters v. FCC*, 102 S.Ct. 1002 (1982).

[5] *Memorandum Opinion and Order in Docket No. 19995*, FCC 78–217, 67 FCC 2d 1303 (1978), *granting recon. of* 76–1076, 62 FCC 2d 99 (1976), *recon. denied*, FCC 78–597, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. Federal Communications Commission*, 619 F.2d 314 (4th Cir. 1980).

[6] KTVZ has also objected to a "Notice of Intent to Conduct Significant Viewing Survey" submitted on behalf of *KGW-TV, KOIN-TV, and Television Broadcast* Station KATU (ABC, Channel 2), Portland, Oregon, contending that the survey's methodology will not distinguish between direct off-air viewing of the Portland stations and viewing of these stations from translators. No information from such a survey, if it has been conducted, has been submitted.

deletion of the signals of translator stations. Translators with 100 watts or higher power were to be carried if they were "serving the community" of the cable systems[7] and were entitled not to be deleted under the network nonduplication rules if "licensed to the community" of the cable system.[8]

6. In this proceeding it seems relatively clear that the two Portland television stations seeking relief under the rules are widely viewed in the county in which Bend is located and have been for some years. This audience, it appears, is almost entirely from translator stations, which are not licensed to Bend.[9] Neither of the stations meet the 1972 significant viewing test as set forth in Section 76.54(a) of the rules, and no audience data for Bend or any other community has been submitted which might permit a judgment to be made as to whether that part of the rule has been complied with. Rather, what has been submitted is county-wide data which evidently includes that audience of the translator stations located in the county, along with a request that the procedural requirements of the rules otherwise be waived.

7. We do not find any reason to reconsider those requirements in the context of this proceeding. The parties in this proceeding acknowledge that their viewing data includes translator viewing data. In analyzing viewing data submitted pursuant to Section 76.54 of the Rules, translator viewing statistics are not normally to be combined with the audience viewing statistics of the originating station. *Scranton Broadcasters, Inc. and WBRE-TV, Inc.*, FCC 82–58, 88 FCC 2d 1482 (1982). Pursuant to Sections 76.5(k), (l), (m), and (n) of the Rules, significantly viewed status is available only to commercial television broadcast stations, and not to television translator stations. Even were we to accept the data submitted in this proceeding, since KGW-TV has chosen not to separate out audience statistics for its translator station nor for KOIN-TV's translator station, we have no evidence in this proceeding upon which a finding of significantly viewed status for either station could be made. *Scranton Broadcasters, Inc. and WBRE-TV, Inc., supra.*

8. The remaining question before us is whether reasons have been presented which would justify waiver of our requirement that the significantly viewed status of a station on the air in 1972, but not on our significantly viewed list, be determined by reference to community-specific data. We cannot conclude that such reasons have been advanced. While we have in the past accepted county-wide

[7] *See, e.g.*, Section 76.59 of the Rules.
[8] *See, e.g.*, Section 76.92(e) of the Rules.
[9] KGW-TV's translator, K75BL, and KOIN-TV's translator, K70AI, are licensed to serve Prineville and Redmond, Oregon.

showings from stations which had been on the air at the time of the original surveys,[10] this was only upon a showing of major financial burden or extensive technical improvements to the station.[11] KGW-TV has not submitted any such information. As the Bureau Chief noted in *KOIN-TV, Inc.*, 50 RR 2d at 718, we stated in 1972 that "we see no reason not . . . to require that the required viewing level is attained in the cable community in question where the showing is in support of a specific application." *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 348–349.

9. In view of the foregoing, we find that grant of KGW-TV's application is not in the public interest.

10. Accordingly, IT IS ORDERED, That the "Reply to Opposition to Application for Review" filed January 4, 1982, by King Broadcasting Company IS DISMISSED.

11. IT IS FURTHER ORDERED, That the "Application for Review" filed December 4, 1981, by King Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[10] Section 76.54(d) of the Rules allows post-survey stations to utilize county-wide data, to ensure equitable treatment for such stations. *Report and Order in Docket No. 20371*, FCC 75–1145, 56 FCC 2d 265 (1975).

[11] *Clearview Cable TV* (Richmond, Indiana), FCC 79–199, 71 FCC 2d 1133 (1979); *Calvert Telecommunications Corp. d/b/a CALTEC* (Lutherville-Timonium, Maryland), FCC 77–180, 63 FCC 2d 1022 (1977); *Courier Cable Company, Inc.* (Buffalo, New York), FCC 77–75, 63 FCC 2d 79 (1977); *Burwell Cable TV, Inc. d/b/a Imperial Cable TV* (Imperial, Nebraska), FCC 76–767, 60 FCC 2d 759 (1976); *Cablevision of Marlow, Inc.* (Marlow, Oklahoma) FCC 73–1273, 44 FCC 2d 257 (1973).

Minority Ownership, Factor in Comparative Proceeding
Ownership and Management, Integration of
Review by Review Board

Review Board affirms Initial Decision granting construction permit to applicant with greatest quantitative integration of ownership and management.
–*Las Misiones De Bejar TV Co.*
BC Docket No. 81–647

FCC 83R-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAS MISIONES DE BEJAR TELEVISION CO. San Antonio, Texas	BC Docket No. 81–647 File No. BPCT-5235
ALAMO BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–648 File No. BPCT-5244
CHRISTIAN TELE-COMMUNICATIONS, INC. San Antonio, Texas	BC Docket No. 81–649 File No. BPCT-5245
UNITED TELEVISION BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81–652 File No. BPCT-5248
For Construction Permit	

APPEARANCES

William K. Keane, for Las Misiones De Bejar Television Company; *Meredith Senter*, for Alamo Broadcasting Corporation; *George R. Grange, II*, for Christian Tele-Communications, Inc.; and *Stephen T. Yelverton*, for Mass Media Bureau, Federal Communications Commission.

Decision

(Adopted: February 4, 1983; Released: February 11, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Three applicants are continuing their contest for a UHF television channel in San Antonio, Texas; the fourth applicant which participated in the comparative hearing has not filed exceptions to the Initial Decision of Administrative Law Judge Stirmer, FCC 82D-55, released August 4, 1982. Las Misiones De Bejar and Christian Tele-Communications, Inc., the losing applicants, filed briefs and exceptions on September 3; reply briefs were filed on September 23; and oral argument was held November 24, 1982. Our review of the record and the parties' contentions has been facilitated by a solid Initial Decision which contains the necessary findings and conclusions. This has permitted the Board to focus upon the questions presented by the parties, and after considering the written and oral arguments, we affirm the ALJ's selection of Alamo Broadcasting Corporation because of its substantial integration preference, para. 17 below. In essence, the ALJ correctly applied the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) and then available precedents such as *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); and *WPIX, Inc.*, 68 FCC 2d 381, 411 (1978). His conclusion is also supported by other recent decisions. *Waters Broadcasting Corp.*, FCC 82-483, released December 1, 1982; and *Absolutely Great Radio, Inc.*, FCC 83R-9, released February 4, 1983.

2. *Background*: The basic findings of fact in the Initial Decision, see I.D. paras. 1-92, 104-105, are supported by the record and are hereby adopted. These findings led the Administrative Law Judge to conclude that Alamo was the best comparative applicant. *I.D.*, para. 155, 148-154. When new broadcast applicants are being compared we first look at diversification of control of ownership of mass media of communications which constitutes "a primary objective in the licensing scheme," 1965 *Policy Statement*, *supra*, 1 FCC 2d at 394. No other cognizable or significant media interests were attributable to Alamo, the ALJ correctly concluded, because of its timely and unequivocal commitment to divest other media interests before the receipt of program test authority for its proposed San Antonio station. *I.D.*, paras. 130-132. Since the other applicants also did not have any cognizable media interests, *I.D.*, para. 155, the comparative choice turned on which applicant was entitled to a preference for full-time participation of owners in the management of the the station. 1965 *Policy Statement*, 1 FCC 2d at 395.

3. This comparative factor emphasizes the "substantial importance" which the Commission attaches to new applicants which propose the largest quantity of ownership participation in managing the "day-to-day operation of the station." Highest credit is given for full-time "integration of stockholders exercising policy functions."

The focus is upon the positions which the participating owners will occupy "to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Policy Statement*, *supra*, 1 FCC 2d at 395. Quantitative credit may be enhanced by qualitative factors. This aspect of comparison deals with attributes of the owners, 1 FCC 2d at 395–396. Of special relevance are local residence and minority ownership. *Waters*, *supra*, FCC 82–483, para. 11. Female ownership and broadcast experience are also considered enhancement factors but are entitled to lesser weight. *Policy Statement*, *supra*, 1 FCC 2d at 396; *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829 (Rev. Bd. 1979), *rev. denied*, FCC 80–734, Dec. 4, 1980.

4. After all the relevant factors had been weighed, and findings had been made, the ALJ held that Alamo was entitled to a "substantial preference" over the other applicants on the integration factor. *I.D.*, para. 155. Alamo proposed that 99% of its stock be integrated full time in the operation of the station. Paris Schindler, with 45% of the stock, is the proposed general manager, and will relocate to San Antonio; his sister Sherry Schindler, 30%, is the proposed program manager, and will also relocate; Phyllis Davis, 15%, a long-time resident, is the proposed women's news director. (*I.D.*, paras. 148–151, 22–38). Four local resident minority owners with 9% of the stock also proposed to participate full time in the management of the station. Mr. Lopez, a Hispanic with 2% of the stock, is the proposed business manager; Mr. Myart, 3%, a Black American, is promotion manager; Ms. Long, 2%, a Black American, is community and cultural affairs director; and Mr. Collins, 2%, a Black American, is the proposed news director. (*I.D.*, paras. 152–153; 39–74)

5. In his ultimate conclusions the ALJ decided that it was not necessary to award any credit to Alamo for the four minority stockholders, whose participation had been challenged by the competitors as "tokenism" and "window dressing." *I.D.*, paras. 152–154. Alamo's credit for at least 90% ownership participation, the ALJ reasoned, was more than enough to substantially outweigh the proposals of its competitors. Thus, Las Misiones was awarded credit for 12.5% full-time participation of Dr. San Martin, its proposed general manager. This credit was enhanced because Dr. San Martin is a Hispanic and "long time local resident of San Antonio with an exemplary record of civic participation in leadership capacities. . . ." *I.D.*, paras. 155, 136. Las Misiones' enhanced credit was found to be sufficient to overcome Christian Tele-Communications' credit for 16.6% full-time participation, but neither proposal was sufficient to overcome Alamo's proposal of at least 90% participation.

6. Three major points emerge from a review of the briefs. First, Las Misiones argues that it should have been awarded a decisive and "substantial preference for its minority ownership *per se*" Br. 17–27.

Second, Tele-Communications urges that it should have been awarded 100% credit for integration even though one of its three directors withdrew from the broadcast venture, after the hearing, because of a religious dispute. (Br. 22–30). It also argues that the ALJ erred in finding its corporation to be a mere broadcasting subsidiary of the Trinity Church and thereby reducing its integration credit to 16.6% (Br. 5–21). Finally, the winning applicant Alamo submits that it should have also been credited for the additional 9% minority ownership. (Reply Br. 16–20).

7. *Las Misiones "Per Se" Rule.* At the hearing and in its exceptions Las Misiones urged a grant on a novel theory in comparative cases. It pointed to its 100% ownership by local residents who are also Hispanic Americans and to the fact that more than 50% of San Antonio's population is Hispanic. Decisive significance should be given to minority ownership *per se* even though most of that ownership (87.5%) would not participate full time in the management of the station. *I.D.*, paras. 137–138. The ALJ correctly ruled that Las Misiones was urging the adoption of a new policy at variance with the policy set out by the Commission in *WPIX*, *supra*, 68 FCC 2d at 411–412, and *Klein*, *supra*, 86 FCC 2d at 430–32. Those cases established that minority ownership is related to integration of ownership into management. It is an attribute of ownership, like local residence, which enhances the qualitative aspects of integration. Both local residence and minority ownership help contribute to diversification of ownership. Those cases had been consistently applied by the Review Board, the ALJ noted. Thus, special credit was not awarded for minority ownership in proportion to ethnic composition of the community in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 845 n. 17, 50 RR 2d 1117 (Rev. Bd. 1981), because "the relevant consideration is not minority ownership *per se*, but rather the extent to which minority owners are integrated into the proposed . . . operation." 88 FCC 2d at 844. See also *Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982); *Radio Gaithersburg, Inc.*, *supra*, 72 FCC 2d 820. Accordingly, the ALJ, applying existing policy, concluded that a large quantitative difference in full-time integration could not be overcome by qualitative differences. *I.D.*, paras. 137–139.

8. A *per se* minority rule is inconsistent with the established policy on which the ALJ relied and a very recent decision where a Black applicant with 100% full-time integration was awarded substantial enhancement credit for minority ownership even though there was no significant minority presence in the community, *Waters Broadcasting Corp.*, 88 FCC 2d 1204 (Rev. Bd. 1981), *rev'd on other grounds*, FCC 82–483. *supra*. In that case the Board followed the Commission's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 980–981 (1978), which indicated that the absence of minority ownership was "detrimental not only to

the minority audience but to *all of the viewing and listening public.* Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community *but also enriches and educates the non-minority* audience'. (Emphasis added.) Later in the *Minority Policy Statement*, the Commission cited with approval several cases in which comparative merit was awarded to applicants whose '*minority owners were to participate in the operation of the station*'. 68 FCC 2d at 982, and note 15." (Emphasis added.) *Id.*, 88 FCC 2d at 1210.

9. On appeal the Commission specifically reaffirmed this past approach in *Waters*, FCC 82–483, at paras. 8–9. In its conclusion, it did stress that the "minority ownership policy is to be given full application and significant weight in comparative . . . proceedings." Waters was awarded "substantial enhancement" credit because its "100% minority and female ownership [was] integrated with full-time management." FCC 82–483 at paras. 11–12. In *Waters* and *Klein*, 100% and 5% full-time minority participation tipped the comparative scales in favor of the winning applicants; but the Commission did not apply a *per se* rule; nor did it award credit in proportion to minority population in the community proposed to be served. In both cases minority ownership, like other attributes of owners, was considered a factor enhancing full-time participation of owners in the management of the station.

10. In *Absolutely Great Radio, Inc., supra*, FCC 83R-9, a minority applicant proposing 100% full-time participation was victorious. Following the Commission's decisions in *WPIX*, and *Waters*, the Board rejected a suggestion that "minority ownership is an independent factor and not subsumed within the integration criterion," at para. 16, n. 17. That holding is equally applicable here and we therefore affirm the ALJ's rejection of the proposed *per se* rule. Las Misiones points to the lottery legislation and the Commission's rulemaking in the low power television and clear channel proceedings as special demonstrations of Congressional and Commission sensitivity to the need for minority ownership. While these actions did relate to minority ownership they did not deal with or change existing comparative standards and policy. Under these circumstances neither the ALJ nor the Board is authorized to make the substantial changes in comparative policy and standards contemplated by the proposed *per se* rule. See *Horne Industries, Inc.*, FCC 82R-68, released November 26, 1982.

11. *Ownership of Tele-Communications*: Tele-Communications will receive only 66.6% integration credit because one of its directors withdrew from the proposal after testifying at the hearing. *I.D.*, paras. 91–93. Under established practice, *see e.g., New Continental, supra*, 88 FCC 2d at 842–44, the ALJ held that the corporation could not be restructured at that late point to retain 100% integration credit. *I.D.*, paras. 140–141. Tele-Communications' ownership credit

was further reduced by the ALJ who found, *I.D.*, paras. 93–105, and concluded that the company was "in reality, nothing more than the broadcasting subsidiary of Trinity Church," and therefore was only entitled to credit for 16.6% integration. *I.D.*, paras. 142–146. In its brief, Tele-Communications urges that a correct application of precedent by the ALJ would have resulted in its receiving credit for 100% integration, even though a director withdrew late in the comparative process, and that reliance on *New Continental, supra*, is misplaced. (Br. 22–30). Tele-Communications also argues that it is completely separate from Trinity Church; that no real party in interest issue was designated in this case; that controlling precedent was misapplied or ignored; that the relationship between the two entities should be evaluated in a religious rather than a business context; that the "corporate fiction-alter ego" doctrine is inapplicable here; and that the evidence of control by the Church was not substantial. (Br. 5–21)

12. The ALJ's ruling that Tele-Communications may not restructure in response to one of its director's voluntary withdrawal at a very late stage in the comparative process is affirmed. Under established comparative practice an applicant will not be permitted to modify its proposal to retain a comparative advantage if a principal voluntarily withdraws after the time for amending as a matter of right has expired. *See, New Continental, supra*, see also additional cases discussed in *Birmingham Family Television*, FCC 82R-59, released October 4, 1982. Here the voluntary withdrawal of one of the directors because of "a theological schism" (Tr. 1015) came very late in the comparative process. An exception is made to the general rule in cases of involuntary changes such as those caused by the death of a principal. That exception does not apply in this case. The general rule is designed to insure fairness to all parties in the comparative case and we will not belabor this point because this matter has been recently fully reviewed, discussed and applied in several similar factual settings. *See, e.g., Birmingham Family, supra*, paras. 8–10.

13. The Board will not further reduce Tele-Communications' 66.6% credit because of its affiliation with the Trinity Church. Although the parties apparently had actual notice that the issue was being litigated since they were trying to raise similar issues against each other (Tr. 1040–42), I.D., para. 151, we agree with Tele-Communications that designation of a specific issue is more in accord with past agency practice. Br. 6–8. Our decision in *Henderson Broadcasting Co.*, 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977), should be considered a narrow exception to the rule that a specific issue is necessary before a competing applicant will be permitted to inquire into a real party in interest question. *Henderson* did not involve a "third party" to the hearing. Moreover, the requirement that specific issues must be sought and justified will permit the ALJ

to retain firmer control over comparative proceedings where competitors are naturally tempted to try to undermine their opponents in every possible manner. *Compare* 1965 *Policy Statement*, 1 FCC 2d at 399–400.[1] We find merit to Tele-Communications' contention that as a matter of law, absent exceptional circumstances, the corporate veil should be pierced only with great caution. (Br. 15). This is especially true in cases where there has been no showing that the separate corporation was established to circumvent the Commission's authority. See *GTE Service Corpv. FCC*, 474 F.2d 724, 733 (2d Cir. 1973).

14. *Alamo's Minority Owners*: In reply Alamo maintains that it should also have received full quantitative and enhancement credit for its minority owners. It notes that all minority stockholders testified that they were personally liable for their stock; that Mr. Lopez participated in the negotiations for the Alamo loan and would pledge his net worth if required; that Mr. Myart testified that he attempted to obtain independent financing before turning to Paris Schindler and still felt he was financially responsible. Relying on *Berryville Broadcasting Co.*, 70 FCC 2d 1, 7–8 (Rev. Bd. 1978), Alamo argues that even if the minority stockholders had been given their stock their *bona fide* ownership should have been credited because they will be fully integrated into meaningful positions in the management of the station. Br. 16–19.

15. After the matter had been fully explored at the hearing and considered in his findings, the ALJ concluded (I.D., para. 154):

> There is no showing here that Paris Schindler lacked good faith in adding the minorities to Alamo's application. Those minorities recognized their limited stock interest. The fact that Paris Schindler arranged for and guaranteed the bank loans to enable the minorities to purchase their stock is not something that should be criticized. It has long been recognized by the Commission that a lack of financing has been a formidable obstacle to minority ownership and participation in broadcasting. Paris Schindler, by financially underwriting the purchase of stock by the minorities, has given these young minorities a stake in a television broadcast station which they would otherwise not have. Even if that stake is small, individually or collectively, it is still

[1] Finally, Tele-Communications continues to press its allegations about "Alamo's secret ownership agreement" and reporting violations. (Br. 31–40). After fully exploring these matters both in our review of the pleadings and at oral argument, we are convinced by the ALJ's resolution of these matters at the hearing, and by the Bureau's Reply Brief, pp. 2–5, that this is the traditional "much ado about nothing" that has become routine in comparative hearings. See cases cited in *Millard Orick, Jr.*, 89 FCC 2d 571, 573 and Note 1 (Rev. Bd. 1982). Its claim that the ALJ erred in applying the divestiture requirements (Br. 41–43) is simply wrong. See *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982); *compare Morris, Pierce & Pierce*, 88 FCC 2d 713, para. 6 (Rev. Bd. 1981); *Muncie Broadcasting Corp.*, 89 FCC 2d 123, para. 13 (Rev. Bd. 1982); *Thomas C. & Essie L. Collins*, FCC 82D-56, released August 3, 1982, para. 17, exceptions pending.

better than nothing. While the addition of the minorities was designed to enhance the comparative posture of the Alamo application, the characterization of this action as "cynical" is unsupported. (Footnotes omitted)

We concur fully in this conclusion and with the ALJ's additional recognition that in *Klein, supra*, the Commission credited minority ownership and integration where the stock was acquired by a gift. Our action on this matter is squarely controlled by the Commission's decision in *Klein*. On a review of the ALJ's findings, I.D., paras. 24–70, and the parties contentions, we are convinced that the showing required in *Klein*, 86 FCC 2d at 431–432, has been made by Alamo. Accordingly, it will be credited with 99% quantitative integration enhanced by minority ownership and local residence. Moreover, as the ALJ has already found, Alamo's integration preference is also slightly enhanced because Paris Schindler will move to San Antonio, *I.D.*, para. 149, enhanced because Ms. Schindler, a woman, will relocate, *I.D.*, para. 150, and is further enhanced because Mrs. Davis is a woman, a local resident, and has been involved in several local organizations, *I.D.*, para. 151.

Summation

16. Alamo's proposed 99% participation of owners full time in the management of the station is enhanced by local residence, minority ownership, female ownership, and therefore it is substantially superior to the two remaining competitors. Because of its qualitative superiority Alamo would be superior to Tele-Communications even if we had awarded that applicant 100% quantitative integration. As previously noted, the ALJ substantially enhanced Las Misiones' 12.5% integration because of Dr. San Martin's minority status, his local residence and outstanding community activities, plus merit because of minority participation of its directors. Nevertheless he concluded that Las Misiones' proposal was not sufficient to overcome Alamo's substantial comparative advantage. *I.D.*, para. 155. His conclusion correctly applied the 1965 *Policy Statement* and relevant Commission precedent. We therefore affirm his grant of the application of Alamo Broadcasting Corporation.

17. ACCORDINGLY, IT IS ORDERED, That the Motion to Accept Transcript Corrections filed on January 20, 1983 by Christian Tele-Communications, Inc. IS GRANTED; and

18. IT IS FURTHER ORDERED, That the applications of Las Misiones De Bejar Television Co., BPCT-5235, and Christian Tele-Communications, Inc., BPCT-5245, ARE DENIED; the application of United Television Broadcasting Corporation, File No. BPCT-5248, IS DISMISSED, pursuant to 47 CFR 1.276(f); and the application of Alamo Broadcasting Corporation, BPCT-5244, IS GRANTED, subject to the following condition:

Prior to construction of the TV tower authorized herein, permittee

shall notify AM Station WOAI so that the station may determine operating power by the indirect method. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the aforementioned AM station. Subsequent to construction of the TV tower and installation of all appurtenances thereon, antenna impedance measurements of the AM antenna shall be made and sufficient field strength measurements obtained at at least 10 locations along each of eight equally spaced radials shall be made to establish that the AM radiation pattern is essentially omnidirectional and, the results submitted to the Commission in application for the AM station to return to the direct method of power determination. Thereafter the TV station may commence *Limited Program Tests.*

JOSEPH A. MARINO *Chairman, Review Board*

FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-55

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAS MISIONES DE BEJAR TELEVISION CO. San Antonio, Texas	BC Docket No. 81-647 File No. BPCT-5235
ALAMO BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81-648 File No. BPCT-5244
CHRISTIAN TELE-COMMUNICATIONS, INC. San Antonio, Texas	BC Docket No. 81-649 File No. BPCT-5245
UNITED TELEVISION BROADCASTING CORPORATION San Antonio, Texas	BC Docket No. 81-652 File No. BPCT-5248
For Construction Permit	

APPEARANCES

James P. Riley, David Sternlicht on behalf of Hubbard Broadcasting of San Antonio, Inc.; *William K. Keane, Norman Leventhal, Dennis Corbett* on behalf of Las Misiones De Bejar Television Company; *R. Clark Wadlow, Meredith Senter, Robert Beizer* on behalf of Alamo Broadcasting Corporation; *James Gammon, George R. Grange, II* on behalf of Christian Tele-Communications, Inc.; *William S. Green* on behalf of Lee Enterprises, Incorporated; *William P. Bernton* on behalf of Tejas Broadcasting Company; *Thomas W. Fletcher* on behalf of United Television Broadcasting Corporation; and *Stephen T. Yelverton* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

Initial Decision of Administrative Law Judge Joseph Stirmer

(Issued: July 29, 1982 Released: August 4, 1982)

Preliminary Statement

1. This proceeding was designated for hearing by Order of the Chief, Broadcast Bureau, released September 24, 1981. Originally, seven mutually exclusive applications were designated for hearing.

However, the applications of Hubbard Broadcasting of San Antonio, Inc., Lee Enterprises, Incorporated, and Tejas Broadcasting Company were dismissed with prejudice prior to the commencement of the hearing[1] thereby leaving only four applicants, Las Misiones De Bejar Television Co. (Las Misiones), Alamo Broadcasting Corporation (Alamo), Christian Tele-Communications, Inc. (CTI) and United Television Broadcasting Corporation (United) still vying for the facility at issue in this proceeding. The order of designation specified the following issues against the remaining four applicants:

1. To determine with respect to United Television Broadcasting Corporation:
   (a) the source and availability of $2,056,916 to construct its proposed station and operate it for three months;
   (b) whether, in light of the evidence adduced pursuant to the foregoing issue, applicant is financially qualified.
2. To determine, on a comparative basis, which of the applications would best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on November 25, 1981. The hearing convened in Washington, D.C. on January 26, 1982 and continued through January 29, 1982. The hearing resumed on February 5, 1982 for the completion of testimony, and the record was closed that same day. The record was reopened on May 3, 1982 for the purpose of receiving an amendment to the CTI application and was again closed that same day.

3. Proposed findings of fact and conclusions of law were filed by the parties on April 30, 1982. All but one of the applicants also filed reply findings on May 14, 1982.

Findings of Fact

Las Misiones De Bejar Television Co.

4. Las Misiones De Bejar Television Co. (Las Misiones) was incorporated on June 15, 1978 for the purpose of applying for a construction permit to build and operate a television station on Channel 29, San Antonio (Las Misiones Exh. 1).

5. The officers, directors and stockholders of Las Misiones are as follows (*Id.*):

[1] The application of Hubbard Broadcasting of San Antonio, Inc. was dismissed by Order of the Presiding Judge (FCC 82M-0661) released March 1, 1982 and the application of Lee Enterprises, Incorporated was dismissed by Order of the Presiding Judge (FCC 82M-0654) released March 1, 1982. The application of Tejas Broadcasting Company was dismissed by Order of the Presiding Judge (FCC 82M-0736) released March 4, 1982.

	Office	*Director*	*Stock Interest*
Dr. Jose San Martin, Jr.	President	Yes	12.500%
Dr. Ismael Guajardo	1st Vice-President	Yes	16.660%
Dr. Felix P. Majul	2nd Vice-President	Yes	8.000%
Cesar A. Gutierrez	Treasurer	Yes	5.000%
Louis F. Flores	Secretary	Yes	4.166%
Carlos R. Chavez	----------	Yes	10.000%
Dr. Roberto San Martin	----------	Yes	5.772%
Raul B. Fernandez	----------	Yes	17.894%
Gerardo S. Gonzales	----------	No	20.000%
Arthur Troilo, Esq.	Asst. Secretary	No	----------

6. Las Misiones is comprised entirely of Hispanic-Americans. According to 1980 Census data, the Hispanic-American population of San Antonio is approximately 421,774 persons or 53.7% of the population (*Id.*) Moreover, the Hispanic-American population of surrounding Bexar County is 460,911 persons, or 46.6% (*Id.*)

7. Each of Las Misiones' principals is a resident of San Antonio, in most cases for many years (Tr. 46). For example, Las Misiones' president, Dr. Jose San Martin, Jr., has lived and worked continuously in San Antonio since 1949 (Las Misiones Exh. 2, p. 2).

8. Aside from this application, Las Misiones has no other media interests; nor do any of Las Misiones' other officers, directors or stockholders (Las Misiones Exh. 1, p. 2).

9. Dr. Jose San Martin, Jr., Las Misiones' president, director and 12.5% stockholder, would be full-time general manager for the station (Las Misiones Exh. 2, pp. 1, 5).

10. Dr. San Martin was born on October 12, 1916 in Torreon, Choahuila Mexico. He resided in Mexico until his move to the United States in 1929. He became a U.S. citizen in January 1944. Dr. San Martin is bilingual in Spanish and English (Las Misiones Exh. 2).

11. After grade school and high school, Dr. San Martin entered St. Mary's University in San Antonio in 1944 where he studied three years concentrating on courses preparatory for education in optometry. In 1947 he entered the Los Angeles College of Optometry in Los Angeles, California where he studied for two years. He graduated in June 1949 with a degree in Optometry. Upon his graduation, Dr. San Martin returned to Texas and successfully completed the optometry examination administered by the State Board of Examiners. Dr. San Martin has practiced optometry continuously in San Antonio since August 1949 (*Id.*).

12. Dr. San Martin initiated and helped organize the group which became Las Misiones. He has from the beginning of the project occupied a principal position in preparing, filing and advocating a grant of the application. Among other matters, he contacted and retained local and FCC counsel, reviewed equipment estimates, helped secure financing and helped formulate Las Misiones' programming plans. As general manager, he will manage day-to-day operations and answer to the Board of Directors and stockholders for the station's performance including its programming service, its financial success, its employment practices, budget development and contract negotiations (*Id.*).

13. As a member of the Board of Directors he will participate in discussions relating to these and other topics and cast his vote in Board meetings (*Id.*).

14. Dr. San Martin will also serve on the Program Policy Committee, described hereafter (*Id.*).

15. Currently Dr. San Martin serves on the Board of Directors of the Valero Energy Corporation (a processor and distributor of natural gas) and the San Antonio City Water Board (*Id.*).

16. Dr. San Martin has been reducing the time spent on his optometry practice. Three of his sons are optometrists who have been and will be assuming an increasing share of the practice. In the event of a grant of the Las Misiones application, neither his optometry practice (which would by then require only a very small amount of time) nor his Board memberships (which require only occasional meetings) will interfere with his commitment to devote full time to his duties as general manager of the television station (*Id.*).

17. Among his numerous activities over the years, Dr. San Martin was an elected member of the San Antonio City Council during the period 1956–60; from 1961–64 a member of the Board of Managers of the Bexar County Hospital District; from 1963–69, a member of the Board of Regents of the State Senior Colleges; in 1966 a member of the White House Planning Conference for Mexican-Americans; from 1967–68, a member of the Department of Health, Education and Welfare Committee on Dyslexia and related reading problems; in 1968 a member of the Executive Committee of Hemisfair, the World's Fair held in San Antonio that year; and from 1973–75 again a member of the San Antonio City Council and, in addition, Mayor Pro Tempore (Las Misiones Exh. 2, pp. 3–4).

18. Dr. San Martin has also served on the following boards: Board of Trustees, Southwest Research Institute; Sembradores de Amistad, an organization dedicated to the improvement of relations between the United States and Mexico; the Executive Committee of the International Black and White Ball; the Board of Our Lady of the Lake University in San Antonio; the Board of Governors of the Cancer Therapy and Research Foundation; the Board of Directors of

Prevent Blindness, the Texas Society for Prevention of Blindness; the United Way Executive Committee; and Chairman of the Public Sector, United San Antonio, a campaign to foster economic development in the area (*Id.*).

19. Among his other activities of service to the community, Dr. San Martin has moderated on an unpaid basis the Civic Awareness Program on Spanish-language station KWEX-TV, San Antonio. This one-half hour weekly program concentrated on community problems and needs. Dr. San Martin was responsible for selecting the topics for discussion and the participants. He served as moderator for a total of six years (from 1956–60 and again from 1975–77) (*Id.* at 4).

20. During the period 1953 through 1977, Dr. San Martin received 50 civic awards and honors (*Id.* at 6–8).

21. Las Misiones' Directors will serve six-month terms on the Program Policy Committee whose other members will include the general manager, program director, news and public affairs director, and the sales manager (Las Misiones Exh. 3). The Program Policy Committee was part of Las Misiones' original plans and was discussed among the directors and stockholders from the very beginning of their organizing efforts (Tr. 54–55). Each of the directors has confirmed their willingness to serve on the committee and to devote one day per week to its functions during their terms (Tr. 62–63).

Alamo Broadcasting Corporation

22. Alamo Broadcasting Corporation (Alamo) is comprised of the following stockholders, the chart showing the position, number of shares owned or subscribed, and the percent of stock ownership for each stockholder:

Name	*Position*	*No. Shares Owned or Subscribed*	*Percent of Stock Owned*
Paris R. Schindler	General Manager	22,500	45
Sherry L. Schindler	Program Manager	15,000	30
Phyllis G. Davis	Assistant General Manager & Women's News Director	7,500	15
Reynaldo H. Lopez	Business Manager	1,000	2
James W. Myart, Jr.	Promotion Manager	1,500	3
Jo Long	Community & Cultural Affairs Director	1,000	2

Name	*Position*	*No. Shares Owned or Subscribed*	*Percent of Stock Owned*
Franklin D. Collins	News Manager	1,000	2
Ray Jimenez[2]		500	1

23. Herbert G. Davis, the husband of Phyllis G. Davis, was the prime mover of Alamo originally (Tr. 840). He formed and put the corporation together in 1976, with the intent of applying for Channel 29 at San Antonio (Tr. 110–12). In 1978, prior to filing the Alamo application, Mr. Davis was to have 15% of the corporate stock, and the Schindler family was to have 85%, with 10 to 15% of the Schindler's 85% interest set aside for minorities.[3] The Schindlers were also to help finance the minorities' stock interests (Tr. 899–901).

24. On May 12, 1981, a Memorandum of Agreement was entered into relative to the ownership and financing of Alamo (CTI Exh. 6). This agreement was prepared by Herbert Davis and was signed by Herbert Davis, Phyllis Davis, Paris Schindler and Sherry Schindler. The Memorandum of Agreement provides, *inter alia*, that Paris R. Schindler and Sherry L. Schindler (hereinafter sometimes referred to as the "Schindlers") shall own 75% of Alamo stock, and that the Schindlers will arrange financing to obtain the construction permit (CTI Exh. 6, p. 1). Neither Herbert G. Davis, nor Phyllis G. Davis, will participate or underwrite or guarantee financing the application effort except for the payment of a total of $7,500 for a 15% stock interest. And, the minorities will acquire their 10% of the stock (of Alamo) through non-personal liability loans at a bank arranged by the corporation, at Schindlers' responsibility (CTI Exh. 6, p. 2, para. 4). The agreement further refers to the transfer of 1,500 shares of Alamo from Herbert to Phyllis Davis and her obligation to pay $6,000 for an additional 6,000 shares of stock (CTI Exh. 6).

Paris R. Schindler

25. Paris R. Schindler is president of Alamo. He owns and has subscribed to a total of 22,500 shares of Alamo stock, 45% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, he will move to San Antonio and will devote at least 40 hours a week to his duties as general manager of the station (Alamo Exh. 2(a)). Mr. Schindler has been a lifelong resident of Houston, Texas, where he owns two homes (Tr. 836). Mr. Schindler is the president of Hurricane Drilling Company, a

[2] In Alamo's 5/15/81 amendment, Ray Jimenez was listed as a 1% stock subscriber (Tr. 137, 234–35). Thereafter, Alamo reported his withdrawal. Apparently his stock subscription has not been taken over by any other principal and his 1% of the stock is being set aside for a key employee stock option program (Tr. 930).

[3] As used herein, minorities refer to racial minorities.

company that was in the process of being sold and wound down (Tr. 849).

Sherry L. Schindler

26. Sherry L. Schindler, the sister of Paris Schindler, is secretary/treasurer of Alamo. She has subscribed to 15,000 shares of Alamo stock, 30% of the total stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, she will move to San Antonio and will devote at least 40 hours a week to her duties as program manager for the station (Alamo Exh. 2(b)). She, like her brother, has been a lifelong resident of Houston, Texas (Tr. 198). She has never lived in San Antonio (Tr. 197). She owns and operates a bike and backpack shop in Houston (Tr. 212). She will discontinue the management of this shop if Alamo is successful (Tr. 212).

27. Ms. Schindler was not involved in arranging Alamo's financing, including the $375,000 loan commitment to her for the acquisition of her stock. Her brother, Paris Schindler, made all the arrangements for the loan commitments even though they involved her personal guarantee (Tr. 215–16, 249–51). She did not participate in the process of selecting the five minority principals who were introduced into Alamo's application (Tr. 226). She knew none of these five individuals at the time they were brought into Alamo's application (Tr. 227). When she, along with other Alamo principals, took action to include these new principals she had not personally met any of them (Tr. 237). She subsequently met four of the new principals, but the fifth, Mr. Reynaldo Jimenez, who later withdrew from Alamo, she has never met (Tr. 237).

28. Her role as program manager was suggested by a consultant to Alamo, and her brother, Paris (Tr. 208). There is nothing in writing describing her duties and responsibilities as program manager (Tr. 211). No fixed salary has been discussed for her position (Tr. 212). Initially, in early 1978, she declined to work full time at the proposed station because of personal turmoil including the process of getting a divorce. Subsequently, after these matters were settled, she changed her mind and decided to devote full time to the proposed station. This was done at the urging of her brother, to get a higher degree of ownership and management (Tr. 204–05).

Phyllis G. Davis

29. Phyllis G. Davis is a vice-president of Alamo. She has been a resident of San Antonio since 1945. She owns and has subscribed to a total of 7,500 shares of Alamo stock, 15% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, she will devote at least 40 hours a week to her duties as assistant general manager and women's news director for the station (Alamo Exh. 2(c)).

30. Mrs. Davis has resided in San Antonio since October 1945, where she has participated in the following civic activities (*Id.*):

Secretary, San Antonio Bar Auxiliary, approximately 1962–1964.
Treasurer, Northeast PTA Council, approximately 1965–1966.
Member, Regional Board of Directors, Arthritis Foundation, approximately 1975–1981.
Member of the Board of Directors and Personnel Chairman, Jewish Day School of San Antonio, 1979 to present (Tr. 190).

31. Mrs. Davis has been a school guidance counselor since 1968 or 1969. Prior thereto she was a teacher. She began teaching about 25 years ago (Tr. 178–79). Ms. Davis has never had a management role in a business (Tr. 139, 179).

32. With regard to her duties as assistant general manager, Ms. Davis would fulfill the duties of general manager in that person's absence (Tr. 180–81). In this connection, Mrs. Davis would be responsible for interviewing and making hiring recommendations although she has not discussed specifics with Paris Schindler (Tr. 184, 186).

33. While Mrs. Davis will be the "assistant general manager", she and Franklin Collins, the proposed news director, would be co-equal in management, but she would answer to Collins when she was performing the duties of women's news director (Tr. 143).

34. As noted, Phyllis Davis is the wife of Herbert Davis. When the application was filed in 1978, Mrs. Davis' participation was limited to being a member of the Board of Directors (Tr. 110). She did not become a stockholder until 1981 (Tr. 113). In that year her husband transferred his 1,500 shares to her (Tr. 117, 151–52).

35. Herbert Davis, as already noted, was the original prime mover in Alamo and its first president (Tr. 111, 839–41). Davis was instrumental in putting the group together; in drawing up the corporation charter in 1976; and in interviewing and selecting the minority-group stockholders (Tr. 110, 839–41). He continues as the corporation's local counsel (Tr. 889–91). He also maintains the public file and keeps the corporate records at his office (Tr. 182). Meetings of the stockholders are sometimes held at his office. Herbert Davis officially withdrew as a stockholder from the Alamo application with the filing of the May 1981 amendment (Tr. 884–89; CTI Exh. 6).

36. According to Paris Schindler, Mrs. Davis was essentially being "carried" by Alamo for her 15% interest and that the price for her stock, i.e. $1.00 per share, reflected the value of services previously rendered by her husband (Tr. 841–42). In contrast, other stockholders (including the minority-group subscribers) are required to pay $25.00 per share (e.g. Tr. 274–77, 372).

37. Mrs. Davis obtained her stock in Alamo as a gift from her husband although funds from a joint account were used to purchase the shares. She stepped into her husband's shoes, and in her words ". . . I now maintain his position" (Tr. 152).

38. Mrs. Davis has had no role in negotiating Alamo's bank loan or any other financial aspect of the application (Tr. 144, 177). Her involvement in Alamo's application has included conducting some of the leadership ascertainments and attending Board of Director's and stockholder meetings (Tr. 136, 138). She disclaimed having any real expertise for her proposed position and she has no communications experience (Tr. 139). She has not discussed with the proposed news manager, Mr. Frank Collins, how the news department would be run (Tr. 140). She has not discussed salary and she has not told her school principal, where she has been employed since 1965, that she is committed to leave her job and go to work for Alamo if such application is successful (Tr. 140, 147, 148). There will be no problem in leaving her school board position (Tr. 149).

Reynaldo H. Lopez

39. Reynaldo H. Lopez is a vice-president of Alamo. He has subscribed to 1,000 shares of Alamo's stock, 2% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, Lopez proposes to devote at least 40 hours a week to his duties as business manager of the station (Alamo Exh. 2(d)).

40. Mr. Lopez resided in San Antonio from his birth until 1981. In 1971, he received a Bachelor of Science degree in Radio, Television and Film from the University of Texas at Austin. In 1974, he received a Masters in Business Administration from Harvard University (*Id.*).

41. Mr. Lopez currently resides in Carrollton, Texas, a suburb of Dallas, where he is employed as the Regional Administrator, Region 6, of the Small Business Administration. He maintains a house in San Antonio that is under lease. He proposes to move back to San Antonio if Alamo is granted the construction permit for Channel 29. He is Hispanic (*Id.*).

42. Mr. Lopez has participated in the following civic activities in the San Antonio area (*Id.*):

S.A. Alumni Steering Committee, Greater San Antonio Chamber of Commerce Leadership, Summer 1981 to present.
Member, Texas Industrial Development Council, 1979 to present.
Member, Southern Industrial Development Council, 1979 to present.
Member, Council on Urban Economic Development, 1979 to present.
Member, St. Mary's School Board of Directors, 1979 to May 1981.
Member, San Antonio Business and Economic Society, 1979 to present.
Member, United Way Allocation Panel, 1980 to present.
Member, El Rey Feo Education Fund, LULAC, 1981.

43. While a student, Mr. Lopez held the following positions with broadcast stations (*Id.*):

May 1972 - September 1972	Full-time Newsman	KTSA, KTFM San Antonio, Texas
January 1972 - May 1972	Full-time Newsman	KNOW Austin, Texas
June 1971 - January 1972	Part-time Newsman/Student	KNOW Austin, Texas
January 1971 - May 1971	Full-time Newsman/Student	KLRM(TV), KUT Austin, Texas
January 1970 - May 1970	Full-time Newsman/Student	KSYM-FM San Antonio, Texas

44. Mr. Lopez was first contacted about the Alamo application in early 1981 (Tr. 269). He had discussions with Paris Schindler, Herbert Davis and possibly Bill Carter, a consultant to Alamo (Tr. 273). His decision to participate as an Alamo stock subscriber coincided with his signing the stock subscription agreement on May 12, 1981 (Tr. 298, 299–300). He did not see Alamo's application prior to joining Alamo (Tr. 281). Since then he has only seen parts of the application during the 6–8 month period preceding the hearing and does not recall whether he has seen the ascertainment portion (Tr. 283, 288).

45. Mr. Lopez has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 292, 293, 329, 953). His stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 354–55).

46. As Regional Administrator, Lopez holds a Presidential Appointment. He is a member of the Senior Executive Service and is, as he said, at "the max" GS-Grade earning $50,112 per year. Prior to accepting the appointment, Lopez was making approximately $35,000 per year (Tr. 288–90). As Regional Administrator, Lopez is responsible for the operation and performance of some 570 employees grouped in 11 districts and two branch offices across five states—Texas, Louisiana, Oklahoma, New Mexico and Arkansas (Tr. 288). He expects to serve in office through the duration of the Reagan Administration (Tr. 313).

47. Lopez has had no discussions with Paris Schindler relative to his salary although he had discussed salary questions with other proposed management-level people (Tr. 290, 345). As far as the responsibilities of his proposed position are concerned, he believed that in the beginning they "perhaps" would have need for a "bookkeeper/secretary-type person", but has not discussed specific staffing with Paris Schindler (Tr. 290).

48. In answer to a specific question as to whether he would quit

his SES/Presidential Appointee position to work for Alamo, Lopez initially said "Sure; yes, I would"; but then added (Tr. 360–61):

> I would certainly want to evaluate it and look at all the—you know, at that point is when I start asking the questions you all have been asking me up to now, how much money will be paid, am I going to be able to survive on whatever we are able to work out, what kind of financial terms are we going to be able to arrange, how do the pro formas look, do the sales look like we are going to be able to pay back the loan, does it look like it is going to be a profitable deal for me. I mean those are the kind of—at that point is when I start—we start talking about what are the relevant issues.

49. Subsequent to the reporting of Mr. Lopez' role in Alamo he responded to the invitation of a Mr. Gary Munson and became involved in an applicant for an FM station in Lockhart, Texas (Tr. 316–17). This application, which was filed by Texas Professional Communications in August 1981, reported Mr. Lopez as a 15% stock participant (Tr. 324; 327–28); as proposed vice-president and general manager of the FM station (Tr. 328); as proposing to establish residence in Lockhart, Texas upon grant of this application (Tr. 332); and as proposing to join the local Lockhart Chamber of Commerce and other civic groups (Tr. 332–35). Further, Mr. Lopez apparently initiated the $900,000 loan request from Frost National Bank. Mr. Lopez got involved in the Lockhart deal because he "was just trying to create options" (Tr. 319). According to Lopez, if the Lockhart grant comes prior to a grant to Alamo, "I would take a look at it and if it looks like a good deal, I will go after the Lockhart deal, but subsequent to that, if the Alamo deal presented itself, even after Lockhart, I would pursue that Alamo deal . . ." (Tr. 335–36).

James W. Myart, Jr.

50. James W. Myart, Jr. has subscribed to 1,500 shares of Alamo, 3% of the total amount of stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, he proposes to devote at least 40 hours per week to his duties as promotion manager for the station (Alamo Exh. 2(e)). He has never worked in such capacity at a broadcast station (Tr. 478).

51. Mr. Myart, a Black citizen, has resided in San Antonio since his birth on October 4, 1954. Mr. Myart is currently employed as director for the Department of Motor Vehicle Registration, Bexar County, San Antonio, Texas (Alamo Exh. 2(e)).

52. Mr. Myart has participated in the following civic and local activities in the San Antonio area (*Id.*):

> Superintendent, Second Cumberland Presbyterian Church Sunday School, 1975-present.
>
> Member, United Negro College Fund, Executive Board, 1978-present.

Member, Leadership San Antonio Steering Committee, 1978-present.
Member, KLRN Community Advisory Committee, 1981-present.
Chairman, San Antonio Voter Registration and Awareness Program, 1977-present.
Chairman, Political Action Committee for Black Concerns, San Antonio, 1981-present.
Member, Carver Restoration Committee, San Antonio, 1976–77.
Member, Washington Workshops Advisory Committee, Washington, D.C., 1972-present.
Member, Mayor's Eastside Advisory Committee, 1980-present.
Member, Mayor's Committee on Neighborhoods, 1981-present.
Member, Mayor's Prayer Breakfast Committee, 1981-present.
Member, Mayor's Commission on Southern Sector Economic Development

53. Myart was first contacted about joining Alamo in late 1978 or early 1979 by Seth Newberger and about two months later met with Newberger and Herbert Davis in the latter's offices (Tr. 466–68). Myart learned that Newberger was an investor and that Davis was essentially engaged in an effort to reconstitute a prior Channel 29 venture (Tr. 495–96). Although Myart decided to participate, he was not actually brought into the corporation until May 1981 (Tr. 474). Mr. Myart is neither an officer nor a director of Alamo (Tr. 470, 476–77, 479–80). He does not know why he was not made an officer or director (Tr. 479). Mr. Myart has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 293, 516, 953). His stock acquisition of $37,000 is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 472, 500–01). Mr. Myart has never worked at a broadcast station before and he does not claim any past broadcast experience (Tr. 485).

54. At Mr. Reynaldo Lopez' invitation, Mr. Myart became involved as a principal in an application for a new FM station in Lockhart, Texas (Tr. 509, 511). Mr. Myart is proposed as a 5% stockholder (50 shares), serving full time in a management-level position (Tr. 510–11). The Lockhart application proposed that Myart would "join the local Lockhart Chamber of Commerce and other civic groups" (Lockhart 301 application, Ex. IV-H). Myart is maintaining his involvement in the Lockhart application as an option and that if the Lockhart application is granted before any action on Alamo, he would probably go to work for Lockhart though his total commitment is to Alamo (Tr. 511, 516).

Jo Long—Integration

55. Jo Long is a vice-president of Alamo. She has subscribed to 1,000 shares of its stock, 2% of the stock to be issued. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas,

she proposes to devote at least 40 hours per week to her duties as community and cultural affairs director for the station (Alamo Exh. 2(f)).

56. Ms. Long, a Black citizen, has resided in San Antonio since 1976. She is currently employed as a free-lance consultant in arts administration. She also served as a panelist on the National Endowment for the Arts until 1982. From 1976–79 she was employed as the director of the Carver Community Cultural Center. In that capacity, she produced and negotiated contracts for programs in the performing and visual arts (*Id.*).

57. Ms. Long has participated in the following civic activities in the San Antonio area (*Id.*):

Executive Committee, United Negro College Fund, 1976–77.
Board of Directors, Alamo Branch YWCA, 1976.
Member, Pine Street YWCA, 1977.
Board of Directors, Metropolitan YWCA, 1977–78.
Board of Directors, River City Media Center, 1978-present.
Advisory Board, San Antonio Ballet Company, 1977–78.
Member, Mexican American Cultural Center "One City-Many Cultures" Advisory Board, 1979–80.
Board of Directors, Cameo Cabaret Players, 1980-present.
Member, National Hook-Up of Black Women, Inc., 1981-present.
Member, Political Action Committee for Black Concerns, 1981-present.
Advisory Review Panel, Arts Council of San Antonio, 1976.
Senator Glenn Kothmann Legislative Advisory Committee, 1981-present.
Board of Directors, Symphony Society of San Antonio, 1979-present.
Opera Study Committee, 1980.
Public Relations Committee, 1981-present.
Commissioner, Fine Arts Commission, 1980-present. Conducted interviews to document the contributions of Black women in San Antonio from 1900–1950 as a special project for the National Council for Negro Women, 1980.
Fine Arts School Advisory Committee, University of Texas at San Antonio, 1979-present.
Texas Commission on the Arts, 1979-present.
Music Advisory Panel, 1979–80.
Elementary Secondary Act Advisory Panel, 1977-present.

58. Long was first contacted about the Alamo application by James Myart in late 1979 (Tr. 375). A couple of weeks later she met with Herbert Davis, Seth Newberger and Myart to discuss the matter (Tr. 375, 378). However, it was not until a meeting in Herbert Davis' office in May 1981, that she was told what the price per share would be, and that Paris Schindler had arranged financing for her

stock subscription (Tr. 381–82). Two or three days later Long decided to subscribe (Tr. 383).

59. Long did not see any portion of the application prior to signing her subscription agreement (Tr. 387). Although she was made a vice-president and a member of the Board of Directors, she was not asked for her consent or even advised of the matter beforehand (Tr. 383–84). She was told that she had been made a director on the day she signed the stock subscription agreement, i.e., May 12, 1981 (Tr. 403–04).

60. Ms. Long has paid no money to Alamo to date and is not required to contribute any money unless and until Alamo's construction permit is granted (Tr. 293, 393, 953). Her stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris and Sherry Schindler (Tr. 393, 406). Ms. Long has never previously worked at a broadcast station and she does not claim any past broadcast experience (Tr. 388).

Franklin D. Collins—Integration

61. Franklin D. Collins has subscribed to 1,000 shares of Alamo, 2% of the total stock to be issued. If Alamo is granted a construction permit for Channel 29, San Antonio, Texas, he proposes to devote at least 40 hours per week to his duties as news manager of the station (Alamo Exh. 2(g)).

62. Mr. Collins, a Black citizen, has resided in San Antonio since 1964.

63. Mr. Collins has participated in the following civic activities in the San Antonio area (*Id.*):

Board of Directors, Alamo Branch, YMCA, 1965–66.
Board of Directors, Metropolitan YMCA, 1966–70.
Board of Directors, NAACP of San Antonio, 1965–81.
Board of Directors, Urban Coalition of San Antonio, 1968–74.
Board of Directors, San Antonio Press Club, 1965–73.
Board of Directors, United Negro College Fund, 1972–75.
Board of Directors, Economic Opportunities Development Corp., 1968–74.
Vice Chairman, Economic Opportunities Development Corp., 1972–74.
Board of Directors, United Way, 1970–76.
Precinct Committeeman, 1977-present.
Member, San Antonio Radio Broadcasters Association, 1972–76.
Member, National Association of Television & Radio Announcers, 1968–78.
Board of Directors, Alamo Branch YMCA, 1980–81.
Member, Alamo City Chamber of Commerce, 1970–81.

64. Collins was first approached regarding the Alamo application in late 1978 or early 1979 by Newberger (Tr. 410). Although he expressed interest in joining at that meeting, it was not until May

1981 that the specifics of his participation were firmed up and he actually became a stock subscriber (Tr. 414–15).

65. Prior to his subscribing to Alamo stock, Collins was asked to furnish information regarding his background and experience. That request did not seek information on any specific topics and Collins merely supplied Herbert Davis with a resume.

66. Collins had no input into the preparation of the Alamo application, its financal plan, proposed staffing, or ascertainment, and had never seen the complete application (Tr. 444). Although he is the proposed news manager, and had been contacted regarding the application as far back as late 1978 or early 1979, he was not consulted regarding the proposed news staff (Tr. 445).

67. Collins expects to be paid a salary commensurate with that earned by other news managers in San Antonio, which he understands to be in the range of $30,000 to $50,000 (Tr. 423–26). However, while his commitment to Alamo is contingent on a favorable salary, he has reached no agreement with the Schindlers in that respect (Tr. 423, 427).

68. Mr. Collins has paid no money to Alamo to date and is not required to contribute any money until Alamo's construction permit is granted (Tr. 293, 443, 953). His stock acquisition is being financed entirely through a bank loan arranged and guaranteed by Paris Schindler and his sister (Tr. 415–16, 451–52).

69. Paris Schindler acknowledged that "the minorities" had no role in preparation of the application and that he and his sister would absorb all the expenses if Alamo is not awarded the construction permit (Tr. 943–44, 958).

70. Prior to the hearing, neither Lopez, Myart, Long nor Collins had ever seen the May 12, 1981 Memorandum of Agreement (Tr. 935). Paris Schindler had not shown the Memorandum to the minority stockholders because he did not want them to know that he and his sister were prepared to fully guarantee their loans (Tr. 937–38).

71. Alamo has no interest in any broadcasting station, cable television system, newspaper or other medium of mass communications other than its pending application for Channel 29, San Antonio, Texas (Alamo Exh. 3).

72. Individual shareholders of Alamo have the following other broadcast interests (*Id.*):

Licensee	*Paris R. Schindler*	*Sheery L. Schindler*
Fayette Broadcasting Corp.	16% ownership	16% ownership
KVLG, KMUZ(FM)	Vice-President	Vice-President
La Grange, Texas	Director	Director
Ozark Television Co.	15% ownership	15% ownership
KLMN(TV)	Vice-President	Vice-President
Fort Smith, Arkansas	Director	Director

Licensee	*Paris R. Schindler*	*Sheery L. Schindler*
Dogwood Broadcasting Corp. Permittee Channel 19 Nacogdoches, Texas	5% ownership Vice-President Director	
Sage Broadcasting Corp. Permittee Channel 6 San Angelo, Texas	5% ownership Vice-President Director	

73. If Alamo is granted the construction permit for Channel 29, San Antonio, Texas, Paris and Sherry Schindler will divest their interests in and resign all positions with the above-referenced companies, prior to the issuance of program test authority (*Id.*).

74. Reynaldo Lopez, a 2% Alamo shareholder, owns less than 1% of the stock of Nuestro Graphico, Inc., which owns approximately 51% of Nuestro Publications, Inc. Nuestro Publications, Inc. which is based in New York City, publishes *Nuestro Magazine* ten times a year. *Nuestro* is oriented towards a Hispanic audience (*Id.*).

Christian Tele-Communications, Inc.

75. CTI is a non-profit, non-stock Texas corporation.[4] Its only business is the prosecution of its application for a construction permit for Channel 29, San Antonio, Texas (CTI Exh. 1). At the time of the hearing, CTI was comprised of the following:

Name	*Office*	*Director*
Allen Ray Randolph	President	Yes
Kathleen Anne Ryan[5]	Treasurer	Yes
Elmer Leroy Hembrea	Secretary	Yes

76. CTI was incorporated on May 15, 1978 (Alamo Exh. 8). Its original Articles of Incorporation stated that the corporation was formed, *inter alia*, "to communicate the Gospel of Jesus Christ through various forms of media communications." (*Id.* at Art. 4) It was organized as a member corporation, with membership "limited to Christian citizens of the United States who have a bonafide interest in the attainment of the purposes set forth" in the Articles (*Id.* at Art. 5). The incorporators and original members of CTI's Board of Directors were Allen Randolph, Richard McPherson, and Elmer Hembree (*Id.* at Art. 7 and 8).

77. Slightly over one month later, CTI amended its Articles of Incorporation (Alamo Exh. 6). The restated Articles provided that the corporation "is organized as a non-profit religious corporation for

[4] As will be discussed *infra*, CTI has now been incorporated as a Delaware corporation with only two directors.

[5] As will be discussed later, Ryan resigned from CTI after the hearing.

the purpose of bringing glory to Almighty God by disseminating the Gospel of Jesus Christ and the other truths of the Holy Bible by whatever means possible . . . and for no other purpose." (*Id.* at p. 3) The revised Articles also changed the corporation from a membership to a non-member non-profit corporation (*Id.* at Art. 5).

78. CTI changed from a member to a non-member corporation at the suggestion of its Washington communications counsel. Mr. Randolph had forwarded communications counsel a copy of the original Articles and counsel had indicated that the corporation should be a non-member rather than member corporation (Tr. 768–70).

79. Neither Allen Randolph nor Elmer Hembree can recall why the Board decided to change from a member to a non-member corporation, although both were members of the Board when the change was made and testified that they recall discussing it (Tr. 643–50, 699–700, 770–71). Mr. Randolph does not recall asking why the change should be made until after his deposition in January 1982. According to Mr. Randolph, he does not know the difference between a member and non-member corporation or the significance of a non-member corporation (Tr. 770–71). Mr. Hembree recalls that the change was made about the same time that he was advised by counsel that his commitment to work full time at the station would benefit the application (Tr. 660–62).

80. The revised Articles also substituted Kathleen Ryan for Richard McPherson who was originally one of three directors (Alamo Exh. 6, Art. 8). The Board had discovered that Mr. McPherson was a Canadian citizen, and that his presence on the Board would prevent CTI from obtaining a television station license (Tr. 585).

81. CTI's Board is self-perpetuating (Tr. 575). Directors are elected for two-year terms by a majority of the other directors, and may be re-elected without limitation. Directors may be removed with or without cause by a majority vote of the directors. The number of directors on the Board may also be increased or decreased by a majority vote of the Board members. Directors may resign, provided that such removal or resignation would not be effective without prior FCC approval if such removal or resignation would result in transfer of control, as defined by the FCC (CTI Exh. 1; Tr. 575–76).

82. CTI originally proposed to integrate all of its directors into the full time management of its proposed Channel 29 facility (CTI Exh. 11, p. 1). In this connection, it was proposed in the application that Allen Randolph, CTI's president, would serve as program director of the station (Tr. 604).[6] In its written direct case, however, CTI stated that Mr. Randolph is to serve full time as general

[6] The response to question 27 merely recited that the three directors would work full time at the station in management roles. Elsewhere in the application, it was stated that Randolph would be program manager.

manager and program director (CTI Exh. 2). CTI intends to hire a person experienced in broadcasting as station manager to assist Mr. Randolph, and as soon as feasible will hire an experienced program director who will work under Mr. Randolph's direction and supervision (*Id.*).

83. Mr. Randolph is a white male (CTI Exh. 3). He presently resides in Hollywood Park, a separately incorporated suburb of San Antonio, but well within CTI's proposed city grade coverage. His residence is within the San Antonio postal district (Tr. 571–72; 604).

84. Mr. Randolph is a U.S. citizen born in Carbondale, Illinois on July 18, 1942 and has been a resident of San Antonio since July 1975. Mr. Randolph is married and has two children (CTI Exh. 3, p. 1). He was educated through all grade school levels in Granite City, Illinois. He attended Bethany Bible College, Santa Cruz, California, from September 1960 through May 1963, returning in 1966 to graduate with a Bachelor of Science degree (CTI Exh. 3, pp. 1–2). Mr. Randolph has spent most of his professional career in church service. He began his pastorship at Trinity Assembly Church in San Antonio in July 1975, and is currently senior pastor there. He also served as pastor at City Temple in Grant City, Illinois (September 1963 to January 1966) and at Faith Temple in San Jose, California (January 1966 to July 1975). (*Id.*)

85. Mr. Randolph has been on the Board of Directors from 1979 to 1981 of Teen Challenge (San Antonio), which is a drug abuse program. He presently serves on the board of Bexar County Detention Ministries, which provides and oversees the chaplaincy program for the Bexar County Jail. (*Id.*)

Elmer Leroy Hembree

86. Elmer Leroy Hembree, CTI's secretary and director, is proposed as the full time business manager of the station. In this capacity, Mr. Hembree will be responsible for establishing and supervising the station's business and accounting procedures and practices. Mr. Hembree described his responsibilities as business manager to include preparing policies and procedures as well as carrying on the "day-to-day operations of [the station] in the business area" (Tr. 624). Initially, he will not have a staff, but eventually will have someone to handle the nitty-gritty pencil and paper work through he will continue to supervise all business activities and be involved in the day-to-day operations as well (Tr. 625–26). Mr. Hembree was involved in preparing the application, conducted ascertainment, has attended all official board meetings of CTI and has contributed his own personal funds to help finance CTI's application (Tr. 629, 656, 663).

87. Elmer Leroy Hembree is a white male (*Id.*). Mr. Hembree resides in an unincorporated area of Bexar County which is within

the San Antonio postal district and well within CTI's proposed city grade coverage contour (Tr. 614, 715–16).

88. Mr. Hembree's education includes a two-year attendance at San Antonio College, majoring in business administration; one year at DeVry Technical Institute, majoring in electronics; and a one-year Bible seminar, majoring in theology. Mr. Hembree has also attended a number of military schools, primarily to enlarge upon his knowledge and skills in business administration.

89. Mr. Hembree served in the United States Air Force for 20 years, retiring as an E-8. His awards and decorations include: Korean Service Medal, United States Service Medal; National Defense Service Medal; Distinguished Service Medal; Good Conduct and Oak Leaf Clusters Commentation Medal.

90. Mr. Hembree has spent most of his professional career in business management. Between 1971 and 1976 he served as business manager at two corporations where he established and supervised operating policies and administrative functions. During this period, for approximately two years, he also was employed as assistant director for retail operations, where he established operating policies for four retail stores and managed a staff of 18. Mr. Hembree is currently employed as manager of nonproduction purchasing for the Datapoint Corporation, where he coordinates and supervises the purchase of all nonproduction goods and services. The annual purchase volume of the corporation approximates $15–20 million (Tr. 628–29).

Kathleen A. Ryan

91. Mrs. Kathleen A. Ryan was CTI's proposed public relations and sales director. She is a U.S. citizen, born in McAllen, Texas on April 17, 1938, and has been a resident of the San Antonio area for approximately 22 years. She presently resides at 319 Yosemite Drive, Hollywood Park, Texas, a separately incorporated suburb of San Antonio which is within the San Antonio postal district and well within the proposed station's service contours (Tr. 728, 763–64; CTI Exh. 3, p. 5). She unequivocally expressed her commitment to work at CTI's proposed station:

> I have always been committed to working at the station and I honestly don't know whether or not that's a requirement. I just simply have always been committed to doing that. I have a deep concern about this station and there's never been any question that I would be working (Tr. 737).

92. On February 9, 1982—just 11 days after giving the above testimony—Ryan addressed a letter to Randolph in which she stated:

> Please accept my resignation from the Board of Directors of Christian Tele-Communications. Also, the genuine commitment I have had to be an employee at Channel 29 should Christian Tele-

Communications be awarded that station can no longer be maintained.

I will be awaiting a written statement acknowledging my resignation as soon as possible. On March 2, 1982, counsel for CTI transmitted the letter of resignation to the Presiding Judge and the other parties and represented that an amendment reflecting Ryan's withdrawal would be filed in the very near future.[7] On April 9, 1982, CTI filed a petition for leave to amend seeking to reflect, *inter alia*, that Ryan had withdrawn, that Hembree had acquired Ryan's duties as treasurer and that, CTI was reincorporated as a Delaware corporation with only Randolph and Hembree as directors. The amendment was accepted for reporting purposes pursuant to Order of the Presiding Judge released May 3, 1982.

Relationship Between CTI and Trinity Church

93. All three of the incorporators and original directors of CTI were members of the Board of Elders of Trinity Church and the address of CTI and its registered office is at Trinity Church (Tr. 572, 615, 638–39, 641, 702–03). The present directors of CTI are all church members. Trinity Church is located in San Antonio and has six members of its Board of Elders, the governing body of the church (Tr. 639). It has a congregation of approximately 1,500 adults, 700–750 members, and a staff of 17 (CTI Exh. 3; Tr. 600–02). Trinity Church is a membership corporation (Tr. 771).

94. Trinity Church is providing the financial backing for CTI. The church has obtained a $1 million bank loan commitment for CTI, to be collateralized by a mortgage on church property located at 8750 Fourwinds Drive in San Antonio. Trinity Church will also make a direct loan to CTI of $50,000. Trinity Church will not require any collateral for its loan to CTI, nor will Trinity Church require repayment if it would adversely affect CTI (Tr. 657–58). Thus far, most of CTI's funds ($50,000–$100,000) have come directly from Trinity Church. The remainder of the funds have come from donations by individual members of Trinity Church (Tr. 657–59, 753–57, 771–72).

95. The members of the church vote on important matters that the church plans to undertake—in fact, frequently so (Tr. 739). Thus, the church's decision to mortgage its property for the $1 million bank loan to CTI and to loan $50,000 to the applicant (funds which have now amounted to $50,000 to $100,000) was taken following a presentation by Randolph in a meeting of the church members and a vote by that body (Tr. 659, 754).

[7] Because Ryan has withdrawn from CTI and will not be integrated, biographical data relating to her has not been included in the findings.

96. According to Hembree, the church committed itself to mortgage its property (Tr. 659):

> Because of the involvement of the church in the community. They felt that would be the best way to accomplish what they had in mind through something of that nature to endorse a christian television station within the city of San Antonio.

Hembree believes that CTI's "main goal" is to disseminate Christianity (Tr. 642–43).

97. Allen Randolph, CTI's president and a director, is senior pastor of Trinity Church, and the leader of its Board of Elders, the church's managing body (CTI Exh. 3; Tr. 572). Allen Randolph intends to continue to serve as pastor of Trinity Church in the event CTI is granted Channel 29, notwithstanding his plans to work full time as the station's general manager. CTI will not initially pay Mr. Randolph. Rather, he will continue to receive a salary from Trinity Church. According to Mr. Randolph, CTI's directors (not Trinity Church's) will determine if it is necessary for Trinity Church to continue to compensate him or whether such compensation should come from CTI (Tr. 573–74).

98. As noted, all of the current directors are members of Trinity Church. Indeed, Mrs. Ryan was employed by the church until recently as director of women's ministries (Tr. 615, 727–28). Moreover, all of the management employees initially proposed by CTI were church members; many were also church assistant pastors, staff members, or members of the church's Board of Elders (Tr. 633–38, 736, 741).

99. Officers and staff of Trinity Church continue to play a role in the management and operations of CTI. Asked about the relationship between CTI and Trinity Church, Allen Randolph responded: "I'm a major part of that relationship, sir, as having been pastor of Trinity Church and for the facilitating of much of this the staff that is available to me have been involved" (Tr. 587–88).

100. Richard McPherson, who was an incorporator and original director of CTI and was proposed for a management position, is associate pastor of Trinity Church, second in command behind Mr. Randolph (Tr. 585, 587–88, 605). Notwithstanding his withdrawal from CTI, he continues to perform services for CTI. Together with Allen Randolph, he negotiated and prepared the air-time contracts between CTI and various religious broadcasters that are a part of CTI's application (Tr. 585–87). Kathleen Ryan, on the other hand, has not participated at all in the negotiation of those contracts notwithstanding that she is a director of CTI and the station's proposed sales director (Tr. 743, 751; CTI Exh. 2). According to Mr. Randolph, "RicK McPherson participates in a great deal of things I do and has responsibility for those" (Tr. 587).

101. Beverly Hime, who is secretary/treasurer of Trinity Church, is one of only two people authorized to sign checks on CTI's

account. The other person is Allen Randolph. Ms. Hime, however, is not an officer, director, employee or proposed employee of CTI (Tr. 575, 657, 676, 745), Kathleen Ryan, who has been the treasurer of CTI since 1978, is not, on the other hand, authorized to sign checks for CTI. While she knew that CTI had a checking account, when asked at what bank she replied: "I realize being treasurer that may seem strange. I really don't know" (Tr. 748).

102. Although Mrs. Ryan was previously CTI's treasurer, she did not keep the corporation's books and records and is not authorized to sign checks on CTI's account. These jobs are performed by Beverly Hime, an officer and employee of Trinity Church, even though Mrs. Ryan does not recall the Board ever authorizing her to do so (Tr. 728, 747, 749–51).

103. According to Mr. Randolph, there is no understanding that Board members of CTI must work at the station (Tr. 576–79). However, both Mr. Hembree and Mrs. Ryan were originally told that all Board members were required to work at the station (Tr. 620–21, 639–40, 716, 730–31, 733). CTI, has, however, no requirement in its Articles of Incorporation or its By-laws requiring directors to work at CTI's proposed station (Tr. 576–79).

104. Besides its application for Channel 29, CTI has on file two applications for low power television stations in San Antonio on Channel 2 and 54 (CTI Exh. 1, p. 1). It has proposed to dispose of any licenses it receives for these facilities, but only if required to do so by the multiple ownership rules (*Id.*).

105. As specified in its amendment of May 15, 1981, CTI proposes to equip its transmitter site with an emergency power source. This would consist of a Caterpiller 500 kilowatt generator with a tank holding enough fuel for several days of operation. This generator would have sufficient power capacity to operate the transmitter at its full rated output. Thus, in the event of a power failure at the transmitter site, service to the public would not be interrupted.

United Television Broadcasting Corporation (United)

106. The applicant, United, is a Texas corporation, authorized to issue 5,000 shares of stock, each share of stock having one vote; 1,200 shares are issued and outstanding (United Exh. 1, p. 2). United is structured as follows (United Exh. 1, pp. 2, 3):

	Name and Resident	*Nature of Interest*	*Board of Directors*	*% of Ownership*
a)	Gene W Schneider[a] Englewood, Colorado	Chairman of Board	Yes	—

[a] Gene W. Schneider is the president and member of Board of Directors of United Cable Television Corporation (United Exh. 2, p. 2).

	Name and Resident	*Nature of Interest*	*Board of Directors*	*% of Ownership*
b)	Bob A. Roth 207 Thelma Drive San Antonio, Texas	President	Yes	6.6%
c)	James M. Golden Englewood, Colorado	Secretary	Yes	—
d)	William J. Elsner Denver, Colorado	Treasurer	Yes	—
e)	Harold M. Scherr 606 Crestway San Antonio, Texas	—	Yes	6.6%
f)	Thomas E. Beatty Helotes, Texas	—	Yes	0.2%
g)	Herbert D. Kelleher 144 Thelma Drive San Antonio, Texas	—	—	6.6%
h)	United Cable Television Corporation Denver, Colorado	—	—	80%

107. When United filed its application on July 6, 1978, it did not specify the number of shares or ownership percentages held by the various San Antonio stockholders (Roth, Scherr, Beatty, and Kelleher). Instead it said that "[t]he precise percentage of each in this group is to be determined" (United Exh. 1). United's Exhibit 1 states:

> In the latter part of October 1981, it was tentatively agreed among the San Antonio group that the 20% (240 shares) held by that group will be allocated between them as follows: Messrs. Roth, Scherr and Kelleher, 6.6% each, and Mr. Beatty, 0.2% —total 20%. Inclusive of the date of this exhibit, United Television Broadcasting Corporation has not tendered with the Commission an amendment to its application (File No. BPCT-5248) specifying the within-referenced precise percentages of stock allocated among Messrs. Roth, Scherr, Kelleher and Beatty.

108. *Bob A. Roth* is the only principal of United proposed to be integrated into the operation of the proposed station on Channel 29 at San Antonio, Texas. Mr. Roth will be the general manager and devote full time to the operaion of the station (Tr. 808). His duties will include those general, supervisory aspects of all station operations, inclusive of finances, personnel, programming and public relations (United Exh. 4, p. 6). It was understood from the beginning that Mr. Roth would be the president and general manager, with responsibilities for the construction and operation of the station (Tr. 805).

109. *Harold M. Scherr* was born on April 10, 1923, in New Orleans, Louisiana. He resides at 606 Crestway, San Antonio, Texas (United Exh. 5, p. 2).

110. *Thomas E. Beatty*, a Black, was born on July 10, 1924, in Boston, Massachusetts. He presently resides with his family in an unincorporated suburb of San Antonio (United Exh. 6, p. 2).

111. *Herbert D. Kelleher* was born on March 12, 1931, in Camden, New Jersey (United Exh. 7, p. 2). He resides at 144 Thelma Drive, San Antonio, Texas (United Exh. 1, p. 2).

112. *Bob A. Roth* was born on July 17, 1922 in San Antonio, Texas. He attended public schools in San Antonio. Following high school, Mr. Roth entered Texas A & M University, majoring in Economics and Business in the School of Liberal Arts. He was called to active duty during World War II, serving in the South Pacific Theatre. After his discharge, Mr. Roth returned to Texas A & M University and obtained his degree in June 1946 (United Exh. 4, p. 2).

113. Mr. Roth entered the broadcast business in 1946 at Station KONO as a commissioned time salesman and soon became commercial manager of the station. In 1953, he received the Radio Advertising Bureau Outstanding Salesman Award. Thereafter, he started acquiring stock in Station KONO (Mission Broadcasting), a station built and organized by his father, Eugene J. Roth (United Exh. 4, p. 3).

114. At this time, television came along, and Mr. Roth organized a group of investors, including the Roth family, to apply for Channel 12 in San Antonio. A construction permit was granted to Mission Telecasting, in which Mr. Roth was president and commercial manager. The station began broadcasting in January 1957, as Station KONO-TV. In 1968, because of family illness, Mr. Roth negotiated the sale of Station KONO-TV to the Outlet Company, and his interest in KONO radio to his brother, Jack Roth (United Exh. 4, p. 4).

115. Mr. Roth is a member of the Board of the San Antonio Chamber of Commerce, and was a member of the Executive Committee for eleven consecutive years, holding the offices of treasurer, vice-president, and president during 1966–67 (United Exh. 4, p. 4). He was a founding member of the Board of the Ecumenical Center for Religion and Health from 1967–74. He served on the Board of Temple Beth-El (San Antonio Reform Jewish Synagogue) for several years, and served as president of the congregation from 1961–63 (United Exh. 4, p. 4).

116. In 1950, Mr. Roth served as president of the San Antonio Executive Association. He served as an Urban Renewal Commissioner for the City of San Antonio from 1966–73. He was vice chairman of the San Antonio Bicentennial Committee in 1973. He was a member of the Executive Committee of Hemisfair 1968, the World's

Fair in San Antonio. He was a member of the Board of Directors of United Way from 1952–58, and has been active to the present as chairman of various United Way campaign divisions. In 1958, Mr. Roth was chairman of the Citizens' Building Committee of the Northeast Independent School District (United Exh. 4, p. 5).

117. Mr. Roth has also served on several boards in San Antonio. In 1957–58, he was elected governor of the 10th district, Advertising Federation of America (United Exh. 4, p. 5).

118. Other professional offices that Bob Roth has held include: president of the San Antonio Advertising Club; member of the National Board of the Advertising Federation of America for two terms; vice chairman of the Council of Advertising Clubs; and vice-president of the Advertising Federation of America (United Exh. 4, p. 6).

119. Mr. Roth has received approximately five awards and honors including the General Federation of Women's Clubs Award to a Broadcaster for his Attitude of Responsibility and Service to the Community; the National Police Officers' Association award for the Improvement of Law Enforcement, resulting from an editorial on the Police Department; and a citation from the mayor of San Antonio in recognition of his services on the Committee for Desegregation (United Exh. 4, pp. 5,6).

120. United has no media interests other than the application (File No. BPCT-5248) for a construction permit for Channel 29 at San Antonio, Texas. No officer or director or stockholder of United has any ownership interest in any operational broadcast facility or related construction permit, newspaper or other publication, other than Bob A. Roth, who is a member of the Board of Directors and executive Committee and chairman-elect of Southwest Texas Public Broadcasting Council, licensee of educational television Stations KLRN, San Antonio, and KLRU-TV, Austin, Texas (United Exh. 3, p. 2).

121. The Board of Directors of Southwest Texas Public Broadcasting Council presently consists of 56 members, but is phasing down to an ultimate goal of 28 members (Tr. 802). Mr. Roth's interest in these educational stations is that of any public spirited citizen who wants to see these stations operate successfully (Tr. 801). As a member of the board and executive committee of the council, he wrestles with all of the problems evolving around raising the money to keep the stations on the air (Tr. 802). He does not manage the stations; there is a paid manager (Tr. 802). His term with the council expires on September 1, 1983, and he has no intention to seek or accept a further appointment (Tr. 821).

122. United Cable is a public corporation engaged primarily in the ownership and operation of cable systems throughout the United States. It owns and operates 37 systems serving communities in 16 states with over 450,000 subscribers (United Exh. 3). United owns

and operates the following cable systems in the State of Texas (United Exh.3-A):

Community	*No. Subscribers*
Abilene, Texas	24,970
Anson, Texas	(see Abilene, Texas)
Hamlin, Texas	(see Abilene, Texas)
Jacksonville, Texas	(see Tyler, Texas)
Perryton, Texas	2,983
Rotan, Texas	(see Abilene, Texas)
Sweetwater, Texas	6,605
Tyler, Texas	30,325

123. On January 5, 1982, United Cable Television Corporation and Buford Television, Inc. entered into a letter of intent entitling United Cable Television Corporation to acquire up to 80% interest in Home Entertainment Network, Inc. (HEN). HEN operates STV systems in the Cincinnati and Dayton, Ohio, and Chicago, Illinois television markets, and expects to commence an STV operation in the Minneapolis-St. Paul, Minnesota area during 1982 (United Exh. 3, pp. 2, 3). On February 12, 1982, the transaction was consummated, whereby United Cable Television Corporation acquired an 80% interest in HEN.

Financial Issue

124. The financial qualifications issue was specified against United Television Broadcasting Corporation because it failed to demonstrate that it had sufficient funds to meet $2,056,916 in estimated construction and operating costs for the first three months. The *Hearing Designation Order*, at paragraph 9, noted that United has relied on an $860,000 bank loan and other funds to be made available to it from its parent corporation. The bank letter did not comply with the requirements of FCC Form 301, Section III, page 3, Item 4(e), in that the letter did not specify the interest rate, repayment terms, or the collateral required. With respect to the funds to be provided by the parent, United submitted documentation that the parent had a $10,500,000 line of credit with a bank. However, it did not appear that the line of credit, or any portion of it, was earmarked for the proposed San Antonio station. Also, United did not submit a balance sheet for the parent which would be required since the line of credit was not earmarked. Finally, United did not submit a copy of the agreement by which the parent is obligated to provide funds. On October 30, 1981, United filed an amendment which set forth a revised financial plan. This amendment was accepted by Order of the Presiding Judge released November 20, 1981. This plan contemplates the lease of equipment

rather than purchase. Thus, United's first three months construction and operation costs would be reduced to $922,769.

125. By letter of October 28, 1981, United Cable Television Corporation (Cable), the parent of United, indicated its willingness to provide $1,000,000 in funds to United at its cost of obtaining such funds (United Exh. 8, p. 5). By letters of October 22, 1981 and November 19, 1981, the First National Bank of Boston indicated its willingness to loan Cable the sum of $1,000,000 which was earmarked for the use of the proposed San Antonio station. This letter further indicated that the funds would come from an existing $125,000,000 line of credit already established by Cable and that such loan would be subject to the customary terms and conditions (United Exh. 8, pp. 6, 7). Also, by letter of October 27, 1981, the Frost National Bank indicated its willingness to loan $200,000 collectively or individually to four of United's local stockholders. The letter clearly spelled out all of the terms and conditions of the proposed loan (United Exh. 8, p. 8). Moreover, Mr. Roth and the other three local stockholders had committed themselves to earmark the $200,000 loan for the proposed San Antonio station (Tr. 818–19). Finally, by letter of October 20, 1981, the Harris Corporation indicated its willingness to provide $1,750,000 in equipment with deferred payments. The letter clearly spelled out all the terms and conditions of the lease arrangement (United Exh. 8, p. 9). Moreover, these terms and conditions are consistent with United's revised financial plan.

Ultimate Findings and Conclusions

126. This proceeding involves four mutually exclusive applicants seeking a construction permit to build a new television station in San Antonio, Texas. With the exception of a financial issue specified against United Television Broadcasting Corporation, all applicants were found basically qualified. Because only basically qualified applicants are entitled to comparative consideration,[9] the financial issue directed against United will be considered and resolved before a comparative evaluation of the competing applicants will be undertaken.

Financial Issue Directed Against United

127. The financial issue was specified against United because of the failure of the applicant to demonstrate sufficient funds to meet anticipated expenses. Originally, the applicant estimated in excess of $2 million in construction and operating costs. As a result of an amendment, which proposes the lease rather than the purchase of

[9] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub nom. Guinan* v. *Federal Communications Commission*, 297 F.2d 782 (1961).

equipment, United's first three months construction and operation costs were reduced to $922,769.

128. United will meet its anticipated costs of construction and operation with a loan from its parent, United Cable Television Corporation, in the amount of $1,000,000. The parent will obtain the $1,000,000 to be made available to United from an existing line of credit in the total amount of $125,000,000. Also, United has $200,000 available from the four local San Antonio stockholders. It, thus, appears that United has demonstrated the availability of $1,200,000 to meet anticipated costs of $922,769 and is financially qualified.

Comparative Evaluation

129. The only basic qualifying issue has been resolved in favor of United and it is now necessary to comparatively evaluate the four applicants contesting for the construction permit at issue in this proceeding. Such evaluation is governed by the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. In that statement, the Commission indicated that there are two primary objectives toward which the process of comparison should be directed: (1) the best practical service to the public; and (2) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

130. In the landmark case of *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court set as a First Amendment objective the maximum possible diffusion of communications facilities. In its *1965 Policy Statement*, the Commission describes diversification of control of the media of mass communications as, "a factor of primary significance". *Id.* at 394. Neither Las Misiones nor any of its principals have any media interests. The same can be said for CTI.[10] Alamo itself has no other media interests, but Paris and Sherry Schindler have several media interests. Specifically, Paris Schindler is 16% owner, vice-president, and director of Fayette Broadcasting Corporation, licensee of KVLG and KMUZ(FM), La Grange, Texas and 15% owner, vice-president and director of Ozark Television Co., KLMN(TV), Fort Smith, Arkansas. He is also 5% owner, a vice-president and director, in Dogwood Broadcasting Corp., permittee of Channel 19, Nacagdoches, Texas and Sage Broadcasting Corp., permittee of Channel 6 in San Angelo, Texas. Sherry Schindler has interests similar to her brother in Fayette Broadcasting Corp. and Ozark Television Co. In the event the construction permit is granted to Alamo, Paris and Sherry Schindler will divest

[10] Mr. Randolph was, until mid January 1982, a director of Friendly Bible Church, Inc. On January 1, 1982, Friendly Bible Church, Inc. acquired an access channel on a CATV system serving San Jose, California (Tr. 568). This interest is not of sufficient magnitude to enter into the comparative aspects of this case.

their interests in and resign all positions with the above-referenced companies, prior to the issuance of program test authority. Another of Alamo's stockholders also has a media interest. Specifically, Reynaldo Lopez owns less than 1% of the stock in a corporation which in turn owns 51% of Nuestro Publications, Inc., publisher of *Nuestro Magazine*. The magazine is published ten times a year out of New York City and is oriented toward a Hispanic audience. Because Lopez's interest in this magazine is remote and *de minimis* in nature, it will not be given weight as a comparative factor in this proceeding.

131. CTI argues that the Schindlers should not be credited with their commitment to divest and that Alamo should be charged with their media interests under the diversification criteria. It is CTI's position that under *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (1978), *aff'd* 86 FCC 2d 423 (1981), a commitment to divest must, *inter alia*, involve a sale to the majority stockholder, promptly upon grant, and such divestment must be a *sine qua non* of financial qualifications. CTI argues that Alamo has not met these conditions and therefore the Schindlers' commitment to divest should not be credited.

132. The Presiding Judge is unpersuaded by the arguments advanced by CTI. In a recent decision, the Review Board fully credited an unequivocal commitment to divest prior to licensing of the new station made by an applicant before designation. *WHW Enterprises, Inc.*, 89 FCC 2d 799 (1982). Here, the Schindlers, prior to the time this case was comparatively "frozen", unequivocally committed themselves to divest their minority broadcast interests in the event of a grant of the Alamo application with such divestiture occurring prior to program test authority.[11] This is sufficient under the Review Board's decision in *WHW Enterprises, Inc.*, cited *supra*, to eliminate from comparative consideration the minority broadcast interests of Paris and Sherry Schindler and CTI's arguments to the contrary are rejected.

133. United is 80% owned by United Cable Television Corporation (United Cable). United Cable owns and operates 37 CATV systems in 16 states which provide service to 450,000 subscribers. Included among United Cable's systems are eight wholly owned systems in Texas that provide service to approximately 65,000 subscribers. In addition, United Cable recently acquired 80% of Home Entertainment Network (HEN) which operates STV systems in the Cincinnati and Dayton, Ohio and Chicago, Illinois television markets and expects to begin an STV operation in the Minneapolis-St. Paul, Minnesota area during 1982. These extensive CATV and STV interests cannot be considered trivial. See *Alexander S. Klein, Jr.*, 86 FCC 2d 423. Such interests place United behind the other

[11] Alamo suggests that divestiture may be made a condition of the grant of the Alamo application.

applicants under the diversification criteria of the comparative issue.[12]

Integration

134. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra*, at 395. Full-time, or almost full-time participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

United

135. Of the four applicants, United proposes the least amount of integration. It proposes to integrate Mr. Roth into the management of its station as the full time general manager. Roth is also an officer and director of United. The difficulty with this proposal is that no precise ownership interest in United was assigned to Mr. Roth prior to the time the comparative cases were frozen. While Mr. Roth is represented to have a 6.6% interest, such interest was not revealed until the exhibits were exchanged and even then it was merely stated that such ownership interest resulted from a "tentative agreement." Indeed, no amendment to the application has ever been filed to reflect the precise ownership interest of Mr. Roth in United.[13] Under these circumstances, United cannot be credited with 6.6% integration credit for Mr. Roth. Such ownership interest for Roth was never reflected in the application, perhaps because it may still be only tentative, and to award ownership and integration credit on the basis of a "tentative agreement" which may or may not

[12] This is more so because United's only integrated stockholder, Mr. Roth, who is an officer and director of United, is also a member of the board of directors and executive committee and chairman-elect of Southwest Texas Public Broadcasting Council, licensee of educational television stations KLRN, San Antonio, and KLRU-TV, Austin, Texas.

[13] Because Roth was proposed as the full time general manager, his precise degree of ownership was a decisionally significant matter. Thus, when his ownership interest was firmed up, an amendment should have been filled.

fix actual ownership would be unfair and prejudicial to the other applicants and unjustified. In any event, even if United was credited with the 6.6% full time integration of Roth as general manager, United would still not be a serious contender for the construction permit at issue in this proceeding under the Commission's comparative criteria because its integration is lower than the other applicants and it has other significant media interests which places it last under the diversification criteria.[14]

Las Misiones

136. Las Misiones proposes to integrate Dr. San Martin into the ownership and management of the station as full time general manager. Dr. Martin is president, director and 12.5% stockholder in Las Misiones. He and the nine other stockholders in Las Misiones are Hispanic-Americans and all are local residents, many of long duration. The integration credit of Dr. Martin is further enhanced because of his long time local residence, his active and long time involvement in local civic activities and organizations in significant capacities and his past broadcast experience. His background, which includes numerous awards for community service, adds great strength to the Las Misiones application. Also, Las Misiones is entitled to some merit for the participation of its eight directors on the Program Policy Committee, not under integration, but because the directors will devote some time to station affairs and this represents minority participation in a broadcast station. See *Midwest Broadcasting Company*, 70 FCC 2d 1489, 1496 (1979).[15]

137. Las Misiones argues that it should be the preferred applicant in this proceeding. In support of this position, Las Misiones states that San Antonio has a 53.5% Hispanic population; that all its stockholders are locally-resident Hispanic-Americans; that significance should be given to minority control *per se*, a criterion the Commission has established in low power cases and for "clear" AM channel filings; that Las Misiones' 100% Hispanic ownership is entitled to a "conclusive preference";[16] that Las Misiones' application should be preferred because its 100% minority-owned proposal would "affirmatively promote diversification".

138. Las Misiones candidly admits that the position it is urging

[14] Mr. Roth, because of his past broadcast experience and long and distinguished service in various organizations in San Antonio, brings great strength to United's application. However, such factors clearly do not overcome the matters previously considered in evaluating United's comparative standing.

[15] It is proposed that the directors will devote 1 day per week, an insufficient amount of time to merit integration credit. See *Midwest Broadcasting Company*, cited *supra*.

[16] Las Misiones argues that it should not here receive less of a preference then it would receive if it applied for a low power station or a previously clear AM channel.

is contrary to Commission policy set forth in *WPIX, Inc.*, 68 FCC 2d 381, 411 (1978) and *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981), that minority ownership-participation should be regarded as a qualitative aspect of integration. However, it is Las Misiones' position that these cases are no longer good law, particularly in light of the Commission's emphasis on minority ownership as expressed in the *Report & Order* in the low power rulemaking proceeding[17] and the AM clear channel proceeding.[18]

139. The position advocated by Las Misiones cannot be adopted. What Las Misiones overlooks is that *WPIX, Inc.* and *Alexander S. Klein, Jr.* have been uniformly followed by the Review Board in recent cases dealing with minority ownership and participation and there is no justification for the Presiding Judge to ignore those cases simply because Las Misiones believes they are no longer good law. Indeed, in *New Continental Broadcasting Co.*, 88 FCC 2d 830 (1981), *recon. denied*; 51 RR 2d 266 (1982), the Review Board rejected arguments quite similar to those advanced here by Las Misiones. Specifically, the Board rejected an argument that an applicant should receive special credit for minority ownership proportionately related to the ethnic composition of the community, 88 FCC 2d 845, n. 17. Thus, Las Misiones is not entitled to special credit because of the high percentage of Hispanics in San Antonio. The Review Board emphasized that "the relevant consideration is not minority ownership *per se*, but rather the extent to which minority owners are integrated into the proposed station's operation".[19] In line with *WPIX, Inc.*, cited *supra*, minority ownership is a factor which qualitatively enhances an integration proposal. *Bradley, Hand and Triplett*, 51 RR 2d 383, 387 (Rev. Bd. 1982). The Presiding Judge is not at liberty to change well established Commission policy on the basis of the arguments advanced by Las Misiones. Clearly minority participation enhances an integration proposal. But where a large difference in the degree of quantitative full time integration exists, qualitative attributes alone cannot overcome quantitative differences. *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (1981); *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (1980). As will be shown, there is a large difference in Las Misiones' integration proposal (12.5% full time) as compared to one or more of the other applicants. Even when Las Misiones is given full qualitative enhancement credit, it still cannot overcome the large difference in quantitative

[17] *Report & Order* in BC Docket 78-253, an *Inquiry into the Future Role of Low Power Television Broadcasting*, FCC 80-107 (released April 26, 1982).

[18] *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345 (1980) *aff'd sub nom Loyole University* v. *FCC*, 80-1824 (D.C. Cir., Jan. 26, 1982).

[19] 88 FCC 2d at 844.

integration existing between its application and one or more of the other applicants.

CTI

140. CTI has undergone a substantial change since completion of the hearing. While CTI argues that it is entitled to 100% integration credit, according to the Review Board's decision in *New Continental Broadcasting Company*, cited *supra*, such credit cannot exceed 66 2/3%. Even more important perhaps, is the argument by the other applicants that CTI is entitled to virtually no integration credit. These matters must be considered in order to properly evaluate the integration credit to which CTI is properly entitled.

141. CTI has proposed to integrate its three directors as full time managerial employees: Allen Randolph, Elmer Hembree and Kathleen Ryan. This was the proposal put forth at the hearing. Thereafter, Kathleen Ryan, who testified as to her commitment to CTI on January 29, 1982, resigned both as a director and an employee on February 9, 1982. Thus, in keeping with the Review Board's decision in *New Continental Broadcasting Company*, cited *supra*, CTI can, at most, be credited with only 66 2/3% integration and CTI's claim of 100% integration credit on the basis of a reconstituted Delaware corporation with only two directors is rejected.[20]

142. It is clear from the foregoing that CTI's claim for integration credit is predicated on its argument that the directors of CTI are the sole "owners" of the applicant for purposes of assigning integration credit. However, the *de jure* aspects of CTI's corporate organization cannot be blindly accepted at face value. In line with *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (1977),[21] an

[20] See *Memorandum Opinion and Order* of the Presiding Judge released May 3, 1982 accepting CTI's amendment reporting the resignation of Ryan and the reconstitution of CTI as a Delaware, rather than a Texas corporation. Such amendment was accepted for Section 1.65 purposes only.

[21] In *Henderson Broadcasting Co., Inc.*, one of the applicants, BMC, had two classes of stock, Class A (non-voting) and Class B (voting), and two stock-holders, Rogers and Hilgenberg. Hilgenberg was the proposed general manager; Rogers was not to be integrated. After all subscribed shares had been issued, Hilgenberg was to own all of the Class B voting stock, 25 shares and 1 share of Class A non-voting stock. Rogers would own 450 shares of Class A non-voting stock, and no voting stock. BMC argued for 100% integration credit on the basis of Hilgenberg's ownership of all of the voting stock. The Administrative Law Judge credited BMC with only 5.46% integration, which was Hilgenberg's interest in the corporation if the voting and non-voting stock were combined. The Judge rejected BMC's 100% integration argument, concluding that Rogers controlled BMC. Of critical significance, the Judge found, was that Rogers was virtually the sole financial investor and the only one authorized to draw upon BMC's bank account. "Thus, he ha[d] complete control of the purse strings of the applicant, and through this means [would] have complete veto power over Mr. Hilgenberg's action as proposed general manager". The Review Board agreed with the Judge's analysis

examination of the relationship between CTI and Trinity Church must be undertaken to determine whether, for integration purposes, CTI can be considered an entity separate and distinct from the church itself with its "ownership" limited to its directors. While CTI may be a separate legal entity, the findings discussed below firmly supports the conclusion that CTI is, in reality, nothing more than the broadcasting subsidiary of Trinity Church and CTI and Trinity Church must be treated as one and the same for evaluating and assigning integration credit.

143. CTI was organized in 1978 by members of the Board of Elders of Trinity Assembly Church of San Antonio. The purposes and objectives of Trinity Church and CTI are the same. Originally a member corporation, CTI was changed to a non-member corporation expressly on the advice of its Washington communications counsel. The church and CTI have the same address. The pastor of Trinity Church is the president of CTI and the proposed general manager of the station. All directors of CTI are members of Trinity Church. The church has made between $50,000 and $100,000 available to CTI for its application and has agreed to make church property available as collateral for a $1 million bank loan to finance construction and

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and applauded the refusal to accept the mechanical and automatic *de jure* evaluation of ownership urged by BMC in the determination of the credit which should be accorded BMC on the integration criterion. But the Board concluded, using an "alternative approach", that Rogers should be considered the sole owner of BMC and that BMC should be accorded no integration credit.

As a basis for its analysis, the Board explained:

> there is a well-established principle of law, known as the corporate fiction - alter ego doctrine, that all *de jure* aspects of a corporate organization must be disregarded when failure to do so would enable the corporate device, particularly in an administrative proceeding, to circumvent the public interest, cause unfairness, or perpetrate inequities, and that in such circumstances the stockholders may be treated as if the corporation did not exist.

The Board stated that "venality does not constitute a prerequisite to invoke the corporate fiction - alter ego doctrine". Rather, the Board held that there are "two sole prerequisites":

> (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and
>
> (2) that if the *de jure* aspects of the corporation are deemed controlling, there would be a circumvention of the public interest, or there would result inequities or unfairness.

Thus, the Board held:

> It therefore necessarily follows that acceptance of BMC's proposition - resulting in a 100% integration credit to BMC or, indeed, in any significant credit - would make a mockery of the underlying objective of the integration criterion. It would also result in unfairness to the other applicants in this proceeding, and it would frustrate all other comparative proceedings by encouraging other applicants to follow this same facade.

operation of the station. These financial undertakings by the church were authorized by the membership of Trinity Church. The funds that have come to CTI have been made available by Trinity Church itself or members of Trinity Church. Significantly, the funds of CTI are controlled by officers of the church, not CTI. For example, the only two people who can sign checks for CTI are Allen Randolph, the pastor of Trinity Church (and president of CTI) and Beverly Hime, the secretary/treasurer of Trinity Church. Beverly Hime is not an officer, director or employee of CTI. On the other hand, the treasurer and a director of CTI, Mrs. Ryan, had no authority to sign checks and in fact did not even know in what bank CTI maintained its checking account. Richard McPherson, employed as associate pastor of Trinity Church and one of the incorporators and original directors of CTI before he withdrew when it was realized that his Canadian citizenship would prevent a grant of a construction permit, continues to perform services for CTI although he has no official connection with CTI. Reverend Randolph, while he is proposed for full time integration by CTI as general manager, will continue to be paid only by Trinity Church.

144. These factors demonstrate the interrelationship between CTI and Trinity Church. Clearly, the church has full control of CTI's purse strings and has exercised, through Reverend Randolph and other church members, a pervasive influence over virtually all aspects of CTI's activities. There is a unity of interest and ownership between Trinity Church and CTI. Under these circumstances, to evaluate CTI's integration credit by limiting its "ownership" solely to its directors would elevate form over substance and thwart a proper and meaningful evaluation. Indeed, in evaluating the integration credit to be assigned, CTI and Trinity Church must be considered one and the same.

145. Having reached the conclusion that for integration purposes CTI and Trinity Church must be considered one and the same, it is now necessary to attempt to assign integration credit based on such conclusion. One of two approaches can be taken. First, it can be said that for integration purposes, the true "owners" of CTI are the members of Trinity Church. Because Trinity Church has between 700–750 members, it would appear that the proposal to integrate only Randolph and Hembree would result in minute integration credit for CTI. Another approach would be to consider the Board of Elders of Trinity Church, the church's governing body, as the true "owners" of CTI for integration purposes. Under this analysis, because there are at least six members of the Board of Elders and only one[22] (Reverend Randolph) is proposed to be integrated, CTI is entitled to, at most, 16.66% integration credit. CTI disagrees with all

[22] Hembree, while a member of the church, is not presently a member of the Board of Elders.

this and argues that such type evaluations are improper because no real party in interest issue was sought or added. But these findings and conclusions are not being made to disqualify CTI under an unspecified real party in interest issue. They are being made to reasonably and fairly evaluate CTI's integration credit under the comparative issue. Significantly, there was no real party in interest issue in *Henderson* where a somewhat similar analysis was undertaken under the comparative issue. It would be simply unfair and prejudicial to other applicants to allow Trinity Church, or similar type organizations, to structure applications in such a way as to create the illusion of 100% integration credit and not permit full exploration of such claim in order to expose the artificiality of the proposal.

146. Based on the foregoing, CTI is entitled to, at most, only 16.66% integration credit for its proposal to integrate Randolph as general manager.[23] Such proposal is enhanced because Randolph resides within the proposed station's service contours and he has served on the Board of Directors of two local civic organizations. CTI also receives a slight preference for proposing auxiliary power.

Alamo

147. Thus far, no more than 16.66% integration credit can be assigned to any of the applicants previously considered. Because Alamo, as discussed below, proposes 99% integration, unless virtually all of its integration proposal is discredited, the other applicants stand well behind Alamo on quantitative integration.

148. Alamo proposes to integrate all its stockholders full time in the operation of the station in various management capacities. Paris Schindler, a 45% stockholder, will be general manager; Sherry Schindler, his sister and a 30% stockholder, will be program manager; Phyllis Davis, a 15% stockholder, will be assistant general manager and women's news director; Reynaldo H. Lopez, a 2% stockholder and an Hispanic, will be business manager; James Myart, a 3% stockholder and a Black American, will be promotion

[23] An issue has been raised whether the proposal of Randolph to serve as general manager is at variance with the proposal in the application that he will serve as program director. Generally, an applicant may not proffer evidence at the hearing that is contrary to or inconsistent with information previously submitted in the application. *Muncie Broadcasting Co.*, 51 RR 2d 46 (1982). Here, there was no statement in the CTI application as to who would serve as general manager. The application was silent on this point. Thus, the proposal that Randolph would be the general manager (in addition to program director) is not inconsistent with or contrary to information in the application and does not constitute a variance. *WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (1982). It was the intention of Randolph from the inception to serve as general manager (Tr. 591–92; 663–64). His proposal, however to be program director does not appear to be of an enduring nature because it is represented that an experienced program director will be hired "as soon as feasible". In any event, Randolph will receive integration credit for being the general manager and such credit would not be significantly enhanced even if he received credit for also being the program director.

manager; Joe Long, a 2% stockholder and a Black American, will be community and cultural affairs director; and Frank Collins, a 2% stockholder and a Black American, will be news manager. On the basis of the proposal, Alamo, as noted, claims 99% integration credit.[24] This claim, however, is assailed by the other applicants on various grounds.

149. No applicant has advanced a persuasive argument for discounting or discrediting the integration proposal of Paris Schindler.[25] He will be the full time general manager of the station, and, together with his sister, is mainly responsible for financing construction and operation of the station. His 45% integration credit as general manager is entitled only to slight enhancement credit for his pledge to move to San Antonio. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 430 n. 33 (1981). Because he has no past broadcast experience or participation in San Antonio civic organizations, no further enhancement credit is warranted.

150. The other applicants argue that Alamo should not be credited with Sherry Schindler's integration proposal. In support of this, it is argued that she has not been assigned specific duties; that she is merely a "nominal" principal and is dominated by her brother, Paris Schindler; that she has not been actively involved in Alamo and she shouldn't be considered a "true and actual" owner. The Presiding Judge finds these arguments unpersuasive. Sherry Schindler will be the program director, a management position, and she testified regarding the duties she will perform at the station (Tr. 209–12; 259–60). Thus, the argument that no specific duties have been assigned has no merit. Moreover, although she looks to her brother for advice and guidance with respect to Alamo's application, there is no evidence to support a conclusion that Sherry Schindler is not an actual owner or is only a nominal principal. She is paying her pro rata share of the expenses in prosecuting the application; she is not dependent on her brother; she owns and operates a successful business in Houston; and she has committed herself to work full time at the station as program director. The fact that she played no role in recruiting the minorities does not discredit her integration proposal or demonstrate in any way that she is not the actual owner of her stock. Her brother is the single largest stockholder in Alamo and it is understandable that he would assume most of the burdens regarding

[24] A 1% stockholder withdrew. Thus, only 99% integration credit is claimed by Alamo.

[25] CTI does not question such credit. However, Las Misiones argues that the manner in which the minorities were added to the Alamo application requires the imposition of a comparative demerit sufficient to wipe out all of the 45% integration credit claimed for Paris Schindler. This argument lacks merit, but will be discussed *infra*. Also, United argues that Paris Schindler's duties have not been specified. This is erroneous because Paris Schindler will be the general manager of the proposed station, a management position entitled to particular weight. *Grand Broadcasting Co.*, 36 FCC 925 (1964).

the application. There is no reasonable basis to discredit her integration proposal and the other applicants attempt to do so is unsupported. Thus, Alamo will be credited with Sherry Schindler's 30% integration proposal. Such proposal is slightly enhanced because Ms. Schindler is a woman and she has pledged to move to San Antonio.

151. Alamo's claimed credit for the proposal to integrate Mrs. Davis is also attacked. In this connection, it is argued that Mrs. Davis is merely a nominal owner and that her husband, Herbert Davis, is the true and actual owner. This claim is made primarily because Herbert Davis was instrumental in preparing and filing the Alamo application; he remains the local attorney for Alamo and attends meetings; Mrs. Davis' interest in Alamo has been derived from her husband; and Mrs. Davis is paying less for her stock than other stockholders. Originally, Mr. Davis owned the interest in Alamo now held by Mrs. Davis. But Mrs. Davis' interest in Alamo was transferred to Mrs. Davis before the comparative cases were frozen. There is no evidence that such transfer was a sham and that Mr. Davis is still the true owner. Indeed, it was the intention of the parties that Mr. Davis' interest would be transferred to Mrs. Davis and since then Mrs. Davis has been the true and actual owner of the stock and there is no evidence to the contrary. The arguments advanced by the other applicants to support the claim that Mrs. Davis is not the true and actual owner are predicated on speculation, and lacking in factual support. There is simply no reasonable basis for discrediting the integration proposal of Mrs. Davis. Thus, Alamo will be credited with 15% full time integration credit for Mrs. Davis as proposed assistant general manager and women's news director. Such credit is enhanced because Mrs. Davis is a woman, is a local resident, and has been involved in several local organizations.

152. As already noted, Alamo also proposes to integrate Lopez, Long, and Collins, each 2% stockholders, and Myart a 3% stockholder (hereinafter called minorities). However, questions have been raised regarding whether such proposals should be credited.[26] It is argued that the minorities are "window-dressing"; that their addition to the Alamo application and their limited interest represents "tokenism"; that they are merely "surrogates" of the Schindlers, the "money people"; that they have not "shaped" the Alamo application, have no meaningful financial commitment to Alamo,[27] and, despite their titles, they do not have any "important roles in management".[28]

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[26] CTI does not question the integration credit although it argues that such credit should be slight.

[27] The minorities are purchasing their stock interest with bank loans arranged for and guaranteed by Paris Schindler.

[28] The other applicants question Lopez and Myart's integration proposal because

153. It appears clear that the minorities were recruited to add comparative strength to the Alamo application. Alamo did, of course, have the right to upgrade its application in good faith prior to the cut-off date. *Alexander S. Klein, Jr.*, cited *supra*. The arguments raised by the other applicants raise interesting and troublesome issues. Fortunately, in the context of this case, it is not necessary to consider the question of how much integration credit Alamo should receive for the proposal to integrate the minorities. Even if the minority integration proposal was given no credit at all, Alamo would still have 90% integration credit, far more than any other applicant in this proceeding. Indeed, it would appear that Paris Schindler's 45% full time integration proposal as general manager is quantitatively so far superior to the other applicants as to be sufficient, in and of itself, to carry the day for Alamo in this proceeding. For these reasons, it is not necessary in the context of this case to address the arguments regarding minority integration credit raised by the other parties, which, the Commission characterized as "troublesome" in *Alexander S. Klein, Jr.*, cited *supra*.

154. One argument raised by Las Misiones must, however, be addressed. As noted earlier, Las Misiones argues that Paris Schindler should receive no integration credit because of his "cynical attempt to utilize minority stockholders as window-dressing". It would seem, however, that even if the claim of "window-dressing" or "tokenism" had merit, the correct way to deal with it would be to deny integration credit for the claimed "token" integration. There is no showing here that Paris Schindler lacked good faith in adding the minorities to Alamo's application. Those minorities recognized their limited stock interest. The fact that Paris Schindler arranged for and guaranteed the bank loans to enable the minorities to purchase their stock is not something that should be criticized.[29] It has long been recognized by the Commission that a lack of financing has been a formidable obstacle to minority ownership and participation in broadcasting.[30] Paris Schindler, by financially underwriting the purchase of stock by the minorities, has given these young minorities a stake in a television broadcast station which they would otherwise not have. Even if that stake is small, individually or collectively, it is

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three months after they became committed to Alamo, they became involved in an application for a station in Lockhart, Texas, in which they represented, *inter alia*, that they would be integrated in the operation of the Lockhart station. Moreover, Las Misiones questions the definiteness of Lopez's integration proposal because of his own testimony (see Tr. 360–61). If this case was close enough to turn on the validity of the minority stockholders' integration proposals (which it is not), further consideration to the arguments of the parties regarding these proposals would be warranted and necessary.

[29] The Commission has credited minority ownership and integration even where the stock interest was awarded as a gift. See *Alexander S. Klein, Jr.*, cited *supra*.

[30] See for example, *Financial Qualifications Standard for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978).

still better than nothing. While the addition of the minorities was designed to enhance the comparative posture of the Alamo application, the characterization of this action as "cynical" is unsupported. There is simply no support or justification in fact or law for penalizing Alamo by stripping it of all the integration credit it receives by virtue of Paris Schindler's full time integration as general manager.

155. In summary, the following ranking of the four applicants under the Commission's comparative criteria is warranted. United is last. It has other cognizable media interests and has proposed virtually no integration. It is a clear loser. Las Misiones and CTI have no cognizable media interests; Las Misiones has 12.5% full time integration and CTI has been credited with 16.66% full time integration. The Presiding Judge would rank Las Misiones ahead of CTI because of qualitative factors. Specifically, the Las Misiones application is enhanced because of the full time minority integration of Dr. San Martin. Also, Dr. San Martin is a long time local resident of San Antonio with an exemplary record of civic participation in leadership capacities in various organizations for which he has been recognized and honored. His full time participation adds great strength to the Las Misiones application. Such enhancement credit (plus the merit Las Misiones receives because of the minority participation of its directors) is sufficient to overcome the small (4.1%) difference in quantitative integration and slight preference CTI has received for proposing auxiliary power. Alamo, with no cognizable media interests,[31] and its quantiatively superior full time integration proposal of at least 90%, is preferred under the integration criteria, i.e. best practical service. While qualitative factors elevate Las Misiones' application over CTI's, such factors clearly cannot bridge the wide gap between 12.5% full time integration and 90% full time integration. *Scott & Davis Enterprises, Inc.*, cited *supra*. Thus, Alamo receives a substantial preference under integration and is equal with CTI and Las Misiones under diversification. In keeping with the Commission's comparative policy statement, Alamo is the preferred applicant and a grant of its application will best serve the public interest.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Alamo Broadcasting Corporation for a construction permit for a new television station in San Antonio, Texas, IS GRANTED and the competing applications of Las Misiones

[31] Alamo is unequivocally committed to divest the media interest of Paris and Sherry Schindler before program test authority.

De Bejar Television Co., Christian Tele-Communications, Inc., and United Television Broadcasting Corporation, ARE DENIED;[32]

IT IS FURTHER ORDERED that the construction permit granted to Alamo Broadcasting Corporation is subject to the following condition:

Prior to construction of the TV tower authorized herein, permittee shall notify AM Station WOAI so that that station may determine operating power by the indirect method. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the aforementioned AM station. Subsequent to construction of the TV tower and installation of all appurtenances thereon, antenna impedance measurements of the AM antenna shall be made and sufficient field strength measurements obtained at at least 10 locations along each of eight equally spaced radials shall be made to establish that the AM radiation pattern is essentially omnidirectional and, the results submitted to the Commission in application for the AM station to return to the direct method of power determination. Thereafter the TV station may commence *Limited Program Tests.*

JOSEPH STIRMER *Administrative Law Judge*

FEDERAL COMMUNICATIONS COMMISSION

[32] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Service, Resale and Shared Use
Wide Area Telephone Service

Petition for declaratory ruling granted. BSOCs cannot invoke state tariff restrictions to prevent resale or sharing of intrastate WATS to terminate interstate communications. WATS between points within a state is interstate service when used to complete interstate calls, and as such is subject to FCC's policy favoring unrestricted resale and sharing of interstate public switched network services.

–Market Structure (Phase I)
CC Docket No. 78–72

FCC 82–579

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS and WATS Market Structure	CC Docket No. 78–72, Phase I

THIRD REPORT AND ORDER

(Adopted December 22, 1982; Released February 28, 1983)

BY THE COMMISSION: COMMISSIONERS QUELLO, FOGARTY, DAWSON, RIVERA AND SHARP ISSUING SEPARATE STATEMENTS; COMMISSIONER JONES CONCURRING AND DISSENTING IN PART AND ISSUING A SEPARATE STATEMENT.

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I. *INTRODUCTION*

A. *Outline of the Plan*

1. When this Commission initiated this proceeding to determine an optimal market structure for the MTS-WATS market, we concluded that it would also be necessary to prescribe the compensation that exchange carriers should receive for the origination or termination of all interstate and international services of all carriers. We recognized that it would be impossible to determine

"access" compensation for services of carriers that compete with MTS or WATS without correcting existing disparities in access compensation among services offered by AT&T and its telephone company partners.

2. We subsequently invited comments upon a tentative plan for carrier's carrier access charges that would allocate exchange plant costs among four service categories on the basis of relative use. We hoped that such a plan would eliminate discrimination or preferences in rates that were charged to end users of all services that we regulate. Comments in this and other proceedings and other developments led us to conclude that the tentative plan would not produce a correct solution to the discrimination problem. The recovery of fixed costs through usage charges produces discrimination among MTS users that is a primary cause of the inter-service disparities. The comments in this proceeding reveal a fairly broad consensus that this is the case.

3. We have accordingly concluded that a substantial portion of fixed exchange plant costs that are assigned to interstate services should ultimately be recovered through flat per line charges that are assessed upon end users. We are adopting access charge computation rules that will accomplish that result.[1] Those rules incorporate exceptions for pay telephones, the portion of a local dial switch that is sometimes described as non-traffic sensitive, and "private line" facilities used for services that are not close substitutes for MTS. Certain other fixed costs assigned to interstate services for customer premises equipment, inside wiring, and a Universal Service Fund will not be recovered through end user charges and will continue to be recovered through carrier's carrier charges. The Universal Service Fund will be designed to preserve universal service by enabling high cost local exchange companies to establish local exchange rates that do not substantially exceed local exchange rates charged by other local exchange companies.

4. A transitional plan is necessary for several reasons. Immediate recovery of high fixed costs through flat end user charges might cause a significant number of local exchange service subscribers to cancel local exchange service despite the existence of a Universal Service Fund. Such a result would not be consistent with the goals of the Communications Act. Some transitional adjustments are also necessary to avoid anomalous effects of existing disparities in interstate costs in different areas and to establish access charges for competing carriers that reflect existing inequalities in the quality of access arrangements. The transitional plan will also enable us to

[1] The rules are contained in Appendix A. Appendices B and D list persons who filed comments in response to the *Second* and *Fourth Supplemental Notices*. Appendices C and E contain summaries of those comments. Appendix F contains supplemental information with respect to the "bypass" phenomenon and Appendix G contains supplemental information with respect to the universality of service.

adjust rules in the future if unexpected developments demonstrate that changes are warranted.

5. This combination of factors has led us to adopt rules that incorporate two transitions. Some fixed costs in addition to any high cost or Universal Service Fund costs will be recovered through carrier's carrier charges during a 5-year transition period. A substantial portion of those costs will initially be assessed to AT&T as a charge for premium access. The remaining costs will be assessed to end users and will be recovered through a combination of usage and flat charges during a 7-year transition period. Before the end of the fifth year of the 7-year transition, we will evaluate the rules and policies adopted in this *Report and Order* and, if necessary, will make adjustments needed to promote the expressed goals of this proceeding. A minimum charge will be assessed upon all end users. The remainder of the costs may be recovered through usage charges until the usage charge for any line equals a cap or maximum. We are giving the exchange carriers considerable discretion to devise a combination of minimum, usage and maximum charges. This will give the carriers discretion as to how rapidly to phase in flat charges. It will enable carriers to respond quickly to any bypass threat where this a problem, while allowing for a more gradual phase-in where it is not. We are, however, imposing some limits upon carrier discretion. A minimum charge cannot be less than $2 per month for residential customers and $4 per month for business customers and the business minimum cannot exceed 200% of the residential minimum. Maximum charges will assure that customers do not pay more through end user charges for interstate use of a line that is used for local exchange and interstate services than they would pay for a line that is dedicated to a particular interstate service.

6. We are also prescribing rules for the computation of carrier's carrier charges for access services other than exchange plant. Although the tentative plan we described in 1980 would have limited the definition of access to facilities that are used in common by exchange and interexchange services, we have expanded the definition of access to correspond with the *Modified Final Judgment* in the AT&T antitrust case.[2] We have established nine different elements for such carrier's carrier changes and are prescribing rules for the computation of each element charge that are tailored to the nature of each service. We have established two elements for the use of local dial switches, three elements for operator services, and two elements for other switching and transmission facilities. We have also established a Billing and Collection element and a Special Access

[2] *See* Modified Final Judgment in United States v. American Telephone and Telegraph Co., Civil Nos. 74-1698 and 82-0192,—F.Supp.—, 47 Fed. Reg. 40, 392 (D.D.C. 1982). (hereinafter "MFJ").

element that consists primarily of the use of a variety of "private line" facilities.

7. We have decided that we should neither compel all exchange carriers to join in pooled uniform charges for all access elements nor permit unrestricted deaveraging. We are mandating the creation of an exchange carrier association that will collect and distribute the carrier's carrier portion of the non-traffic sensitive charges and file tariffs and administer revenue pools for companies that choose to join in the association's common tariffs for other access elements.

8. We are directing AT&T to prepare the initial association tariffs in order to ensure that access charges will be in place on January 1, 1984.

B. *Background: The Origins and Purpose of the Access Charge Proceeding*

9. This proceeding began in February, 1978 with the issuance of a *Notice of Inquiry and Proposed Rulemaking* (the "*Initial Notice*"), 67 FCC 2d 757 (1978), to determine the MTS-WATS market structure that would best serve the public interest. To resolve this fundamental question, we have issued four subsequent notices of inquiry.[3] Each represented a refinement in our understanding of the issues requiring resolution. In the *Third Supplemental Notice*, we concluded that a general policy of open entry in the domestic MTS/WATS market, including Hawaii, would be in the public interest. While tentatively reaching the same conclusion for the Alaska submarket, we decided to give further consideration to issues relating to that submarket. In light of the conclusions reached in the *Third Supplemental Notice*, we determined that future proceedings in this docket would be restricted to consideration of two issues. In Phase I of the docket, we would develop a system of access charges by which local telephone companies would receive compensation for the use of their plant to complete competitive interstate telecommunications offerings. In Phase II we would determine the appropriate market structure for MTS/WATS in the Alaskan submarket.

10. We recently resolved Phase II of the docket by affirming our tentative conclusion that an open entry policy in the Alaskan interstate MTS/WATS market would be in the public interest. *See Second Report and Order* in CC Docket No. 78–72, FCC No. 82–515, released November 30, 1982. Today we resolve Phase I by adopting rules that will determine the rates interexchange carriers and end

[3] Supplemental Notice of Inquiry and Proposed Rulemaking ("First Supplemental Notice"), 73 FCC 2d 222 (1979), Second Supplemental Notice of Inquiry and Proposed Rulemaking ("Second Supplemental Notice"), 77 FCC 2d 224 (1980); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking ("Third Supplemental Notice"), 81 FCC 2d 177 (1980); and Fourth Supplemental Notice of Inquiry and Proposed Rulemaking ("Fourth Supplemental Notice"), 90 FCC 2d 135 (1982).

users will pay for access to local telephone company facilities used to complete interstate service offerings. We believe that through these rules we shall achieve the competitive market structure that is the explicit goal of both this proceeding and of the MFJ.

11. As we have noted above, this phase of the proceeding was instituted to determine, first, whether the existing methods of compensation for exchange plant used in interstate telephone service should be replaced by a tariffed access charge framework and, second, if so, what the structure of such tariffs should be. The entry of the MFJ has effectively mooted the first question. Currently, approximately 80% of revenues for this plant are covered by the Bell System's Division of Revenues process. This private contractual agreement has transferred revenues of almost $7 billion per year within the Bell System. On the date of divestiture, the system will no longer exist. The MFJ requires the termination of this system and its replacement by a generalized tariffed offering of access service.

12. While it would theoretically be possible to maintain the private settlements mechanism (which is equivalent to the Division of Revenues plan) to compensate non-Bell telephone companies, we believe that, even absent this *Report and Order*, some generalized access charge tariff scheme would result. We now decide that the public interest requires that the basic structure of such access tariffs be set by this Commission. We expect access tariffs to be filed in 1983 and require that such access tariffs be in conformance with the rules adopted herein.

13. The plan described in this *Report and Order* is, of course, limited to basic, or regulated, services. The plan is also limited to interstate and foreign services subject to our jurisdiction. We have assumed, for purposes of the proceeding, that the existing *Separations Manual* correctly identifies the costs assignable to those interstate and foreign services. Some commenting participants, *e.g.*, Satellite Business Systems, have argued that non-traffic sensitive access costs should no longer be allocated between the intrastate and interstate jurisdictions. They propose that a single charge should recover the entire revenue requirement associated with non-traffic sensitive facilities. They claim that such a charge should fall within federal jurisdiction, despite the Supreme Court's decision in *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930). In this proceeding we need make no determination as to whether *Smith* requires jurisdictional separations of NTS plant. As we said in the *Fourth Supplemental Notice*, 90 FCC 2d at 154, it is the separations process that determines what costs must be recovered from the interstate jurisdiction by means of an access charge. That process is currently being investigated by a Joint Board and is beyond the scope of this docket. In the *Order Requesting Further Comments* ("Joint Board Order" hereinafter), the Joint Board specifically invited parties to comment on whether separation of NTS costs by jurisdiction is

required, and on the desirability of a discretionary assignment of 100 percent to either jurisdiction.[4] 47 Fed. Reg. 54479, 54517 (December 3, 1982).

14. Finally, we have limited our consideration here to the provision of that portion of interstate and foreign service which we consider to be "access" service. We had earlier used the term "access" to describe the use of certain exchange plant necessary to originate and terminate interexchange services. We have, however, decided to expand the scope of our access charge rules to conform to the boundaries established by MFJ. In the *Fourth Supplemental Notice* we suggested that it might be desirable to expand our access charge plan to encompass all services or facilities that will be included in access charges of the divested Bell Operating Companies ("BOCs") and invited "interested persons to submit suggestions for accomplishing that purpose." 90 FCC 2d at 153. We have concluded that such a course would be desirable because disparities would be likely to arise in the future if independent telephone companies and the undivested BOCs[5] are compensated through some other mechanism for services or facilities that are included in divested BOC access charges. The access rules we prescribe will therefore cover all services and facilities that are classified as exchange access for purposes of the MFJ. We are, however, adopting less detailed rules for the computation of charges for access elements that we might have excluded from our plan if the MFJ did not exist. For non-access interstate facilities and services, we have assumed that any questions concerning apportionment or allocation will be resolved in the *Interim Cost Allocation Manual* or a successor to that *Manual*.[6]

15. Although Phase I of this docket is a part of a larger proceeding to determine and encourage an optimal structure for a market that includes MTS and WATS, we have not limited this phase to the apportionment of access costs among competing interexchange carriers. The *Initial Notice* said that we expect to prescribe "divisions" for all interstate services of all carriers. 67 FCC 2d at 759.

16. We reiterated this view in the *Second Supplemental Notice*. We explained that subsequent events had confirmed our preliminary conclusion that it will not be possible to establish access compensation for the MTS-WATS equivalent services of the new interex-

[4] A decision to assign 100% to either jurisdiction would, of course, require changes in the access charge rules we are adopting.

[5] Cincinnati Bell Inc. and Southern New England Telephone Company.

[6] The *Interim Cost Allocation Manual* or *"ICAM"* was adopted in *Amer. Tele. and Tele. Co.*, 84 FCC 2d 384, *recon. denied*, 86 FCC 2d 667 (1981), *affirmed sub nom. MCI Telecommunications Corp. v. FCC* (*"ICAM"*), 679 F.2d 408 (D.C. Cir. 1982), to establish rules for the apportionment of AT&T costs among the MTS, WATS, private line and ENFIA service categories. We expect to provide guidance in separate proceedings to enable AT&T to reflect access charges in *ICAM* cost apportionments.

change carriers without correcting existing disparities in access compensation that is paid directly or indirectly by users of services offered by the telephone company partnership. AT&T had proposed access charges for MTS-WATS equivalent services that purported to establish parity with the access compensation for MTS and WATS that the BOCs receive through the Bell System division of revenues process. Carriers that provided the MTS-WATS equivalent services claimed that the proposed charges would create unlawful discrimination because the charges would be much higher than the charges that customers of Foreign Exchange ("FX") service pay for access service at the foreign exchange or "open" end. Those carriers alleged that the access they received was identical with the access FX customers received. The affected carriers eventually entered into an agreement known as "ENFIA" that established an intermediate rate for MTS-WATS equivalent (or "Execunet/SPRINT type") access for an interim period.[7] This Commission concluded that allowing the negotiated rate for an interim period would serve the public interest.

17. The *Second Supplemental Notice* concluded (77 FCC 2d at 230–231):

> The history of the ENFIA negotiations demonstrates that it would be impossible to prescribe any charges for the origination and termination of services that are functionally equivalent to MTS or WATS without determining the appropriate relationship among origination and termination services for MTS-WATS, functional equivalents of MTS-WATS, and FX-CCSA open ends. That history also indicates that there is no basis for assuming that the present relationship is appropriate.

18. That *Notice* also concluded that "the discrimination problem" is not confined to differences in access compensation among MTS, WATS, FX, CCSA and MTS-WATS equivalent services and described a tentative access charge plan that included the origination and termination of private line services. *Id.* at 231. Some comments that were filed in response to the *Second Supplemental Notice* questioned the inclusion of private line services other than FX and CCSA in an access charge plan.[8]

19. Private line services are not as distinct from an engineering or an economic perspective as they are sometimes perceived to be. A private line between two customer locations is normally routed in much the same manner as are telecommunications that use the switch that is used also for local exchange service. The access portion of the private line service consists primarily of the provision of lines or loops that connect a customer terminal with the interexchange

[7] *See Exchange Network Facilities (ENFIA)*, 71 F.C.C. 2d 440 (1979).

[8] *E.g.*, American Satellite Co. Comments, p.7; ARINC reply, p.9.

portion of the facilities. The exchange carrier uses the right-of-way that it was granted for the purpose of providing local exchange service to place that line between the customer location and the interexchange facility.

20. Private line and message services not only employ similar facilities, but are also frequently used by customers to satisfy the same telecommunications needs. The interchangeability factor necessarily requires that at least some private line access service be included in an access compensation scheme that is designed to establish parity among all services that are reasonably interchangeable with MTS. We have specifically established such parity with MTS for the "open end" of FX and CCSA services.

21. It would be possible to distinguish private line service that is a close substitute for MTS from private line service that is not. We could possibly accomplish our original purpose by limiting access charge rules to access for MTS, WATS, MTS-WATS equivalents, FX, CCSA and other private line service that is a close substitute for MTS, limiting the scope of access to the use of equipment, facilities, or right-of-way used in common with local exchange services.

22. As already noted, however, we have decided, in response to the MFJ, to expand the scope of access to include all tariffed services and facilities that the BOCs will provide for the origination or termination of interstate calls. The decree definition of access service—and thus the conforming definition of access service relied upon in this *Report and Order*—includes some services and facilities that we might exclude in designing access charges for the sole purpose of establishing parity among MTS and all telephone company or "other" carrier services that are close substitutes for MTS.

23. The provision of an origination-termination service could be viewed as providing an interexchange carrier with access to exchange facilities. The service could also be viewed as providing an end user or subscriber with access to interexchange services through exchange facilities that interconnect with interexchange facilities.[9] The earlier notices in this proceeding viewed access services as

[9] When a divested BOC provides interstate access to another carrier, "interexchange" will usually be synonymous with a service that is described as inter-LATA for purposes of the MFJ and the "exchange" facilities will correspond to intra-LATA facilities. The geographic scope of access services provided by other local exchange telephone companies may be different. Such differences are most likely to be reflected in the access element we have described as Common Transport. The formula we have adopted for the computation of access charges will enable carriers to devise charges for the "common transport" that a particular carrier provides. Adapting access charge rules to access service that a divested BOC provides to itself or another carrier for an intra-LATA transmission that is interstate for purposes of the Communications Act may require a special approach. We have decided that it would not be appropriate to establish guidelines for such situations before a final determination of LATA boundaries.

services that a local carrier provides to a long haul carrier. These notices assumed that the local carrier would receive access compensation from a long haul carrier. Most of the earlier notices assumed that a carrier's carrier charge would be the mechanism for access compensation. The *Fourth Supplemental Notice* invited comment upon some additional alternatives that could result in a combination of end user and carrier's carrier charges. We have decided to prescribe such a combination. Terms such as access, access service and access charges will be used in this *Third Report and Order* to encompass both end user and carrier's carrier charges.

24. The inequities between existing forms of compensation for the identical use of such access plant by different interstate services make these forms an inappropriate model for the development of access tariffs. We have decided that a single, uniform and nondiscriminatory structure for interstate access tariffs covering those services that make identical or similar use of access facilities is required by the Communications Act. While we have provided considerable flexibility for telephone companies within our access rules, we believe that the development of the competitive interstate telecommunications market requires certain uniform principles covering both BOC and independent telephone company access tariffs.

25. The amount of money that will have to be recovered through the access tariffs is immense. The revenue requirement for interstate NTS exchange plant alone will be approximately 8.5 billion dollars in 1984, the first year of our plan. An additional amount of approximately 2.5 to 3 billion dollars will be required to recover the costs of traffic sensitive plant for the first year. Based upon the assumption that 100 million lines will be in use in 1984 (an assumption we consider to be reasonably accurate), this translates into a total revenue requirement per access line of approximately $8.50 per month for NTS costs and $3.50 to $3.00 per month for traffic sensitive costs. In its first year the plan would assign $4.00 per line per month or $4.3 billion overall in interstate NTS costs to be recovered directly from the end user by his or her local telephone operating company. Of this amount a minimum of $2.00 for residential subscribers and $4.00 for business subscribers would have to be recovered through the use of a flat charge. The remainder of the $4.00 per line revenue requirement could be recovered, at the carrier's option, through traffic sensitive charges. The maximum amount that could be charged any customer directly would be no greater than the interstate costs of obtaining a private access facility dedicated to interstate use. NTS costs over $4.00 per line—approximately $4.2 billion—will continue to be collected in the first year of the plan through carrier's carrier charges. Of this amount, $1.4

billion will be paid by AT&T and its partners in the form of a charge for premium access.[10] The costs related to the Universal Service Fund, terminal equipment (CPE) ($1.4 billion in 1984) and inside wiring ($1.6 billion in 1984) will either be removed from the carrier revenue requirement through deregulation or will continue to be paid in subsequent years through carrier's carrier charges. The remaining amount collected through a carrier's carrier charge in the first year plus any additional amounts added in subsequent years will be converted to customer charges over a five year period. Over the same five year period the maximum end user charge that may be charged any specific customer for interstate access for message service will be reduced at the rate of 10% per year.

26. The plan is designed to move swiftly and surely from the present reliance on additions to the price of interstate toll minutes as the mechanism for recovery of these costs towards a pricing plan which recognizes that non-traffic sensitive costs covering plant dedicated to individual end users neither increase nor decrease as a result of usage made of that plant. We are taking this important step because we view this new direction as the only means of satisfying our goals of universal service, nondiscrimination, network efficiency, and prevention of uneconomic bypass.

27. Economics teaches us that, except in certain circumstances involving market failure, prices equal to the cost of producing another increment of a good, i.e., equal to the marginal cost of production, are optimal.[11] Provision of telephone services involves two marginal costs. One varies with the traffic level. The other varies with the number of access lines demanded. For this reason, efficient pricing requires both usage sensitive and non-usage sensitive charges for recovery of access costs.[12]

28. The costs imposed upon the nation's telecommunications system, and ultimately upon the general public, by our present usage sensitive method of recovering these NTS costs pose a substantial danger to the long term viability of our nation's telephone systems. New technologies and radical improvements in older technologies make available alternatives to the traditional telephone network. Telecommunications is substitutable for a wide variety of other goods and services produced by our society. Prices based upon the true cost characteristics of telephone company plant are necessary both to make a decision on whether use of the alternative technolo-

[10] Some independent telephone companies will continue to participate in joint rate offerings with AT&T after access charges become effective. Therefore, the premium will in fact be paid by an interexchange partnership. Section 69.207 describes that partnership as "the carriers that offer MTS and WATS. . . ."

[11] *See*, for example, Francis M. Bator, "The Simple Analytics of Welfare Maximization," *The American Economic Review*, pp. 25–59, March 1957.

[12] *See also* P.R.G. Lazard and A.A. Walters, *Micro-Economic Theory*, McGraw-Hill Co., New York, 1978, p. 176.

gies is appropriate and to make a decision on whether to substitute telecommunications for other activities.

29. As telecommunications plays a larger and larger role in fundamental U.S. industries, the problems resulting from inappropriate pricing grow. Computer technology and communications have grown so similar that the Commission has redrawn its traditional definition of communications.[13] Access pricing that does not reflect cost can turn computer technologies from directions that would enhance the productivity of this essential U.S. industry and all of the industries that depend on computers and communications toward simple avoidance of non-cost based telecommunications prices. Investment may be misdirected as a result.

30. The possibility of users, particularly the nation's largest telecommunications users, abandoning the network for less efficient alternatives, *i.e.*, "uneconomic bypass", has been cited by many participants as a major justification for the movement toward cost based customer access charges. Bypass is a growing phenomenon.[14] We also recognize that the elimination of preferential rates covering NTS access plant for large users is certain to increase significantly the incentives of these users to bypass the local phone network. We could attempt to eliminate bypass through our facility authorization authority, but have determined that this is not a good solution. See Part III. A., *infra*.

31. Despite the uncertainty surrounding the precise size and threat of uneconomic bypass, a delay in the institution of a system of access charges that does not recover most fixed costs through usage rates is not justified. If we delayed making a change now, it is likely that circumstances would quickly force such changes upon us. In such a case, however, we would be unable to afford the luxury of the gradual transition needed to satisfy our objective of maintaining affordable service. Moreover, as a result of bypass, delay might mean higher long run costs for those who were required to remain on the network, and even for those who were able to use bypass services.

32. Moreover, were we to delay instituting the smooth movement towards a rational pricing system until a sufficient number of large users had initiated constructing alternative bypass systems, it could well be too late for any remedial action. Usually uneconomic bypass is uneconomic only before the construction of bypass facilities starts. Once a large telecommunications user has committed significant capital to building a private bypass system, the maintenance of that

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[13] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[14] Our staff has conducted a preliminary survey of the current status of bypass services. The results of that survey are set forth for informational purposes as Appendix F of the *Report and Order*.

system is no longer uneconomic. Consequently, we believe that prompt action is essential to preserve the public interest.

33. We believe it is important to state explicitly that this decision does not, in any way, constitute a judgment that subsidizing the costs of basic telephone services for certain customers or for all customers is improper. Our decision is, rather, based upon the more limited judgment that an attempt to generate revenues for such subsidization through a permanent bundling of NTS costs into interstate toll rates would be a harmful and, ultimately, futile approach—one that could lead to the deterioration of a nationwide telephone network providing a variety of services to a wide variety of consumers.

34. In the *Second Supplemental Notice* we had described a plan for imposing usage based charges for access to the local network upon both private line and public switched services. We had first thought that such an approach would assure full, fair competition in the MTS/WATS market and also avoid unlawful preferences or discrimination between private line users and users of switched services. Comments filed in response to that *Notice* caused us to question whether the plan might have the fundamental flaw of encouraging heavy users of private line service to bypass the local network. Our concern has been heightened by the terms of the MFJ that require AT&T to divest itself of its operating companies (other than Cincinnati Bell and Southern New England). For the first time AT&T itself could have a significant incentive to bypass local exchange facilities if such bypass would be profitable.

35. Responding to these concerns, in the *Fourth Supplemental Notice* we introduced an alternative approach that we believed could achieve our primary goals of promoting competition and eliminating discrimination while avoiding the potential problems of the original plan. Instead of creating an access rate structure for private line services like the usage-based MTS/WATS rate structures, we considered the possibility of treating facilities used for access to the public switched network like private line facilities. Specifically, we discussed the possibility of assigning the costs of non-traffic sensitive subscriber plant directly to the customers using it. Thus the costs of private line facilities would continue to be directly assigned, removing one potential incentive for heavy users of such services to bypass local facilities. Every customer of interstate switched services would, however, pay a flat monthly charge reflecting the cost of the non-traffic sensitive subscriber plant dedicated to his use in connection with these services. The plan we adopt today will ultimately point toward this result. In order to avoid the adverse effects that could accompany such a departure from the traditional way in which end users have paid for their use of interstate services, the plan provides for the gradual introduction of these end user access charges. This plan, like the tentative plan of the *Second Supplemen-*

tal Notice, still imposes a carrier's carrier charge upon all interexchange carriers for the use of the remainder of local telephone company plant upon which they rely to complete their interstate service offerings.

II. *COMMISSION AUTHORITY TO ADOPT ACCESS CHARGE RULES*

36. Most comments that have been filed in response to the various notices we have issued in this proceeding do not discuss the scope of this Commission's statutory authority to prescribe access charges for the origination and termination of interstate and foreign services. Almost all of the participants have assumed that this Commission does have the power to prescribe some kind of access service compensation arrangement.

A. *Section 201(a) Authority*

37. After noting that the division of revenues and settlements "have traditionally been industry devised" (67 FCC 2d at 759), the *Initial Notice* said (*id.*) that "[i]t may be timely to exercise our jurisdiction under Section 201(a) of the Communications Act to establish the divisions of charges." The carriers that provide local exchange service receive most of their access compensation through the division of revenues and settlements procedures that have been devised to divide revenues from joint rate services among the members of the telephone company partnership. Section 201(a) authorizes this Commission to replace the industry-devised contractual arrangement with a Commission-devised formula.

38. Section 201(a) provides in pertinent part:

> It shall be the duty of every common carrier . . . in accordance with the orders of this Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

39. After we received comments in response to the *Initial Notice* and considered filings that were provoked by AT&T's initial ENFIA tariff, we tentatively concluded that a system of carrier's carrier access charges should be established to replace the existing combination of carrier's carrier charges, end user charges, and contractual "divisions" and "settlements." That conclusion was announced in the *Supplemental Notice* and a tentative plan for carrier's carrier access charges was described in the *Second Supplemental Notice*.[15]

[15] Several different methods have been used in the telecommunications and transportation industries to compensate participating carriers when two or more

40. Western Union comments that were filed in response to the *Second Supplemental Notice* claimed that Section 201(a) cannot be invoked to replace carrier's carrier access charges with different carrier's carrier charges. Western Union noted that the term "divisions" is normally used to describe the division of joint rate revenues and that it does not maintain any joint rates with the telephone companies. We have concluded that Western Union's claim is incorrect because the language and history of Section 201(a) demonstrate that Congress used the term "divisions" in that particular provision to encompass any arrangement for the compensation of carriers that participate in a through service.[16] That term is at least broad enough to include carrier's carrier charges that compensate an exchange carrier for its participation in a through service that an interexchange carrier offers to the public.

41. Section 201(a) authorizes this Commission to prescribe "divisions" if we find that such action is "necessary or desirable."[17] We have concluded that it is necessary and desirable to establish access charges in lieu of existing access compensation arrangements in order to eliminate existing access compensation disparities and to prevent the development of disparities that might arise if a variety of access compensation mechanisms were used in the future.

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carriers participate in the transmission or transportation. The ultimate customer or end user could be billed separately for the service each carrier provides, but the end user usually pays one of the carriers and that carrier transmits money to the other carrier. The end user may pay a combination or end-on-end rate that is equal to the combined separate charges of the participating carriers. The end user may pay a joint rate and the carriers may divide joint rate revenues in accordance with an agreed or prescribed formula. Sometimes one of the carriers offers the service to the public and pays a charge to a connecting carrier for the use of the other carrier's facilities. We have used the term "carrier's carrier" charge to describe such an arrangement and have used the term "end user" to distinguish the ultimate user from a carrier or an enhanced service provider that obtains service as a customer of another carrier. The carrier's carrier charge arrangement produces essentially the same result as the remission of a "local" rate by a carrier that collected a combination rate charge. Changes in a carrier's carrier charge are not, however, automatically and instantaneously reflected in the rate that an end user pays.

[16] In *St. Louis Southwestern R. Co.* v. *United States*, 245 U.S. 135, 139 n.2 (1917), the Court defined "through route" as "an arrangement, express or implied, between connecting railroads for continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." The Court added (*id.*) "Through carriage implies a through rate. This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the through route . . . ." The reports of the House and Senate Commerce Committees on bills that became the Communications Act of 1934 describe Section 201(a) as requiring carriers "to establish with other carriers physical connections, through routes, through rates, and divisions of through rates." Committee on Interstate Commerce, S. Rep. No. 781, 73rd Cong., 2d Sess., p. 4 (1934); Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5 (1934).

[17] *See United Telephone Co. of the Carolinas*, 54 FCC 2d at 289, 290 (1975), *affirmed*, *United Telephone Co. of the Carolinas* v. *FCC*, 559 F.2d 720 (D.C. Cir. 1977).

B. *Section 205 Authority*

42. When we issued the *Fourth Supplemental Notice* that invited comments upon some alternative plans that included end user access charges, we expanded the list of Communications Act provisions we might invoke to include Section 205. Section 205(a) of the Act, 47 U.S.C. §205(a), empowers this Commission to prescribe end user or carrier's carrier charges for any interstate or foreign service.

43. Although the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that carriers must follow in order to compute access charges. Our Section 205(a) power to prescribe charges includes the power to prescribe steps in the computation of charges. We have exercised that power in the past in prescribing a rate of return that is to be used in computing charges and in prescribing an allocation of investment and expense among major service categories that is to be used in computing AT&T rates. Those actions were affirmed in *Nader v FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) and *MCI Telecommunications Corp. v. FCC* ("*ICAM*"), *supra*.

44. Section 205(a) provides in pertinent part that whenever "the Commission shall be of the opinion that any charge . . . is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge. . . . " Thus, this Commission must find that existing charges are or will be unlawful and that the new methods for computing charges will be "just and reasonable" in order to prescribe methods for computing charges pursuant to Section 205(a).[18]

45. Paragraph 28 of the *Second Supplemental Notice* states that disparities in access service compensation "may also indirectly result in end user rates which violate Section 202(a) of the Communications Act. . . . " 77 FCC 2d at 230. We refrained from using conclusory language in that paragraph in order to afford persons who might wish to defend the *status quo* an opportunity to do so before we made a final determination with respect to the legality of the existing combination of access service compensation arrangements. We are now prepared to make such a determination.

46. Section 202(a) provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications,

[18] Section 205(a) states that the prescription power may be exercised "after full opportunity for hearings, upon complaint or under an order for investigation and hearing made by the Commission on its own initiatives. . . . " Notice and comment rulemaking proceedings are sufficient to satisfy that hearing requirement. *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 21–23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). Such proceedings also satisfy the Section 201(a) hearing requirement. *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1264–68 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

regulations, facilities, or services for or in connection with like communications services, directly or indirectly, by any means, or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47. The portion of Section 202(a) that prohibits "unreasonable discrimination" in connection with "like services" was derived from Section 2 of the original Interstate Commerce Act, 24 Stat. 379. Section 2 of the Interstate Commerce Act was designed primarily to eliminate rebates to favored shippers that produced different charges for the shipment of the same quantity of the same commodity at approximately the same time.

48. The portion of Section 202(a) that prohibits "undue" preferences was derived from Section 3(1) of the Interstate Commerce Act, 24 Stat. 380. Section 3(1) of that Act was designed to remedy disparities in rates to different points that did not reflect actual cost differences. Although Section 3(1) was designed primarily to remedy the locality discrimination problem, the prohibition also encompassed excessive rate differentials for different commodities and shipments of different quantities of the same commodity.

49. In view of the origin of Section 202(a) the unjust discrimination prohibition must be interpreted as imposing a heavy burden upon telecommunications carriers to justify any differential in rates for like services and the undue preference prohibition must be interpreted as imposing a duty upon carriers to maintain rational and reasonable differentials for unlike services.

50. The existing access service compensation arrangements do not produce results that are consistent with those Congressional objectives. This is scarcely surprising in view of the manner in which those arrangements evolved. Neither the carriers nor the regulators viewed access service as a distinct service before this Commission ordered the telephone companies to provide access service to the new "specialized" carriers.[19] The preexisting access compensation arrangements were by-products of managerial or regulatory decisions that were made for some purpose other than fixing access service compensation. Access service compensation for the new carriers could not be fixed in a manner that established parity with each of the preexisting services offered by the telephone companies or the old "other" carriers.

51. Comments from the carriers that receive access service compensation generally acknowledge that there is no system.

[19] *See Specialized Common Carrier Services*, 29 FCC 2d 870, 940 (1971), *affirmed sub nom. Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See also *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *affirmed sub nom. Bell Tel. Co. of Pennsylvania v. FCC*, *supra*.

Although comments from some carriers and some end users that indirectly pay access service compensation claim that any discrimination or preference problem can and should be remedied without changing the access compensation for some services, none of the participants has attempted to demonstrate that there is any reasonable or rational relationship to justify the wide disparities among the charges for access that are directly or indirectly levied upon users of the various interstate services that might satisfy the requirements of Section 202(a). It is readily apparent that it would be impossible to do so. Indeed, the current methods of recovering costs of jointly used non-traffic sensitive subscriber plant for MTS, open-end FX, CCSA and WATS services and the ENFIA services are totally different and produce widely differing results even though each service uses the same plant in the same manner. The FX and CCSA services pay local exchange rates for open end access, the MTS/WATS equivalent services must pay the higher ENFIA rates, and MTS and WATS pay even higher access compensation through the settlements and divisions of revenues process. The level of the ENFIA charge has been negotiated to reflect a discount from the MTS access compensation. It was also designed to produce a rate that is higher than the local exchange rate paid by FX and CCSA customers. Since no one has attempted to justify the disparate rates charged for like access services in this proceeding, we must find them to be unlawfully discriminatory. Moreover, the access compensation differences among services that do use exchange plant differently bear little relationship to actual cost differences. In the absence of any justification for such rate disparities, we must also find that such disparities violate the prohibition of undue preferences. We accordingly conclude that the existing combination of access service compensation arrangements violates Section 202(a) of the Communications Act.[20]

52. Moreover, the existing access compensation arrangements produce results that conflict with Congressional goals other than the elimination of discrimination or preferences that are discussed in Subpart II.D, *infra*. Congress has conferred broad powers upon this

[20] That conclusion is reinforced by the observations in a December 17, 1981 MCI filing. That filing was styled as a complaint, but could not be processed as a complaint because it was not directed at any existing tariff. We accordingly decided to incorporate that document as a comment in the access charge phase of this docket. *See Extension of ENFIA Agreement*, 90 FCC 2d 6, 9, n.3 (1982) *review pending sub nom. MCI Telecommunications Corporation v. FCC*, D.C. Cir. No. 82-1553. That MCI filing argued that "local exchange service" provided to business customers with PBXs, foreign exchange customers, WATS extension customers, Federal Telephone System customers, value-added carriers, domestic record carriers, international record carriers, time sharers and CCSA customers, was functionally identical to "local exchange service" provided to MCI. MCI requested that the Commission issue an order requiring that unlawful discrimination promptly be eliminated. As a result of this *Report and Order*, any discrimination among interstate services will be eliminated.

Commission in Section 4(i) of the Act, 47 U.S.C. §154(i), to adopt orders and regulations to achieve those goals. Those powers would be sufficient to enable us to adopt the access charge rules we are adopting in this *Report and Order* apart from the powers conferred by Sections 201(a) and 205.[21]

53. We believe that the procedures for computing access charges that we are prescribing in this phase of this proceeding are "just and reasonable" or "just, fair and reasonable" for purposes of Section 205(a). Several comments that were filed in response to the *Second Supplemental Notice* urged us to consider the then recent decision in *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980), in deciding how to proceed in prescribing new access service compensation arrangements. That court concluded that a Section 205(a) just and reasonable warranty does not require absolute certainty and precision. After noting that WATS tariffs had remained in effect for several years after this Commission concluded that AT&T had failed to demonstrate that existing tariffs are just and reasonable, that Court declared (*id.* at 340):

> [The Communications Act] assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. The standard of 'just and reasonable' rates is subverted when the delay continues for several years. Rate making theories may change; new information may become relevant; one proceeding may have to take account of another. But there must be some reasonably prompt decisionmaking point at which the FCC says: 'To the best of our knowledge and expertise at this time, the rates are just and reasonable. Perfect, perhaps not, but just and reasonable, yes.' That is all the statute requires.

54. Thus, a prescribed rate is just and reasonable for purposes of Section 205(a) if it represents the best approximation of a rate that satisfies all statutory requirements that this Commission is capable of devising within a reasonable period of time. We proceeded on that assumption when we adopted an *Interim Cost Allocation Manual* for AT&T services that we described as "far from perfect." *Amer. Tele. and Tele. Co.*, *supra*, 84 FCC 2d at 411. The Court of Appeals for the District of Columbia Circuit affirmed that exercise of our Section 205 prescription powers. *MCI Telecommunications Corp. v. FCC (ICAM)*, *supra*.

55. The rules we are adopting in this order are designed in part as a replacement for ICAM allocations of exchange and certain

[21] In *Nader v. FCC*, *supra*, the Court observed (520 F.2d at 203):

> The discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by Section 4(i) of the Communications Act, 47 U.S.C. §154(i) (1970), which gives the Commission the power to issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

interexchange plant costs. We believe that these rules represent a significant further improvement. In light of the Court of Appeals interpretation of the Section 205(a) warranty requirement, we can and do warrant that the rules for the computation of access charges and the allocation of access charge revenues that we are prescribing are "just and reasonable."[22]

C. *Effect of Dual Regulation Upon Commission Powers*

56. A number of participants have asserted that this Commission cannot prescribe particular types of access charges or cannot prescribe access charges at this particular time because such actions would intrude upon the jurisdiction or prerogatives of state regulatory commissions. One participant has even asserted that this Commission cannot prescribe interstate access charges of any kind because such power is vested in the state commissions.[23]

57. We believe the latter claim reflects a misconception with respect to the nature of jurisdiction to regulate interstate commerce. Any action of this Commission that establishes or prescribes charges for the origination and termination of interstate services cannot appropriately be described as a "preemption" of state regulation because such charges are appropriately within the federal jurisdiction, not state jurisdiction. Federal rate regulation began with the enactment of the Interstate Commerce Act in 1887. The creation of a federal commission to regulate interstate rail rates was prompted in part by the Supreme Court decision in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), that held that state legislatures and state commissions cannot regulate rates for interstate railroad shipments because such regulation is precluded by the Commerce Clause of the United States Constitution. The Interstate Commerce Act filled the gap in railroad regulation that was created by the *Wabash* decision. That Act was amended in 1910 to fill a similar gap in telecommunications regulation. The Communications Act of 1934 transferred jurisdiction to regulate interstate and foreign telecommunications rates from the Interstate Commerce Commission to this Commission.

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[22] Our decision to adopt the ICAM at that time was based in part upon our desire to comply with the Court of Appeals schedule for the resolution of some questions relating to WATS tariffs. Similar considerations have caused us to conclude that we should not defer the adoption of access charge rules in order to achieve further refinements. The MFJ will cause the filing of BOC access charge tariffs that will become effective on the day of divestiture unless we reject or suspend the tariffs. The public interest would not be served if we allowed BOC access charge tariffs to become effective and implemented a significantly different methodology a few months later. We have decided that we should act now in order to establish Commission access charge rules that can be implemented at the beginning of 1984.

[23] District of Columbia Public Service Commission, pp. 2–4.

58. The origination or termination of an interstate communication, including the use of a local loop between an end user's home or office and a local switch of a local exchange carrier, is necessarily a part of an interstate communication.[24] It is as much "in commerce" as the interexchange trunk that actually crosses a state line. If the *Wabash* principle is still applicable, the states would not acquire jurisdiction to regulate rates for such interstate access even if this Commission were abolished.

59. The Supreme Court's decision in *Smith v. Illinois Bell, supra*, supports this view of federal jurisdiction. In *Smith* the Court considered the validity of a state public utility commission prescription of telephone rates based on evidence that made no distinction between the interstate and intrastate uses of jointly used telephone property. The telephone companies and the regulators had been using a "board-to-board" separations methodology to determine toll and local exchange rates. The toll rates reflected transmission costs from one long distance switchboard to another. All the costs we have described as NTS and some of the traffic sensitive exchange plant costs were reflected in local exchange service rates. The Supreme Court concluded that the board-to-board method was improper. The Court said (*id.* at 148):

> The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.

60. We reject claims in some comments that the *Smith* decision in some way precludes this Commission from establishing any flat rates for interstate access.[25] The Supreme Court did not purport to determine whether state or federal commissions should mandate flat or usage rates or some combination of flat and usage rates for exchange or toll services. Such rate structure questions were not presented in that case and were not discussed in the opinion. The Court merely attempted to ensure that state or federal regulators do not exceed the limits of their respective powers when they determine economic and social policy questions that have been entrusted to their judgment.

61. The decision to exclude interstate access from local rates could have been implemented by including the interstate access costs in flat or usage rates regulated by federal regulators without violating any express or implicit directive in the *Smith* opinion. AT&T made the decision to recover the interstate exchange plant costs on a usage basis when it recomputed its interstate investment

[24] *See, e.g., New York Telephone v. FCC*, 631 F.2d 1059 (2d Cir. 1980).

[25] *See* Kansas Corporation Commission, p. 8; California Public Utilities Commission, p. 3; Haviland Telephone Co., p. 6; NARUC Reply, p. 8; Roseville Reply, p. 4.

and expenses in 1943 to reflect some exchange plant costs in interstate MTS rates. It had always imposed distance-weighted usage charges upon MTS customers and did not change the pre-existing rate structure when some NTS costs were added to the MTS costs. The NTS exchange plant costs represented a relatively small part of interstate MTS costs at that time. Changes in relative costs and separations allocations during the intervening years have caused NTS costs to become a very significant part of MTS costs. No opinion of this Commission prior to the *Fourth Supplemental Notice* discusses legal, economic or policy implications of recovering the NTS portion of MTS costs through flat or usage charges. Thus, the inclusion of flat charges in an access charge plan does not conflict with precedent. It merely alters a carrier-initiated practice that appears to be the product of historical accident.

62. We accordingly conclude that this Commission's discretion to establish flat or usage charges or some combination of flat and usage charges for interstate access is not inconsistent with past court or Commission decisions.

63. Some comments have expressed the view that we are required to consult with state regulators through the Joint Board mechanism before we make any final decision to adopt an access charge plan.[26] We received extensive comments with respect to the appropriate role of a Joint Board in response to the *First Supplemental Notice*. We concluded in the *Second Supplemental Notice* that a Joint Board referral of questions with respect to interstate rates and the apportionment of interstate costs among interstate services would not be necessary or desirable. 77 FCC 2d at 236.

64. Most who claim that a Joint Board must or should be consulted claim that interstate access charges will affect jurisdictional separations.[27] Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), requires that this Commission obtain an Initial Decision of a Joint Board composed of three federal and four state commissioners before we adopt any change in separations rules.

65. The Missouri Public Service Commission Staff claims a Joint Board referral is mandatory because the implementation of access charges will affect the results that are produced by any separations formula. We do not believe Section 410(c) requires any Joint Board consideration of decisions that merely indirectly affect separations

[26] *See* Kansas Corporation Commission Staff, pp. 1–2; Michigan Action Group, p. 6; NARUC, p. 4; Missouri Public Service Commission Staff, pp. 2–3; Michigan Public Service Commission, p. 4; California Public Utility Commission, p. 3; Rural Telephone Coalition, pp. 43–48; REA, p. 2; Haviland Telephone Co., p. 5; Utah Public Service Commission, p. 2; Ketchikan Public Utilities, pp. 3, 10; Rural Coalition Reply, p. 41; NARUC Reply, pp. 8–9.

[27] We are using the term "separations" to describe the process of apportioning investment and expense between the interstate and intrastate jurisdictions. We are not using the term "separations" to describe the divisions/settlements process that is described in the *Second Supplemental Notice*. *Id.* at 226–228.

results. Every rate decision by this Commission or any state commission has some effect upon separations results. The regulatory processes would be paralyzed if consultation were required before a state or federal commission adopted any decision that affects separations results.

66. Most participants who say that interstate access charge questions should be referred to a Joint Board contend that the adoption of access charges rules will affect the final decision in the pending Docket 80–286 proceeding to reexamine separations rules for the apportionment of exchange plant. NARUC and the Rural Telephone Coalition even assert that the outcome of that proceeding will be "foreordained" by any decision to adopt rules for the computation of interstate access charges. *See* NARUC Reply, p. 9.

67. Such fears are unfounded. We have, of course, asked the Joint Board to consider consistency with access charges in formulating its recommendations for separations changes. *Amendment of Part 67 of the Commission's Rules*, 78 FCC 2d 837, 845 (1980).[28] We have also necessarily made some assumptions with respect to the likely outcome of the pending separations proceeding in order to devise access charge rules that can be implemented in 1984. These actions should not be interpreted as a final decision upon the part of this Commission with respect to questions in Docket No. 80–286 and should not be interpreted as inhibiting the discretion of the Joint Board in formulating its recommendations. If the final decision in that proceeding departs from our current assumptions in a manner that requires a revision of the access charge rules, we will, of course, revise the rules we are adopting in this *Report and Order*.

68. Some participants have recommended that we either refer access charge questions to the Docket 80–286 Joint Board or defer action on access charges until we make a final decision with respect to separations changes in order to avoid the possibility that access charge rules may have to be revised to fit unanticipated separations changes. We have concluded that such a course would not be desirable under the present circumstances because a delay of a few months in the adoption of access charges would not allow sufficient lead time to enable carriers to prepare access charge tariffs that can be filed on or before October 3.[29] If BOC access charges that are not based upon these rules become effective at the beginning of 1984 and radically different charges were substituted a few months later, we could expect considerable confusion and disruption. Such a scenario would be likely to create far greater problems than any changes that

[28] Part III of the *Joint Board Order* discusses possible separations changes to achieve consistency with access charges.

[29] Access charges must be filed on October 3, 1983, to provide a full 90 days notice before a January 1, 1984 effective date.

might be required to adapt access charges to fit unanticipated separations changes.[30]

69. Some participants have suggested that we refer access charge questions to a Joint Board because they hope that such a proceeding would produce a consensus among all regulators that would enable carriers to compute interstate and intrastate access charges in the same manner. It appears doubtful that such a consensus would emerge within a short period of time. Some participants have proposed alternative methods to achieve unified access charges. SBS has proposed that we preempt state regulation of intrastate access charges and others have suggested that we delegate responsibility for interstate access charges to the state commissions. We rejected somewhat similar suggestions when we adopted the *Second Supplemental Notice*. 77 FCC 2d at 232.

70. Unified access charges conceivably might be achieved without new legislation by assigning 100% of the exchange plant investment and related expenses to one jurisdiction or the other. Such a change in jurisdictional separations would, of course, have to be considered by a Joint Board in the first instance. The Joint Board has recently invited comments with respect to the legality and desirability of a 100% assignment of NTS costs in Docket 80–286. *See* para. 13, *supra*.

71. We believe there is reason to hope that a considerable degree of uniformity will in fact emerge even though this *Report and Order* does not require that state commissions follow this Commission's approach to charging for access. The same considerations that have led us to conclude that our plan is an appropriate strategy for reducing discrimination may lead many state commissions to reach similar conclusions. Moreover, all commissions will necessarily recognize that administrative efficiency is served when a single approach to structuring access charges for long distance use of local plant is adopted. State commissions that do not choose to recover all costs in precisely the same way will undoubtedly find many of our methodologies helpful. State commissions will also have an incentive to adopt end user charges because failure to adopt a similar approach to the recovery of non-traffic sensitive costs assigned to state toll would increase toll rate disparity.[31]

72. Our access charge plan for NTS plant is based upon the

[30] Many decisions that affect the computation of access charges will, of course, be made in the separations proceeding. For example, the size of the Universal Service Fund, the characteristics of participating exchange carriers, and the formula that indirectly determines Fund distributions to particular local exchange carriers will be determined in Docket 80–286 after an Initial Decision of that Joint Board.

[31] Toll rate disparity describes the condition that occurs when, because of different ratemaking philosophies adopted by the federal and state jurisdictions and other factors, a call of given duration is priced at different levels depending upon whether it is intrastate or interstate. Toll rate disparity sometimes results in a

following four principles. First, it is important to move towards collecting these costs from customers rather than carriers and on a flat rather than on a usage sensitive basis. Second, it is important to accomplish the transition to flat rates in a smooth and measured way. Third, it is vital to ensure that the plan does not threaten the universal character of telephone service. Fourth, the plan should provide for sufficient flexibility so that telephone companies serving dramatically different service areas can adopt transitional approaches that best serve their unique areas.

73. While the precise timing and mechanics of our access charge plan are based upon the interstate telecommunications market, we believe that these same four principles can serve as the basis for appropriate and acceptable state access charge plans. Obviously, the precise minima, maxima and transition periods would reflect not only unique state usage characteristics but also the level of NTS assignment to state toll service. We stand ready to provide technical or other assistance to state commissions that wish to integrate their access charge plans with the interstate approach. This integration would also be appropriate, technically feasible and reasonable with respect to traffic sensitive plant.

D. *Effect of Section 1 Upon Commission Discretion*

74. Although we are establishing rules for the computation of interstate access charges in order to remedy discrimination and preferences that violate Section 202(a) of the Communications Act, we are also required to consider other policies in designing an appropriate remedy. A variety of different methods could be used to produce access charges that do not result in unreasonable discrimination or undue preferences. We must be guided by Congressional goals expressed in Section 1 of the Act, 47 U.S.C. §151, in choosing among such methods. We observed in the *First Supplemental Notice* that "[a]ll provisions of the Act must be read in the light of that statement of purpose." 73 FCC 2d at 230.

75. Section 1 provides in relevant part:

> For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of promoting safety of life and property through the use of wire and radio communication, . . . there is hereby created a commission to be known as the 'Federal Communications Commission,' . . . which shall execute and enforce the provisions of this Act.

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price for a call to a city in the same state that is much higher than the price for a call to a more distant city in another state.

76. The *First Supplemental Notice* said (73 FCC 2d at 230):

> The reference to the rapidity and efficiency of service and the adequacy of facilities obviously means that Congress wanted to maintain and enhance the quality of communications services. The reference to reasonable charges demonstrates that Congress was also concerned with the level of rates and expected this Commission to follow policies which would mnimize the cost of communications services to ultimate users. This concern with the cost and quality of service demonstrates that economic efficiency is one of the goals of the Act.

77. An efficient communication service could also be defined in a narrower sense as efficient utilization of a network that enables a carrier to provide service at the lowest possible unit cost. Customer choices that affect the utilization of a network are necessarily influenced by the rate structure. Therefore, the creation of customer incentives that will promote efficient network utilization necessarily must be one of the objectives of any rate structure proceeding.

78. The bypass phenomenon that we discussed in the *Fourth Supplemental Notice* can be viewed as a network utilization problem. Diversion of traffic to bypass facilities that are in fact more costly than the access facilities provided by the local exchange telephone companies obviously would not promote efficient utilization of telecommunications facilities. Therefore, we concluded that discouraging uneconomic bypass must be one of the criteria for the design of an access plan.

79. The *Fourth Supplemental Notice* identified a fourth objective in addition to eliminating discrimination or preferences, promoting efficient network utilization generally, and discouraging uneconomic bypass. We said that an access charge plan should be designed to "limit any substantial setback in the availability of telephone service" (90 FCC 2d at 147) and noted that some options could produce "an increase in the price of access to the public network, and a possible reduction in the subscriber base." *Id.* at 140.

80. Most participants who filed comments in response to the *Fourth Supplemental Notice* apparently agree that encouraging persons to subscribe to local exchange service must be one of the objectives of this proceeding. This is usually described as the "universal service" objective or goal. The term "universal service" has rarely been defined. Most participants apparently agree that "universal service" has existed on a nationwide basis for several years. In the context of this proceeding a "universal service objective" means avoiding actions that would cause a significant number of local exchange service subscribers to cancel that service.

81. Although interstate access charges will not have any effect upon local exchange service rates, a customer's decision to subscribe to local exchange service will necessarily be affected by the combined fixed charges that a customer must pay to access all services from a

terminal in his own home or place of business. One could not describe every increase in fixed charges subscribers must pay for local, intrastate toll and interstate access as conflicting with a universal service objective. Such a conflict would arise only if the magnitude and timing of any increase in the fixed charges were sufficient to cause a significant number of subscribers to cancel service.[32]

82. Although most participants apparently agree that universal service is one of the goals of the Act, MCI has questioned the existence of such a statutory goal. Comments, p. 5, Reply, pp. 5–6. The term "universal service" does not appear in the Communications Act and the existence of a universal service goal may not be self-evident from the language Congress used to describe its purposes in Section 1.

83. The *First Supplemental Notice* noted that making service "available . . . to all the people of the United States . . . at reasonable charges" could mean that "Congress wanted to create conditions in which such services, or some of them, are 'affordable' to all." 73 FCC 2d at 231. We also said: "While this may be a credible interpretation of Section 1, it does not appear to be the only possible interpretation." *id.* We have now concluded that the "available . . . to all" language does contemplate that telephone exchange service should be made available at reasonable rates. Such a universal service goal should also be inferred from the Congressional declaration that "promoting safety of life and property through the use of wire and radio communication" is one of the purposes of the Act. A subscription to local exchange service can be useful for safety purposes.

84. Many of the participants have argued that the relative universality of service affects the value of a telecommunications service for all users of a service. If some persons elected to cancel local exchage service, other customers would not be able to place local or long distance calls to those persons. Even if economic efficiency were the sole goal of the Act, a diminution of universal service might reduce economic efficiency in a broader sense.

85. In addition to those four objectives, we necessarily must consider the competitive effects of alternative rate structures. We concluded in the *Third Supplement Notice* that a competitive interexchange market structure will further the goals of the Communications Act. If identical access services were offered to all competing interexchange carriers, we could assume that cost-based access charges will lead to an optimal interexchange market structure. This is not the case today and it will not be possible to remedy all inequalities in access service offerings before the initial access charges become effective. Therefore, preserving an opportuni-

[32] Appendix G of this *Report and Order* describes and discusses past studies of the effect of rate increases upon demand for local exchange telephone service.

ty for fair competition during a transition period must also be viewed as an objective that will further the goals of the Act.

86. The relative priorities that should be afforded goals or factors that can be inferred from Section 1 is an open question. The priorities question was also discussed in the *First Supplemental Notice*. Paragraph 24 said (73 FCC 2d at 231):

> Some comments have suggested that we establish relative priorities in this Supplemental Notice which will be observed if some of the explicit or implicit goals of the Act conflict. It would be unwise to assign any priorities at this time. It seems unlikely that Congress intended to give priority to any particular goal under all conceivable circumstances. A public interest determination is necessarily a balancing process which requires the exercise of judgment, and different goals may take precedence depending on the facts of each case. Therefore, we shall wait until the facts have been developed in the record before we attempt to set priorities for goals in this case.

87. Although those observations related primarily to the entry policy question and a Section 214 public interest determination, we believe that a similar balancing process is required when we exercise our Section 201(a) power to establish through rate divisions or our Section 205 or Section 4(i) powers to prescribe steps in the computation of a charge.

88. An ideal access charge plan would eliminate all discrimination or preferences within or among services, create incentives for the most efficient utilization of all telecommunications facilities, discourage all uneconomic bypass, ensure that no local exchange service subscriber cancels that service, and establish full and fair competition in the interexchange services market. All of those objectives could not be fully accomplished simultaneously and immediately even if we had perfect knowledge. Therefore, we necessarily must exercise judgment and discretion in devising an access charge plan that takes all of those objectives into account.

89. Neither the language of the Act nor past court or Commission opinions preclude this Commission from striking a reasonable balance. On the contrary, Congress undoubtedly anticipated that an exercise of judgment would be required when it declared that it was creating this Commission in order to achieve multiple purposes "so far as possible." Congress conferred broad discretion upon this Commission in order to enable us to fulfill that mandate.

III. *GUIDELINES FOR RECOVERY OF NTS COSTS*

A. *Alternative Strategies For Reducing Discrimination*

90. Exchange plant that an end user or subscriber would need in order to use any local or long distance service is often described as non-traffic sensitive or NTS plant because the cost of providing such

equipment does not vary with usage. NTS encompasses all equipment that a subscriber would need to access the local exchange switch including terminals and other customer premises equipment, the protection block and drop wire and the line or loop between the customer's premises and a local exchange switch or a manual switchboard.

91. A portion of a local dial switch is also classified as non-traffic sensitive plant for separations purposes in order to segregate costs of terminating a line in the switch from the costs of switching. We proposed to include such costs in a non-traffic sensitive element in the tentative plan described in the *Second Supplemental Notice*. We subsequently asked a Joint Board to reexamine the classification of local dial switching equipment.[33] Inasmuch as that proceeding may produce new classifications we have decided that it would not be appropriate to include any local dial switching equipment in an NTS access plan at this time.

92. In order to achieve parity between interstate and international services that use the same subscriber line that is used for local exchange service and other services that are close substitutes for such services, an NTS plan must include comparable facilities that are used by such substitute services. Therefore, for purposes of this *Report and Order* NTS also includes portions of various lines on the customer's side of the class 5 or "end office" that are dedicated to a particular service. These include a WATS access line, an FX or CCSA "closed end" line, or a "private line" terminating in a PBX or other customer premises equipment that may be used for local exchange service. Our NTS plan does not encompass customer side dedicated lines that do not terminate in such equipment.

93. In the *Second Supplemental Notice* we presented a tentative plan to achieve parity among such services by apportioning the total NTS costs among four service categories—MTS/WATS, FX-CCSA Open End, OCC-ENFIA and Private Line—on the basis of relative use. This would have represented a substantial departure from the cost apportionment that is presently used to compute private line rates. The *Separations Manual* has generally assigned the entire cost of facilities that are used exclusively for interstate services to the interstate jurisdiction and has usually apportioned the cost of facilities used jointly for interstate and intrastate calling. A usage-based formula has traditionally been used to apportion jointly used NTS facilities between the jurisdictions. For ratemaking purposes all costs of AT&T assigned to the interstate jurisdiction are apportioned among interstate service categories through the *ICAM*.[34] The costs assigned by the *ICAM* to private line services are, in general, based

[33] *Amendment of Part 67 of the Commission's Rules, supra*, 78 FCC 2d at 842.

[34] *See* footnote 6, *supra*. With some exceptions the other telephone companies concur in AT&T's tariffs for MTS, WATS and private line service.

upon the assignment of these costs to the interstate jurisdiction. Thus, the present rates for private line services reflect the "directly assigned" costs of private line loops. Inasmuch as private line customers normally have very high usage per line as compared to MTS customers, a usage cost allocation would produce a per line assignment to private lines that is much higher than the per line cost that is directly assigned under the *Separations Manual*.

94. Many of the comments that were filed in response to the *Second Supplemental Notice* contended that it would be unjust, inequitable and unlawful to compel private line customers to pay charges that are based upon a cost assignment that exceeds the actual cost of the line they use. Many of those comments also contended that a usage assignment of such fixed costs would be uneconomic because it would discourage usage by pricing the facilities in a manner that greatly exceeds the actual costs of the private line loops.

95. Those arguments caused us to reexamine the assumption that discrimination or preferences between private line and MTS users could best be corrected by assigning all NTS costs on a usage basis. The ratemaking principles advanced in those comments would compel the conclusion that the existing MTS rate structure is incorrect because the usage rates for MTS allocate some fixed costs on a usage basis. The same arguments would support the conclusion that the MTS rate structure compels large MTS users to subsidize other MTS users because a large user of that service would pay NTS costs that substantially exceed the cost of the NTS facilities such a customer uses to make MTS calls. That analysis also suggests that the increasing use of private lines for purposes that could be served by MTS reflects an effort to avoid the subsidy that is inherent in the MTS rate structure and that private lines are being used inefficiently to serve purposes that from a network standpoint could be accomplished more economically through MTS.

96. The discrimination or preference problem could not be solved by maintaining the *status quo*. If one assumes that all users of competing services should pay per minute charges for NTS, total equality could be achieved by apportioning total NTS costs among such services on the basis of minutes of use. If one assumes that all users of competing services should pay per line charges, total equality could be achieved by continuing to assign private line NTS costs on a direct assignment basis and revising the MTS rate structure to include a flat charge for NTS and a reduced usage charge for the other exchange and interexchange facilities that are used to place an MTS call. We described those alternatives as "pure strategies" in the *Fourth Supplemental Notice* because they would produce equality on a per minute or on a per line basis. For convenience, we called the usage apportionment described in the

Second Supplemental Notice "Pure 1" and the per line apportionment alternative "Pure 2."

97. Section 202(a) of the Communications Act does not require total equality of rates at all times or under all circumstances. The Act prohibits "unjust or unreasonable" discrimination, "undue or unreasonable" preferences, and subjecting persons or localities to an "undue or unreasonable prejudice or disadvantage." This necessarily implies that departures from total equality are permissible and may be required to achieve Communications Act goals other than the elimination of discrimination or preferences. The *Fourth Supplemental Notice* accordingly invited comments upon "mixed" strategies that might combine usage and flat charges or usage and fixed cost apportionments. We described two examples of such "mixed strategies" in that *Notice* and invited interested persons to suggest other alternatives. The *Notice* called the two examples "Mixed 1" and "Mixed 2" for convenience. "Mixed 1" would have allocated NTS costs between MTS/WATS and private line service using "equivalent lines." While the charge for private line users would have been a flat rate, each would be required to participate in the "contribution" to the local revenue requirement embodied in an interstate revenue requirement based on the subscriber plant factor. The "Mixed 2" strategy would have continued charging for private line services on a dedicated basis, but would have imposed a new rate structure on MTS. Under this plan, customers would be charged a usage based rate for recovery of NTS costs up to a cap. After this point, no additional NTS contribution would be required. Thus there would be economically efficient pricing for those calls made after the cap was reached.

98. Our decision to invite comments on alternative plans was based on developments that had occurred since the adoption of the *Second Supplemental Notice* and that suggested that Pure 1 might not be feasible even if we concluded that per minute equality would be ideal. At the time we adopted the *Second Supplemental Notice* we assumed that a reapportionment of costs among service categories would produce a shift from telephone company private line services to MTS that would enhance efficient utilization of the telephone companies network by discouraging the use of service-dedicated lines for purposes that could be served by the use of lines that can be commonly used for multiple services to multiple points. We also assumed that the reallocation of costs would produce a reduction in MTS rates.

99. The comments that were filed in this proceeding in 1980 did not dispute those assumptions, but some of the 1981 comments in the Joint Board proceeding did. Several of those comments noted that new technologies provide alternatives to the use of any telephone company loop for the orgination or termination of interexchange telecommunications. Some asserted that any change in rate struc-

ture that increases telephone company private line charges would cause private line users to shift to such alternative services. Some also asserted that the access compensation that is reflected in MTS rates must also be reduced in order to avoid a shift to alternative technology services that "bypass" all telephone company facilities.

100. The subsequent settlement of the AT&T anti-trust case caused us to conclude that bypass may be an even more imminent possibility than it originally appeared to be. AT&T would have a much greater capability to provide bypass services on a large scale than other entrants in interexchange markets. AT&T would not have any incentive to do so as long it retained a massive investment in local exchange facilities. The divestiture of all of its local exchange facilities would remove that inhibition.

101. The selection of a cost apportionment method necessarily affects the decision to prescribe end user or carrier's carrier access charges or some combination of such charges. Although some access charge options might be implemented through any of those methods, the Pure 2 alternative necessarily requires flat rates that are assessed upon end users in order to ensure that each end user pays the fixed costs that are attributable to NTS facilities that are dedicated to that particular user. Such a flat end user charge also must be collected by the exchange carrier because the subscriber line that is used for MTS access can be used for other interstate services including open end WATS, FX and CCSA originations and terminations and switched services offered by carriers that compete with AT&T interexchange services. The *Fourth Supplemental Notice* assumed that Pure 1 or Mixed 1 would be implemented through carrier's carrier access charges and Mixed 2 would be implemented through end user charges.

102. Each of the plans received support from at least some of the participants who responded to the *Fourth Supplemental Notice*. Several states and small telephone companies preferred the Pure 1 scheme. Mixed 1 received some support from commenting parties. This approach was supported (at least as an interim measure) by several participants who were convinced that a Pure 1 approach was overly restrictive.[35] Participants supporting this approach argued that private line users should be expected to contribute to the support of the nationwide system. To some extent the support for Mixed 1 appeared to be based on the perception that this approach represents a relatively small deviation from the current rate structure.

103. Pure 2, or some variation of Pure 2, was supported by many of the participants who filed comments in response to the *Fourth Supplemental Notice*. Most of the support for Mixed 2 came from

[35] *See*, e.g., Comments of Florida PSC, Michigan PSC Staff, NARUC, Oregon PUC, Washington UTC.

those who saw it as the first step toward a Pure 2 approach. However, while the concept of a rate structure combining a flat fee with a usage-based charge to recover NTS costs received considerable support, the Mixed 2 scheme itself was viewed by most participants as unviable. Because many customers make few or no calls in any one period, and because the interstate jurisdiction is assigned NTS costs regardless of the actual use of those facilities, both the charge per unit of use and the cap would have had to be so great that the benefits of cost-based pricing would have been denied to most consumers. Thus, even those participants supporting a rate structure that combined a usage charge with a flat fee were almost unanimous in recommending that each end user be assessed some flat fee for access to the network regardless of his actual usage.

104. We have decided that none of the access charge options presented in our *Fourth Supplemental Notice* is entirely satisfactory. The access charge plan that we are adopting herein is more complex, and we believe it fair to say more sophisticated, than any of these options. Our new plan, however, incorporates elements of the options in the *Fourth Supplemental Notice* and reflects the ideas and suggestions expressed in many of the comments.

105. The pure strategies that were discussed in the *Fourth Supplemental Notice* do have the advantage of providing for a uniform rate structure for MTS and WATS service on the one hand, and private line services on the other. This is an important advantage because we have found that it is virtually impossible to eliminate discrimination among services while maintaining the current MTS/WATS structure and encouraging cost-based rates for other services. We have attempted for many years to eliminate unreasonable discrimination among private line, WATS, and MTS services. These attempts have imposed heavy burdens on users, carriers, and on the Commission, but have achieved, at best, mixed results. We conclude that the costs associated with the non-traffic sensitive plant used to provide these services must ultimately be recovered through charges based on the same rate structure

106. These NTS facilities are essentially identical regardless of the service with which they are associated. Specifically, all of these facilities include access loops and associated wire and CPE that are dedicated to particular customers and allocated to the interstate jurisdiction. We have found in Part II. B, *supra*, that the rate structures for recovering the costs of these similar facilities are very different and result in unlawful discrimination. Only by charging for these facilities on a similar basis can the problems of discrimination be resolved.

107. Although the Pure 1 approach would have the advantage of charging all facilities on the same basis, we must reject the Pure 1

option. Comments by numerous participants have convinced us that bypass is an actual threat and present danger.[36] For this reason, and because of the dynamic economic distortions that Pure 1 would impose on the U.S. economy, we find Pure 1 to be an unacceptable solution.[37]

108. In the *Fourth Supplemental Notice*, we asked whether large users were likely to abandon the network if they were forced to pay prices equal to those paid by MTS users (the Pure 1 approach). Numerous comments indicated that bypass is real. Even with today's rate structure, which allows many large users to escape paying the full MTS rate through use of private line or other services, many large corporations and state, local, and federal governments are planning or using facilities that bypass the local loop. Newly available technologies such as digital termination service (DTS) and cellular radio provide valuable new services in their own right, but may also be used to provide uneconomic bypass if access pricing continues to diverge from cost. Alternative means of resolving unlawful discrimination among services (such as the plan proposed in the *Second Supplemental Notice*) would encourage still more bypass.

109. Because users have alternatives to the traditional telephone network, it is increasingly difficult to force heavy users to pay rates that greatly exceed their costs. Such users would abandon the network, leaving the small consumers who have fewer options with the full costs of the network. Indeed, attempts to overrecover costs from those groups most able to escape these charges may backfire and result in inferior service to large and small users alike.

110. Many participants responded to our expressed concern with the effects of uneconomic bypass by suggesting that we use our powers under Section 214 of the Communications Act, 47 U.S.C. § 214, to deny authorizations to construct facilities that would bypass local telephone company facilities.[38] We reject that suggestion. We noted in the *Fourth Supplemental Notice* that a flat prohibition of bypass services would not be desirable because bypass services can serve functions that are not adequately served by existing telephone company services. We also noted that overpricing of telephone

[36] *See, e.g.*, comments of Aeronautical Radio, Inc; American Petroleum Institute; Association of Data Communications Users; AT&T and BOCs; Centel; Executive Agencies of the United States; Florida PSC; IBM; Ketchikan Public Utilities; Nevada PSC; NTIA; Pennsylvania PSC; Rochester Telephone; SBS; Southern New England Tel (SNET); Southern Pacific Communications (SPC); United Telephone System, Inc.; USITA; Western Union.

[37] Such distortions include the misdirection of investment and industry from paths that make the most productive use of communications to paths that respond to non-cost related communication pricing. For example, the development of computer and related technologies could be inhibited by such a rate structure.

[38] *See, e.g.*, NARUC and Rural Telephone Coalition comments.

company services could lead to the substitution of bypass services that may in fact be more costly to provide than telephone company services that could serve the same purpose. We concluded that access charges should accordingly be designed to avoid this "uneconomic bypass" and invited interested persons to comment upon the compatibility of various pure or mixed NTS access plans with that objective.

111. We continue to adhere to this view. Development of bypass technology provides a competitive spur to ensure that the telephone system offers the type of service that is in demand and is technologically feasible. In many cases it may be appropriate to use some service other than the traditional wireline carrier. We are simply not in a position to determine what constitutes an uneconomic "bypass" service and what is a wholly new service that will attract a new set of users and enhance the ability of all users to make full use of telecommunications service-potential. For example, some comments assert that cellular services constitute a bypass technology. We have concluded, however, that cellular radio is a distinct service that serves distinct needs and that cellular service could be complementary to existing wireline service. Indeed, a given technology may be the efficient means of providing service to certain groups yet constitute uneconomic bypass for other services or groups.

112. In addition to the bypass problem, long run reliance upon usage-based prices for the recovery of fixed-costs will distort economy-wide investment decisions, artificially restrict calling patterns, and may jeopardize the competitive position the U.S. now holds in the world marketplace. In comments filed in response to the *Fourth Supplemental Notice*, NTIA has estimated that non-cost based pricing results in a $1.7 billion annual consumer loss due to repression of calls that would have been made at rates equal to cost. While we have some questions concerning the methodology used in this study, we find the prospect of losses of such a magnitude to be deeply disturbing.[39]

113. Cost-based rates provide correct signals to the marketplace. Both investors and consumers are certain to respond to such cost-based rates by redirecting their behavior in ways that redound to the benefit of the U.S. economy. In the short run, substantial growth in toll calling could be expected as consumers make better use of the network. In the long run, technologies that make more intensive use of the telecommunications system will create even larger benefits. In

[39] In an independent study, James Griffin estimates this loss (including the loss due to intrastate MTS pricing) as $1.5 billion annually. *See* James M. Griffin, "The Welfare Implication of Externalities and Price Elasticities for Telecommunication Pricing," *Review of Economics and Statistics*, February 1982, pp. 59–66. Certain assumptions underlying the results of this study are questionable or unclear. Nevertheless, while this Commission has been unable fully to corroborate estimates of damage, the evidence that significant harm results from current pricing structures seems strong.

an economy increasingly dependent upon information and communications, the dynamic losses caused by investment misdirection can no longer be afforded.

114. Arguments against the Mixed 1 option were similar to those leveled against Pure 1. As with the Pure 1 approach, rates for private line users would be substantially increased. As with Pure 1, it was argued that such substantial rate increases would result in bypass and in economic inefficiency. Several of these participants also argued that the means by which the contribution would have been allocated between private line and message services under Mixed 1 was arbitrary.[40]

115. We are persuaded that either the Pure 1 or Mixed 1 approaches would result in rates that are unrelated to costs for an important class of users and that any subsidy that could be collected from these rates would be shortlived. As users who are best served by the telephone network found lower priced (though higher cost) alternatives, society as a whole would be the loser and the public interest would be disserved.

116. The Mixed 2 plan would eliminate much of the discrimination between private line and message services through use of a ceiling rate. Telephone subscribers who make no use of the interstate network, however, would continue to pay nothing. Supporters of the Mixed 2 approach argued that this approach would resolve the bypass threat by greatly reducing the total bill paid by any large user, while continuing to allow small users and non-users to pay very little or nothing, maintaining universal service.[41]

117. We are convinced, however, that the Mixed 2 proposal, as described in the *Fourth Supplemental Notice*, is unworkable. The distribution of interstate calls by subscribers is highly skewed. A substantial portion of total callers make no calls in any given month. Under the Mixed 2 approach, such users would pay nothing. Heavy users are currently a small fraction of total users, but make a large majority of total calls. Such users would be protected by the maximum charge. The Mixed 2 approach, however, does not alter total revenue requirements. The costs allocated to the interstate jurisdiction are unlikely to fall as a result of the Mixed 2 approach. To recover revenue requirements, access tariffs would have to levy heavy usage charges on moderate users. These charges could be far in excess of the current payments. This approach could result in an inefficient and undesirable increase in the number of subscribers who make no interstate calls. As a result, telephone companies could

[40] *See, e.g.*, Comments of Ad Hoc Telecommunications Users; Aeronautical Radio, Inc.; AT&T/BOCs; First Data Resources; GTE; IBM; Kansas Public Service Commission; NTIA; Pennsylvania PUC.

[41] *See, e.g.*, Comments of Rural Electrification Administration, Virginia Corporation Commission.

find themselves unable to devise charges to meet their authorized revenue requirements. For these reasons, we conclude that the Mixed 2 approach is inappropriate.

118. Proponents of the Pure 2 approach[42] argue that Pure 2 corresponds with economic cost causation and that only the Pure 2 approach can eliminate bypass, encourage efficient use of the national telecommunications network, and be sustained in a competitive environment. Pure 2 would also resolve the discrimination between private line and message service, a fundamental objective of this proceeding. It would do so by charging all users in the same way. Only costs that vary on a usage basis would be recovered on a usage basis. Costs imposed on a non-usage basis would be recovered on a non-usage basis.

119. The majority of those commenting supported the Pure 2 option for the same reasons they found both the Pure 1 and Mixed 1 schemes objectionable.[43] They assert that the Pure 2 approach would enhance network efficiency in at least two ways. First, since under this plan charges would reflect costs, they claim that Pure 2 would eliminate uneconomic bypass. Only these alternative technologies that have real advantages over the telephone network would survive. Second, usage based rates could fall substantially since such rates would no longer recover NTS costs. As a result, telephone users would no longer artificially restrain their calling. Users could weigh the price of a call against the benefit that they would receive from a call, and would make that call whenever the value of the call is at least equal to its cost.

120. Opponents of the Pure 2 approach[44] make two arguments. First, some contended that we could not lawfully impose charges on end users. Access charges, they argue, must be paid from interstate carriers to exchange carriers. In the alternative, some argued that we could not impose charges on subscribers who make no interstate calls. Second, many argued that even if we could impose such a charge we should not. It was argued that Pure 2 would constitute a

[42] Proponents of the Pure 2 approach include ABC/CBS/NBC; Ad Hoc TeleCommunications Uers Committee; Aeronautical Radio; Association of Long Distance Telephone Companies; AT&T/BOCs; Business Telecommunications Corporation; Department of Justice (in reply comments); First Data Resources; GTE; IBM; MCI; Rochester Tel; SNET; SPC; Tel. Systems Management Corp., *et al.*; US Tel; USTS; Western Union.

[43] AT&T and many other telephone companies that had supported the tentative plan in their comments filed in response to the *Second Supplemental Notice*, reversed their earlier position and agreed with heavy users that Pure 1 is an invitation to bypass.

[44] Those arguing against the Pure 2 approach include the California PUC; Consumers Union, *et al.*; Florida PSC; Haviland Telephone *et al.*; Michigan PSC staff; NARUC; National Association of State Utility Consumer advocates; North Dakota PSC; Rural Electrification Administration; Washington UTC; Wisconsin PSC.

substantial step away from universal service since many users would be unable or unwilling to pay the flat fee for interstate access. Further, it was argued that the Pure 2 approach could lead to the loss of nationwide rate averaging. These drawbacks, it was felt, would be particularly severe in high cost rural areas. Some of these considerations have led us to reject the Pure 2 approach.

121. We reject the notion that we cannot impose a flat fee on subscribers, or that a subscriber must make interstate calls before a subscriber can be assessed such a charge. A subscriber who obtains a line to a local dial switch or a manual switchboard necessarily obtains access to interstate as well as local services. The cost of that access has traditionally been described as non-traffic sensitive because such costs do not vary with usage. A subscriber who does not use the subscriber line to place or receive calls imposes the same NTS costs as a subscriber who does use the line. A subscriber who does not make local calls would normally pay a flat fee for the exchange portion of such costs. Imposing a flat change for the interstate portion of those costs is equally reasonable. Any other procedure violates the general principle that costs should be recovered from the cost-causative ratepayer whenever it is possible to do so.[45]

122. We find more merit, however, in the second point raised by the opponents of Pure 2. We cannot ignore the problems which the implementation of Pure 2, especially its implementation on an immediate basis, would have upon universal service and rural subscribers. It has become quite clear to us that the major goals in this proceeding—the continued assurance of universal service; the elimination of unjust discrimination or unlawful preferential rates; the encouragement of network efficiency; and the prevention of uneconomic bypass—are to some extent conflicting and that there is no possibility of devising a "perfect" plan that would fully and immediately effectuate all of our goals. Rather, it has become clear that any acceptable plan must balance these goals in a satisfactory manner. For example, it would be unacceptable for the Commission to put a plan into effect that ameliorates existing efficiency, bypass and discrimination problems, but which, at the same time, had serious consequences for universal service.

123. Moreover, we recognize that the balance to be drawn is a very delicate one and that some adjustments may be necessary. For this reason, we have felt it necessary to move cautiously and have incorporated a transition period for our plan. We have also taken the special precaution of establishing a Universal Service Fund to

[45] *See Phase II Final Decision and Order in Docket 19129*, 64 FCC 2d 1 (1977); *see also First Report and Order in CC Docket 79-105*, (uniform system of accounts), 85 FCC 2d 818 (1981).

protect the needs of subscribers in rural or high costs areas. We now proceed in the succeeding sections to describe our plan.

B. *The Long Range Plan*

124. We are adopting a transition plan that will produce steps toward a rate structure that promotes optimal utilization of telecommunications facilities and a long range plan that will recover significant portions of NTS costs through flat charges that are collected from end users by exchange carriers. We believe it will be possible to achieve that result at the end of a transition period without jeopardizing universal service. We will, however, keep CC Docket 78–72 open in order to conduct a proceeding in the fifth year of the transition and to receive periodic or special reports during the course of the transition period that will enable this Commission to make any adjustments that might be necessary.

125. Although the long range NTS plan will not be fully effective until the 1990s, the total plan will probably be more understandable if we begin with a description of that plan. Under the long range plan, different charges will be assessed for the interstate use of lines that are also used for local exchange service and the use of lines that are dedicated to interstate service. The latter category includes interstate WATS access lines. It also includes all private lines, including closed end FX or CCSA lines, that terminate in a PBX, key system, or other customer premises equipment that is not used exclusively for a particular interstate service.

126. The charges for the line that is commonly used for multiple services will reflect the interstate portion of investment in that line, associated NTS plant, and other investment and expenses that are attributed to that element. We will call these the "Common Line" charges. The charge for the other category, which we will call "Dedicated Access Line", will inevitably be higher because it will reflect the total or unseparated cost of these facilities.[46]

127. We have made some revisions in the existing cost allocations to reflect private line usage of certain station equipment that is in fact jointly used by common line users and users of any private line that terminates in a PBX or similar equipment. Such jointly used equipment is apportioned to MTS and WATS under the current cost apportionment procedures. We are also apportioning a pro rata share of investment in unused or reserve lines to the Dedicated Access Line element. These changes will correct anomalies in the existing cost apportionment methods that impose an unfair burden upon MTS customers. We have decided to refrain from apportioning costs to a private line category as a surrogate for a leaky PBX charge

[46] Although we are describing this element as the "Dedicated Access Line" element, it does not include all lines that are dedicated to interstate services. Some of those lines or portions of such lines are included in the Special Access and Dedicated Transport elements.

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as proposed in the *Second Supplemental Notice*. 77 FCC 2d at 241. This problem is likely to become much less significant in the future because the access charge plan will remove much of the incentive for substituting private line service for MTS. Moreover, any remaining inequity will be at least roughly balanced by the assignment of investment in unused lines to the Dedicated Access Line element on the basis of relative use. An apportionment that was based upon projected use would probably apportion a smaller portion of that investment to the Dedicated Access Line element because common line use is likely to grow at a faster rate than private line use in the future.

128. We are also establishing a third NTS category for pay telephones. Although the NTS costs associated with pay telephone calls do represent fixed costs, it would be impossible to recover such costs through flat rates. We are accordingly prescribing usage charges that will be collected from end users when an interstate or international call is made from a pay telephone. We will call this element the Pay Telephone element.

129. We have also decided that a portion of the common line revenue requirement should be recovered through a carrier's carrier charge. At the present time most interstate common line costs are reflected in nationally averaged MTS and WATS rates, but the compensation that exchange carriers receive through the settlements and divisions of revenues process reflects the actual costs of each carrier that participates in the pool arrangement.[47] When we adopted the *Second Supplemental Notice* we assumed that we could eliminate discrimination and preferences in end user rates for interstate services without drastically altering the telephone industry's voluntary pooling arrangement. We accordingly proposed to establish carrier's carrier access charges that would be uniform in all exchanges of all carriers and proposed that access charge revenues be pooled in essentially the same manner that MTS and WATS revenues are pooled now.[48]

130. Although some comments that were filed in response to the *Second Supplemental Notice* questioned the desirability of uniform access charges with pooling, comments from both large and small telephone companies generally supported that proposal. None of the telephone companies indicated that it would not wish to be included in any such arrangement.

131. After the settlement of the AT&T antitrust case was announced, we recognized that it would probably be necessary to create different arrangements for the preparation of any common

[47] That arrangement is described in the *Second Supplemental Notice*. *See* 77 FCC 2d at 226-228.

[48] The pool we proposed at that time would have differed from the settlements/divisions pool in some respects. *Id.* at 238-239.

tariffs and the administration of any revenue pools. The *Fourth Supplemental Notice* invited comment upon a proposal to create an association to perform administrative functions that AT&T would have performed under the tentative plan in the *Second Supplemental Notice*. The *Fourth Supplemental Notice* also invited further comments upon some possible alternatives to nationwide averaging of access charges.

132. The most recent comments demonstrate that the telephone industry consensus no longer exists. The AT&T comments indicate that the BOCs do not wish to participate in common access tariffs or access revenue pools. Rochester, Continental and Centel have also indicated that they do not wish to participate in such arrangements. Many telephone companies and others have argued that nationwide averaging of access charges should be maintained. Some contend that nationwide averaging with pooling is essential to avoid severe hardships for some subscribers.[49] Such national averaging would allow below cost rates in high cost rural areas with attendant gains in universal service. Opponents of nationwide averaging argue that averaging results in a deviation of costs from rates and the prospect of inefficient use of the network.[50] Some contend that averaging might also have an undesirable effect on incentives to contain costs.[51] Uniform rates also limit a carrier's flexibility to meet unique circumstances, such as an unusual threat of uneconomic bypass or a reduction in universal service in the area served by a particular carrier. If we adopt rules that require every carrier to follow the same path, we will be hardpressed to satisfy legitimate needs of companies that require more rapid movement toward cost-based pricing and those companies that require a more gradual transition.

133. For reasons that are explained more fully in Part VI, we have decided that we should not require every exchange carrier to participate in common tariffs for all access elements. We have also concluded that some adjustment in flat end user common line access charges must be made in order to balance the critical need to move towards a rational cost-based pricing system for access plant with the maintenance of universal service. We do not anticipate that end user rates will ever reflect the full common line NTS costs of the highest cost carriers.

134. Costs of different local exchange carriers do vary. Many of these cost variations are attributable to factors that carrier management cannot control. The Docket 80–286 Joint Board has tentatively

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[49] *See especially*, Haviland Telephone Company, p. 7; Ketchikan Public Utilities, p. 2; Michigan Action Groups, p. 6; Rural Telephone Coalition, p. 14; REA, p. 6; Curtis M. Bushnell, p. 2; First Data Resources Reply, p. 16; NARUC Reply, p. 2.

[50] *See, e.g.*, comments of AT&T; Centel; Continental Telecom; GTE (in the future); NTIA; Rochester Telephone; SNET; Cincinnati Bell; USTS; Vermont PSB; Western Union.

[51] *See especially* Rochester Telephone, p. 34.

endorsed an industry proposal to include a high cost factor in any new separations formula for the apportionment of NTS plant. *Joint Board Order*, *supra*, 47 Fed. Reg. at 54485. Such a factor would represent a percentage of the NTS costs of high cost companies that would be added to a base factor percentage to determine the portion of such a company's NTS costs that would be allocated to the interstate jurisdiction. Such a percentage factor would necessarily take into account any increasing cost pressures caused by inflation or other factors. The high cost factor would promote or preserve universal service by enabling high cost companies to establish local exchange rates that do not substantially exceed rates charged by other companies. In view of the purpose such a factor would serve, we will describe it as a universal service factor in this *Report and Order*. Revenues attributable to the universal service factor will be described as the Universal Service Fund.

135. The purpose that the Universal Service Fund would be designed to serve would obviously be frustrated if all NTS costs were recovered through end user charges that reflect the interstate NTS costs of a particular exchange carrier. Any reduction in the local exchange rates of such a carrier would be offset by increased end user access charges. We have accordingly decided that common line costs that are assigned to the interstate jurisdiction as a result of the application of a universal service factor should be recovered through an access charge that is assessed upon interexchange carriers.

136. Many parties have called for the creation of a "life line" exception to any mandatory flat customer access charge. Life line services have been introduced in a considerable number of state jurisdictions. Such rates have not always provided benefits to the class of users who are the intended beneficiaries.

137. We are, nevertheless, prepared to entertain waiver requests from carriers who wish to provide "life line" options under the following circumstances. First, any such waiver request should state with specificity the terms and conditions which apply to life line service. Second, such waiver requests must specify the revenues which would be lost were such a life line option to be instituted. Third, such waiver requests must specify the specific adjustment to the customer access charge tariff which has been made to secure the revenues lost through the life line option. During the transition period these measures may be either an increase in the minimum flat rates or an increase in the usage charge imposed upon customers for access service. An increase in the transitional maximum charge will not be permitted. Of course, states continue to have full authority to modify existing life line rates for local exchange telephone service or to institute such rates should they believe it is necessary to ameliorate the effects of interstate access charges.

C. *The Transitional Plan for Carrier Common Line Charges*

138. Although we expect that revenues from the Carrier Common Line element will eventually be limited to the Universal Service Fund portion of the Common Line revenue requirement, substantial additional amounts must be included in that carrier's carrier charge during an interim period to avoid anomalous results that would occur if deaveraged end user rates for all other Common Line costs were implemented in 1984.

139. We have recently adopted a change in jurisdictional separations rules that will accomplish the phased removal of CPE from the interstate rate base. We decided to implement that aspect of our decision in *Second Computer Inquiry, supra*, in that manner in order to avoid an abrupt increase in local exchange rates that would result if the interstate CPE allocation were removed on a flash cut basis. The Joint Board has recently invited comment upon an alternative formula that will achieve the same results even if the divested BOCs do not have any CPE to allocate after the divestiture occurs.[52]

140. The purposes of the phased removal of CPE or the allocation of surrogate CPE costs would be frustrated if costs assigned to the interstate jurisdiction to limit increases in local exchange service rates were added to end user access charges. Such a cost assignment could have the same effect upon end users as a local rate increase. In these circumstances, we have concluded that it would be more appropriate to recover such costs through a carrier's carrier charge. Since such costs will disappear four years after the access charges become effective, the exclusion of such costs from End User Common Line charges will avoid churning effects upon End User Common Line charges that could make the transition to a new rate structure unnecessarily difficult.

141. Similar considerations warrant the exclusion of inside wiring costs from End User Common Line charges. Inside wiring that was capitalized as investment before this Commission required the expensing of inside wiring is being amortized and will disappear from the rate base in the early 1990's. We are also considering proposals to remove expenses associated with the installation of new inside wiring from interstate rate computations.[53] It would be inappropriate to add such costs to new flat charges imposed upon end users in view of the uncertainties with respect to the future status of inside wiring. It would also be inappropriate to recover inside wiring or CPE costs through a per line charge because there is little or no

[52] The alternative formular is described in Part IV. D. of the *Joint Board Order*.

[53] *See Deregulation of Customer Premise Inside Wiring*, 86 FCC 2d 885 (1981); *Notice of Proposed Rulemaking*, (CC Docket No. 82-681), 47 Fed Reg. 44770 (October 12, 1982).

relationship between CPE or inside wiring costs of a particular subscriber and the number of loops used by that subscriber.

142. The present *Separations Manual* apportions NTS plant on the basis of a factor, which is called the Subscriber Plant Factor or SPF, that has been computed separately for each "study area." A study area normally means the area served by a particular telephone company within a particular state. The current factors differ widely from one study area to another and many companies that probably will not be classified as high cost companies have interstate NTS costs that are substantially higher than the national average because they happen to have a high interstate SPF. If deaveraged end user rates were implemented under the present circumstances, their customers would be subjected to excessive rate increases.

143. The Joint Board is presently considering a number of alternatives to the current factors that would not be likely to produce such results. Any new factor that differs significantly from an existing factor is, however, likely to be phased in over a transition period. In these circumstances common line costs other than Universal Service Fund (USF), CPE and inside wiring costs that exceed an appropriate cut-off will be assigned to the Carrier Common Line element for an interim period.[54]

144. An additional assignment to the Carrier Common Line element is also desirable to place some limit upon the flat end user charges that carriers would be permitted to adopt during the transition period for End User Common Line charges. In view of all of these considerations, we have decided that, in 1984, Common Line revenue requirements that exceed $4 per line per month should be allocated to the Carrier Common Line charges.

145. The rules we are adopting establish a five-year transition period for the elimination of Common Line costs other than USF, CPE and inside wiring costs from the pooled Carrier Common Line charges. Common Line costs other than USF, CPE and inside wiring could be described as the third component of a Common Line revenue requirement. This third component contains all the residual costs. For each local telephone company, this total residual amount is calculated as follows: Total interstate per line residual amount = total Common Line per line revenue requirement - $4. - (CPE + USF + Inside Wiring)

146. Over a five year period, the total residual amount is to be allocated annually between the End User Common Line charges and the Carrier Common Line charge under the following formula:

[54] *See* Subpart F of the rules.

Year	*Carrier Contribution to total Residual amount*	*End User Contribution to total residual amount*
1984	100%	0%
1985	80%	20%
1986	60%	40%
1987	40%	60%
1988	20%	80%
1989	0%	100%
1990	0%	100%

147. Thus, in the first year of the transition period these residual costs will be recovered fully through the Carrier Common Line charges imposed on all providers of interstate switched services. In the second year, only 80 percent of the residual costs for that year will be recovered from carriers, with 20 percent recovered from end users.

148. We recognize that end user charges constitute a substantial departure from the historic means of cost recovery. Exchange carriers are unfamiliar with this new system. Such carriers, especially small carriers that are unable to devote substantial resources to this task, might be subjected to unnecessary risks if forced to move immediately to full recovery of subscriber plant through subscriber charges. The Carrier Common Line charges, administered through the exchange carrier association, offer a limited degree of risk sharing and increased certainty to these exchange carriers in the early years of the new environment. The fairly rapid reduction of such charges through the transition appears likely to limit uneconomic bypass substantially during the transition to cost-based pricing.

149. The Carrier Common Line charge will also provide the mechanism to adjust the prices charged interexchange carriers for access to reflect differences in access quality. To achieve this result, we have required that the Carrier Common Line element be subdivided into two charges. The first charge, a usage charge, will be imposed upon all interexchange carriers. The second, a premium access charge, will be imposed upon only certain carriers described below.

1. *The Usage Charge*

150. This charge shall be calculated on a straightforward minutes of use basis for services using common lines (*e.g.*, MTS, WATS, FX, and OCC-ENFIA). This charge shall be levied on a nationwide equal per minute basis regardless of the costs of particular originating or terminating exchange carriers, the length of haul, or the rate charged by the interexchange carrier. An exchange carrier association, described in Part VI, shall be responsi-

ble for tariffing and collecting both the premium charge and this usage charge and distributing revenues to all participating carriers.

2. *The Premium Access Charge*

151. There is little disagreement that the quality of interconnection now received by the OCCs[55] through their ENFIA A arrangements is distinctly inferior to that received by the traditional interexchange partnership (predominantly AT&T). Indeed, it appears that the level of interconnection received by the OCCs even under ENFIA B and ENFIA C arrangements (if available) is inferior to that received by the partnership.[56] Such quality differences would give a substantial advantage to the carriers that offer MTS and WATS unless access pricing is adjusted to account for quality differences until equal interconnection is available to all interexchange carriers. It is not clear, however, that this inferior level of interconnection is any cheaper to provide. Cost-based pricing would appear to require that all carriers pay their full costs regardless of any quality differences.

152. Over the past several years, BOCs have been compensated for use of their facilities for OCC interconnection through the ENFIA tariff. That tariff provides a 45 percent discount from the "SEP" amount, *i.e.*, the amount that AT&T calculates that BOCs receive for exchange access through the division of revenue process. This arrangement is the result of compromise, and was adopted only as an interim measure, until the issues involved in this proceeding are solved and an access charge devised.

153. While the OCCs have generally sought a continued rate differential, few participants in this proceeding now assert that any differential should take the form of a "discount". Southern Pacific argues, however, that the existing OCC rate should not be described as a discount since the concept of discount implies that the same good is being provided. While we shall not dispute that definition of discount, cost-based pricing does not appear to allow non-cost based rates, including reductions below the cost of service, regardless of whether the service being provided is inferior to an equally costly service provided others. Instead of justifying an OCC discount, MCI claims, in reply comments, that an AT&T surcharge is appropriate.

154. If the type of access received by AT&T can be provided only to one carrier (at least in the short run), then even if it does not cost much to provide this access to that one carrier, this access has an

[55] The term "Other Common Carriers" or "OCCs" is often used to describe carriers other than telephone companies. The term "OCC" is used in the context of this *Report and Order* to describe an interexchange carrier that offers an MTS/WATS equivalent service such as Execunet or SPRINT.

[56] ENFIA A provides interconnection to the line side of a Class 5 switch, ENFIA B provides interconnection to the trunk side of a Class 5 switch, and ENFIA C provides interconnection through a tandem switch.

"opportunity cost" that is equal to the amount that other carriers would be willing to pay for this preferred access. The cost of providing the favored carrier with this unique level of access includes the denial of this access to other carriers. Those carriers who receive the level of service that could be provided to any number of carriers would pay the full costs of this service. Carriers who receive the premium access service would pay the observable costs and an additional amount reflecting these opportunity costs. A surcharge for such premium access could theoretically be computed to reflect such opportunity costs, but it would probably be necessary to conduct an auction to determine the amount a carrier would pay for such premium access. We have decided that an auction would not be feasible. We will, however, assess a charge upon AT&T and its interexchange partners that will reflect an estimate of premium value. We will describe that charge as the premium access charge. We will not, however, permit exchange carriers to recover premium value in addition to a total revenue requirement that is computed in the usual manner. The premium access payments will be deducted from the Carrier Common Line revenue requirement in order to compute usage charges.

155. Revenues collected from the premium carrier need not flow to the exchange carrier having the greatest value of premium access. Indeed, if exchange carriers were able to levy premium access charges, such exchange carriers would have strong incentives to continue to offer preferential service for a longer period than would be necessary. We have concluded, therefore, that the premium charge should be levied by the exchange carrier association on a nationwide basis.

156. By September of 1986, the quality of interconnection generally available to OCCs will have to be far closer to the quality of access offered the premium carrier because of MFJ requirements. Even then, however, there will still be differences having potential advantages to a premium carrier, including the premium carrier's position as fallback carrier for current subscribers not specifying some other default carrier, and the continued unique premium access to nonelectronic and small switches. This residual premium access will have some value, but will have a value far smaller than is given by its present position. A decreasing surcharge is, therefore, appropriate.[57]

157. A premium charge might be levied as either a lump sum or a per minute charge. We have determined that a lump sum approach

[57] Nothing in the record causes us to expect any carrier other than the AT&T partnership will receive premium access. Improved access received by other carriers appears to reduce the value of AT&T's premium, but not to constitute a replacement of AT&T as the premium carrier. Our prescribing the gradual elimination of the premium access charge reflects our belief that exchange carriers will quickly move toward equal access.

serves the public interest. The value of premium access does not depend on the actual rate structure selected by the premium carrier or the usage generated through that rate structure. Rather, it depends on the value of premium access in its best alternative use. This value is constant without respect to the behavior of the particular carrier receiving premium access.

158. Thus, for example, the premium carrier may make investments to expand its network or reduce blockage in hopes of stimulating increased call volumes. If the premium charge were assessed on a usage basis, these investments might not be made even if they would redound to the benefit of the calling public. By levying a lump sum charge on the carrier receiving premium access, this distortion is avoided. The economic justification for a premium charge is, therefore, consistent with a lump sum charge rather than with a usage based premium charge.

159. We have invited proponents of a large or a small differential in the access compensation paid by OCCs and the telephone company partnership to submit a case for a particular differential both in this docket and in proceedings relating to the ENFIA agreement. Those participants have apparently been unable to produce submissions that have much evidentiary value. In these circumstances, we necessarily must exercise our best judgment to establish an appropriate premium amount.

160. The Element 3 discount in the ENFIA agreement was designed in part to reflect an estimate of the value of differences in access arrangements by the parties to that agreement, but that discount would not establish an appropriate 1984 premium even if that discount could be readily translated into a premium. We noted in *Extension of ENFIA Agreement, supra*, 90 FCC 2d at 16, that the formula for the computation of ENFIA charges was probably designed to produce a charge that would be higher than the FX Open End charge and lower than a charge that would replicate the compensation BOCs receive from the division of MTS revenues. This was apparently perceived to be necessary to achieve equity in view of access compensation disparities between MTS and FX.

161. The existence of those disparities was an important factor in our decision to extend the ENFIA agreement without altering the Element 3 discount factor. We said (*id.* at 16–17):

> We believe it is still reasonable to allow OCCs to pay charges that are lower than MTS/WATS access charges and higher than other access costs during the interim period. That interim period will, of course, end when access charges are established pursuant to the rules we are prescribing in CC Docket No. 78–72.

162. The access charge rules we are adopting do eliminate those disparities. We would have adopted a smaller discount factor when we extended the ENFIA agreement if that factor had been designed for the sole purpose of reflecting the value of qualitative differences

between ENFIA and MTS/WATS access. We would have made a further reduction in the ENFIA Element 3 discount if ENFIA element 2 had been computed to reflect differences in switching costs that will be reflected in our rules for the computation of charges for the Local Switching element. See Part IV.A, *infra*. A smaller premium is also necessary because OCCs will be receiving some access before and during 1984 that is better than the ENFIA A arrangements that existed at the time the ENFIA agreement was negotiated. Nothing has occurred during the years since the ENFIA agreement was signed that would indicate that the parties to the ENFIA agreement overestimated the value of the qualitative differences in OCC and partnership access arrangements. Therefore, the 1984 premium should be smaller than an amount that would replicate the present ENFIA discount.

163. Nevertheless, a substantial premium access assessment is required in 1984 because significant disparities in the quality of access will exist during that year. Those disparities will continue to provide AT&T with a significant competitive advantage.

164. Although we have not approved a differential in access compensation to provide artificial advantages for new competitors, we are, of course, mindful of the adverse effect than an abrupt elimination of access compensation disparities could have upon competition under existing conditions of unequal interconnection. In view of the uncertainties with respect to the magnitude of premium access value and the future progress to equal access, we have decided that a phased elimination of the access compensation differential is justified in order to encourage full and fair competition. That course is consistent with our determination in this proceeding that a competitive interexchange market will produce significant public benefits.

165. We have decided to implement that decision by using the dollar amount of the interstate CPE costs or surrogate CPE costs of all local exchange carriers to determine the premium access assessment.

166. Those costs have been fixed through our decision to remove a base amount from the interstate rate base during a five year transition period that begins in 1983. Thus, the interstate CPE costs will be declining at the rate of 25% per year during the first years that access charges are in effect. Disparities in the quality of access arrangements for OCCs and premium carriers will be phased out during approximately the same time frame.

167. We also believe that 1984 interstate CPE costs, which we estimate to be about $1.4 billion, will correspond with our present estimate of 1984 premium access value. Such an assessment will be substantial and is likely to be significantly smaller than an assessment that would replicate the ENFIA A Element 3 discount. The use of CPE costs also serves administrative convenience.

168. We cannot, however, be certain that the decline in the premium value will correspond to the decline in CPE costs. We have accordingly described the CPE costs as a default formula for the computation of the premium in the access charge rules. Section 69.207 of the Rules says that premium access shall be equal to a CPE or CPE surrogate revenue requirement "[i]n the absence of a Commission order designating the premium access portion . . ." We do not intend to designate a different amount for the 1984 premium assessment, but we may designate a different amount in subsequent years if we have reason to believe that premium value is declining at a much faster or slower rate than the interstate CPE costs.

D. *Transitional End User Common Line Charges*

169. Although the allocation of Common Line costs to Carrier Common Line charges should be sufficient to offset anomalies that could result from the application of transitional separations factors, this would not be sufficient to avoid the disruptive effects of immediate implementation of flat charges for the entire end user portion. The introduction of a $4 per month per line charge for residential end users on a flash cut basis could create an undue risk that a number of residential users would choose to cancel local exchange service.[58]

170. As we noted in the *Fourth Supplemental Notice*, we are quite concerned about the impact of flat charges for NTS costs, and especially a sudden shift to flat charges, on small users and on subscribers in high cost areas. Despite the attractiveness of such flat charges from the standpoint of economic efficiency, we are unwilling to require immediate implementation of flat charges for the entire end user portion. The guidelines that we adopt, however, constitute a gradual transition to a new approach to compensation for interstate access that balances the goals of the Communications Act in a manner that best serves the public interest.

171. Many participants who found at least some flat charges acceptable or desirable argue that a transition period is appropriate.[59] Such a transition would allow subscribers and telephone companies the opportunity to adjust to the new environment. Other participants take the opposite view that a flash-cut approach would be most appropriate.[60] Such a flash cut would allow cost-based pricing immediately to go into effect and confer the economic advantages of flat charges that much earlier.

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[58] Possible effects of access charges upon the universality of service are discussed in Appendix G.

[59] *See, e.g.*, Comments of Ad Hoc Telecommunications User's Committee; AT&T; MCI; NTIA; Pennsylvania PUC; SNET; SPCC; United Telephone System, Inc.; USITA; U.S. Tel.; Vermont PSB.

[60] *See, e.g.*, Comments of Aeronautical Radio, Inc.; GTE; Rochester Tel; Tel. Systems Management Corp., *et. al.*

172. We have concluded that a transition to the flat End User Common Line charge we require is appropriate. A gradual transition allows a more comfortable adjustment to the new economic realities. If the timing of the transition is known, the dynamic efficiency losses that result from failing immediately to move will be small. The extremely long transition advocated by MCI appears unnecessary.

173. The gradual transition we are adopting has several advantages that, we believe, will outweigh any drawbacks. First, it establishes a schedule for movement to a cost-based access arrangement over a medium length period. Companies that have invested heavily in technologies made economic only by the continuance of uneconomic and non-cost based prices will have several years in which to amortize these investments. A pre-set transition will encourage investors to target new investments on technologies that are consistent with the underlying costs of the network and hence on the most efficient possible use of the nationwide telecommunications system.

174. A pre-set transition plan like the one we are adopting has the advantage of providing some certainty to those who must make investments in communications technologies. A fairly rapid movement toward cost-based pricing can allow time for corrections in past investment, yet new investments would be made with the forthcoming prices in mind. It appears unlikely that any company would spend the thousands or even millions of dollars necessary to take advantage of the variance between price and cost during the transition if it understands that the gap is to be reduced year by year, until it is completely eliminated at the end of a mid-length transition period. Thus, while the transition plan incorporates some features in the Mixed 2 plan in the *Fourth Supplemental Notice*, it will not have the fundamental flaw that the maximum rate must remain many times higher than cost.

175. We believe that a more lengthy transition would unnecessarily delay the advantages of cost based rates and might encourage unnecessary bypass and inefficient development of the economy. While the seven-year transition plan we have adopted might appear unnecessarily slow to some users and exchange carriers, the flexibility it provides will allow those carriers who feel compelled to move rapidly the opportunity to do so, while not forcing all carriers to adjust at this same pace. The details of the transition plan are explained in the next subpart and in Subpart C of the access charge rules.

E. *End User Common Line Rate Structure*

1. *The Minimum Change.*

176. As we have already indicated, the End User Common Line charges will meet an increasing share of total NTS costs assigned to

the interstate jurisdiction. This element, combined with the Carrier Common Line charges, will recover most of the costs of subscriber plant, including CPE, inside wire, outside wire (*i.e.*, the drop line and interface) and loop costs allocated to the interstate jurisdiction. All of these costs are non-traffic sensitive and, for the most part, are dedicated to particular consumers. (Only party line loops and any investment associated with coin phones are non-dedicated.)

177. During the transition period for End User Common Line charges we shall require that the access tariff include a minimum flat fee of at least two dollars per month for each residential common line. This payment shall be imposed regardless of whether the particular customer makes or receives any interstate calls. The minimum business line customer charge shall be four dollars per common line loop per month. The difference in these charges should reflect the typically higher interstate revenue requirement generated by business lines as compared to residential lines. In addition, we believe that this differential should reduce the incentive a business subscriber might have to use its dedicated facilities in a way calculated to reduce the usage sensitive portion of its access charge, solely to escape usage payments.

178. We also believe that a differential in the transitional minimum charges for business and residential customers is justified because we have selected a low residential minimum in order to avoid an adverse effect upon universal service. Minimum charges for business customers are unlikely to have any meaningful effect upon universal service because demand for business local exchange service -at least for a single line- tends to be inelastic. We have, however, concluded that some limitations should be imposed upon carrier discretion to select a higher minimum rate. Section 69.203 of our Rules precludes any carrier from establishing a business minimum charge that is more than 200% of the residential minimum charge.

2. *The Usage Charge*

179. The difference between the minimum flat fee (which must be at least two dollars per month per line for residence and four dollars per month per line for business) and the total revenue requirement associated with the end user charge (four dollars per month per line in the first year and increasing amounts in later years) may be recovered through a usage charge, up to a maximum.

180. Traditionally usage has been measured on the basis of minutes of use. The *Fourth Supplemental Notice* had suggested that a per call (rather than per minute) usage measure might be more appropriate for any usage component in the end user access charge. Because nontraffic sensitive costs do not vary with minutes or number of calls, we find neither of these approaches to be clearly superior in all cases. The selection should be based on which will lead to the smaller distortion in usage patterns.

181. Charging users on a per minute basis will encourage users to make shorter calls than they would under efficient pricing. Charging users on a per call basis would encourage them to make fewer and longer calls. Once customers make a call they would have an incentive to communicate as long as efficient, but this efficiency gain must be evaluated against the efficiency loss of fewer calls.

182. The selection of a measure of usage should be based on relative elasticities of demand.[61] If most short calls are made to convey pressing information, the per call charge would not discourage too many callers and this alternative would be desirable. If this is not the case and customers would be willing to make fewer calls or take advantage of patterned calling (*e.g.*, making collect or person-to-person calls that are designed to be refused but to convey information in the request), the per minute option would be preferable. Either a per call or a per minute charge could be used as a valuable component in our transitional plan. Such a charge could be set in order to recover revenue directly from end users (rather than carriers) while prolonging the period before all rates are set on a flat basis. In the *Fourth Supplemental Notice*, we expressed our belief that the elasticity and measurement cost conditions might warrant a per call charge. Several of the comments suggest that under a Mixed 2 option the per call fee would be so high that it would discourage large numbers of calls, and that a per minute charge would be more appropriate. Under the rate structure we have prescribed the per minute or per call charge would be substantially lower than would be necessary under a zero-based Mixed 2 option. We have concluded, however, that the selection of a measure of usage should be left to the exchange carriers. It is certainly possible that different carriers may face customer demands of varying elasticities. The choice that is appropriate for some may be inappropriate for others.

3. *The Maximum Charge*

183. Because common lines are similar to dedicated interstate lines, we shall require that the maximum collected on any such line through end user charges (the sum of the minimum and any usage payment) be less than or equal to the rate established for dedicated access lines. Throughout the transition period we shall require that no one customer be charged in excess of a pre-set maximum. To eliminate unlawful discrimination among services, the maximum should be no more than the rate that a customer would pay as an end user Dedicated Access Line charge.[62] In special cases, however, we

[61] For a discussion of how relative elasticities of demand are related to cost recovery, *see* W.J. Baumol and D. Bradford, "Optimal Departures from Marginal Cost Pricing," American Economic Review, vol. 60, pp. 265–283, June, 1970.

[62] *See* Section 69.205 of the rules for a description of the computation of maximum rates in each transition year.

may allow local companies facing hardship in meeting our requirements to raise the maximum and the rate charged for the Dedicated Access Line element above the Dedicated Access Line per line cost. Such an exception would be allowed only as a temporary expedient in the early years of the transition.

184. In each of the five years subsequent to the introduction of the access charge, the maximum allowed each carrier shall be reduced by 10 percent, but shall never fall below total interstate costs. The exchange carrier or the exchange carrier association may adjust either the minimum, usage component, or both to recover revenue. At the end of the five year transition period, the highest maximum allowed would be reduced to 50 percent of its initial level and all Common Line costs, other than the Universal Service Fund and inside wiring costs would be recovered directly from end users.

185. For the last two years of the seven year transition period, we shall allow exchange carriers to continue to recover their End User Common Line revenue requirement through such a combination of flat fee minimum charges and usage charges with the pre-set maximum. Exchange carriers facing substantial bypass threat may wish to introduce flat rate pricing for recovery of all End User Common Line costs early in the transition period. In areas where bypass is a smaller threat, the more gradual transition permitted by continuing to allow usage recovery (to a maximum) appears to have benefits that outweigh the costs.

186. A maximum End User Common Line charge that is no greater than the price paid for a dedicated interstate loop (such as that associated with a closed end WATS line) or an interstate closed end FX line will allow heavy users to make a more rational choice among private line, MTS, WATS or FX service. It would resolve fundamental problems facing this Commission in this and other proceedings. The maximum is also desirable in its own right to reduce the threat of bypass. Since a substantial share of non-traffic sensitive costs is to be assigned to the End User Common Line element and recovered through minimum and maximum charges, the portion of NTS costs recovered in usage sensitive interstate rates will be substantially reduced. Heavy users, therefore, will find message rates that are dramatically reduced toward costs and would find bypass a less desirable option. The expectation of further reductions in both the maximum and the usage charge will further reduce the dangers of uneconomic bypass.

187. Generally, the usage charges will be imposed upon originating callers. We find, however, that it would be inappropriate to assess a usage charge upon the originating caller for certain calls that have traditionally been charged to the recipient. These include collect MTS calls, IN-WATS calls, and calls to an FX or CCSA subscriber that originate at the open end. The purposes that these

services were designed to serve would be frustrated if usage charges were assessed to the originating caller.

188. It would be difficult to assess such usage charges directly to the party who receives the call because that end user will normally be served by a different local exchange carrier. We have, therefore, decided to impose a charge upon the interexchange carriers that provide such services as a surrogate for a usage charge upon the recipient of the call. Such surrogate charges will, of course, be reflected in the interexchange carrier's charges to recipients in a manner that indirectly recovers appropriate costs from such recipients.

189. We have described this surrogate charge as a "transitional surcharge" in our Rules. Section 69.206 of the Rules describes the formula for computing the transitional surcharges. Although the transitional surcharge will be a carrier's carrier charge, it is an integral part of the transition plan for End User Common Line charges. Transitional surcharge revenues will be deducted from the End User Common Line revenue requirement in order to compute the usage charges that are assessed directly to end users.

190. As ENFIA A access is currently provided, it is difficult for some exchange companies to attribute usage to originating customers. It might appear difficult, therefore, to apply the usage sensitive charges and the maximum charge to these services. One solution is to develop a surrogate charge for these services. We believe, however, that coordination of billing between the exchange carrier and the interexchange carrier offering ENFIA A service is more desirable, efficient, and non-discriminatory.

191. In this *Report and Order* we require local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any. *See* Part IV. C, *infra*. We anticipate that the OCCs will take advantage of exchange carrier billing services and will submit their calling records to the exchange carriers doing the billing. The exchange carriers can, and are expected to, compare the identities of ENFIA A or C callers with their own subscriber rolls, coordinate calls and callers made over ENFIA A or C lines with calls made over other types of interconnection, and bill the end user with a usage charge appropriate for the totality of interstate calls made. If OCCs take advantage of exchange carrier billing services, or if ENFIA A or C minutes can be attributed to end users without this service, no surrogate charge is necessary.[63]

192. So long as the maximum End User Common Line charge differs from the minimum, we must deal with the incentives that

[63] We are not including such a surrogate charge in the rules we are adopting, but will consider waiver petitions to permit such surrogate ENFIA A charges if a carrier demonstrates that it would not be feasible to collect the charges from end users. We would expect a strong showing that alternative methods are not feasible.

might encourage heavy use of one line for interstate and other lines for local or intrastate toll calling. We have considered two options. First, all users, business or residential, could be required to pay the maximum for all lines in addition to their first line. Alternatively, total usage could be aggregated and divided over total lines regardless of use.

193. Transitional issues become important in making that choice. While such users should not expect to be subsidized in the long run, it might be unjust and inefficient to require them to pay high rates if they made their original investments in good faith and with the expectation that the current pricing structure would continue. Furthermore, the number of lines is likely to be a very poor proxy for ability to pay. Such users appear entitled to the benefits of a transition.

194. We, therefore, shall require customers having multiple lines to pay as if their calling had been spread evenly over all of their lines. Because the total usage of all of these phones is aggregated, customers would have no incentive to load all interstate calling inefficiently on any one line. Moreover, the transition plan will tend to limit the willingness of any user to distort investment strategies in response to differences in single line and multiline rates.

F. *Monitoring of the Effects of End User Charges*

195. We are well aware that the plan we adopt today constitutes a significant departure from interstate pricing approaches developed in a monopoly environment. We are totally committed to insure that this approach does not lead to a disruption of our nation's telecommunications system or to the elimination of universal service. That commitment is reflected in our decision to exclude Universal Service Fund costs from end user charges before and after the transition periods that are described in this *Report and Order*. That commitment is also reflected in our decision to conduct another notice-and-comment phase of this docket before taking the final steps in the transition to flat rate end user charges.

196. In view of the importance that we attach to the universal service objective, we have decided that this Commission should also monitor the effects of the implementation of end user access charges during the transition period. We are accordingly directing the Common Carrier Bureau to develop and present to us a monitoring system designed to insure that any developments based upon our access charge plan which threaten the "universal" character of service are brought to our attention in sufficient time for us to be able to take ameliorative action. We further direct that such a plan be in place on or before January 1, 1984, the date of institution of access charges. This monitoring plan should be designed to place as little a burden as possible upon the small businesses which constitute the overwhelming majority of our nation's telephone systems.

The Common Carrier Bureau is directed to present to us within 90 days of the release of this *Report and Order* its proposal for such a monitoring program.

IV. *GUIDELINES FOR RECOVERY OF TRAFFIC SENSITIVE COSTS*

197. In the *Second Supplemental Notice* we presented a plan to prescribe access charges for four categories of interstate service: MTS/WATS; FX/CCSA open-end access; private line; and OCC-ENFIA. Because it would have included toll connecting trunks which did not carry exchange traffic, we rejected the definition of "exchange circuit plant" appearing in the *Separations Manual* as a basis for defining the investment to be included in the access revenue requirement. Instead, in order to determine the investment that would be allocated to exchange access services, we defined "exchange plant" as plant used to furnish both toll and local service. Investment in other plant, called interexchange plant, would be excluded from the access revenue requirement. 77 FCC 2d at 239-240.

198. We had proposed that investment in exchange trunk outside plant (OSP) used jointly for exchange and toll message service (exchange trunk OSP in Category 1.22) and related exchange trunk circuit equipment (central office equipment in Category 8.12) be distributed among the three message service categories on the basis of minutes of use. Investment in exchange plant used for private line services and related equipment was to be directly assigned to the private line category. (OSP linking end offices and toll offices, however, was to be excluded and considered interexchange plant.)

199. Investment in traffic sensitive Category 6 central office equipment (local dial switching equipment) was to be distributed among the message access service categories (MTS/WATS; OCC-ENFIA, and FX/CCSA) on the basis of relative dial equipment minutes (DEMs), except for that portion directly assigned to private line services like CCSA. We proposed to rely on the factors specified in the *Separations Manual* for allocating investment in other traffic sensitive plant among the four access service categories. Direct investment in traffic sensitive equipment unrelated to OCC exchange access, however, was to be excluded from exchange plant. If *Manual* factors could not be used, we proposed at least to rely upon *Manual* principles or, alternatively, relative minutes of use to distribute the cost of the remaining traffic sensitive plant among the service categories.

200. Because the costs and revenues associated with interstate FX and CCSA open-end access services have been treated as intrastate, we found it necessary to adjust the revenue requirement for each access service category to reflect a credit to the FX/CCSA

category. Only in this way could we prevent a double charge to users of this interstate service. By the time our access charge plan is implemented, however, we expect that the *Separations Manual* will be revised. We note that the Joint Board has unanimously proposed that the investment, expenses and revenue attributable to interstate FX and CCSA open-end access services be treated as interstate costs and revenues. [64] Thus, when the access charge tariff replaces the intrastate tariff for these services, there should be no need to make the proposed credit adjustment.

201. To compute the access charge for each message service, we proposed that its revenue requirement be divided by total holding qtime minutes of use for that category to obtain a charge per holding time minute of use. An interstate carrier using that message access service would then pay the local carrier an amount equal to the product of that unit charge and that carrier's holding time minutes of use.

202. The MFJ is, of course, a supervening event that occurred since we released the *Second Supplemental Notice*. The MFJ not only requires AT&T's divestiture of the BOCs, but also imposes upon the BOCs the obligation to provide exchange access to all interexchange carriers equal in price and quality to that provided to AT&T. Recognizing that facilities to provide such access do not presently exist, the MFJ sets a timetable for phasing in the required equal access. Each BOC must begin to offer such access to all interexchange carriers no later than September 1, 1984.[65] BOCs must file tariffs (to be effective on the date of divestiture) which will govern BOC provision of exchange access to all interexchange carriers.

203. Tariffs described in the MFJ must meet the following general criteria:

(1) that they provide unbundled schedules of charges for all exchange access services, including those provided to AT&T (MFJ, App. B, Section B, para. 1);

(2) that they discriminate against no carrier or other customer (MFJ, App. B, Section B, para. 1);

(3) that they require interexchange carriers to pay only for the

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[64] *See Joint Board Order, supra*, 47 Fed. Reg. at 54495.

[65] By September 1, 1985, equal access must be available through end offices serving at least one-third of the BOC's exchange access lines. Unless a BOC obtains a waiver of the schedule requirements, equal access through each of its end offices must be available by September 1, 1986. Such a waiver is available only for end offices using electromechanical switches or serving fewer than 10,000 access lines. To receive the waiver, the BOC must show the Court that for particular categories of service the cost of equal access through such end offices outweighs the potential benefits to users of telecommunications services. Any denial of access based on this exception must be minimized both to its extent and duration. *See MFJ*, App. B, Section A, para. 3.

type of access they use (i.e., no "take it or leave it" bundling of services) (MFJ, App. B, Section B, para. 2);[66]

(4) that their charge for each type of exchange access must be cost justified (MFJ, App. B, Section B, para. 2).[67]

204. The MFJ defines "exchange access" to include any activity or function that a BOC performs in connection with the origination or termination of interexchange telecommunications. The judgment envisions a tariffed "menu" of such services from which an interexchange carrier may select the options it wants. It expects that each BOC will unbundle the rates for as many of these services or functions as technology will permit. The goal of this requirement is to give an interexchange carrier maximum flexibility in requesting and paying for the precise type of exchange access it requires.

205. As the Competitive Impact Statement prepared by the Department of Justice makes clear,[68] the MFJ does not purport to prevent the Commission from prescribing access charges to recover BOC costs allocated to exchange access by jurisdictional separations that do not satisfy all the conditions imposed by the MFJ upon carrier initiated tariffs. Its intent is only to require that, given the Commission's ground rules, the BOCs use a cost-based tariff structure, non-discriminatory in effect, to differentiate among the access charges they levy for each element of service.[69]

206. In the *Second Supplemental Notice*, we had concluded that the only way to eliminate the discrimination among interstate and foreign services was to develop "new allocation procedures in which formulae would be applied uniformly for all services to those plant elements which are used in basically the same way by all services and applied selectively to specific services for those plant elements which are used differently for different services." 77 FCC 2d at 231. Thus, the general criteria that the MFJ imposes upon BOC initiated access charges are fundamentally consistent with the goals of this proceeding. The MFJ, however, would include in access charges compensation for the use of facilities and services that our tentative plan had excluded from its definition of access services. In the *Fourth Supplemental Notice* we noted that while the BOCs could comply with MFJ requirements by filing supplemental charges for elements excluded from our rules for computing access charges, it

[66] Nothing in the decree precludes a BOC from also offering exchange access superior or inferior in type or quality to that provided AT&T at charges reflecting the increased or reduced cost of access.

[67] This means that differences in charges must be justified on the basis of differences in services.

[68] *See* Competitive Impact Statement filed by United States Department of Justice at 35-36, United States v. American Telephone and Telegraph Co., D.D.C. Civil Action No. 74-169.

[69] An antitrust decree could not, of course, limit this Commission's power to prescribe a system of charges that is designed to satisfy Communications Act requirements. The MFJ does not purport to do so.

might be desirable to adapt our plan to include charges for such facilities and services.[70] 90 FCC 2d at 153. We sought suggestions to adapt that plan to include these additional services and facilities.

207. We have concluded that, for reasons we have already discussed, the better choice is to adapt our tentative plan to account for the additional access elements contemplated by the MFJ. In particular, we have added to the plan an element we call the "Dedicated Transport element" through which local telephone companies will recover the interstate revenue requirement associated with the costs of the facilities linking the switches of interexchange carriers to the distribution facilities of local carriers. While we recognize that this element reflects costs that are fundamentally non-traffic sensitive in nature, we have chosen to include the Dedicated Transport element in our discussion of traffic sensitive costs because we perceive it to be an intrinsic part of the costs associated with providing interexchange carriers with access to the local network. Moreover, while the costs associated with the Dedicated Transport element are not traffic sensitive and will not be recovered through usage sensitive rates, these facilities will continue to have such an impact upon the local carrier's configuration of the traffic sensitive components of its network that we believe it is logical to discuss recovery of the cost associated with this component of local network facilities in this Part of this *Report and Order*.

208. The *Separations Manual* classifies certain central office equipment as non-traffic sensitive and allocates the related investment between the jurisdictions as if it were subscriber plant equipment. As previously noted, we have decided that we should not include this non-traffic sensitive central office equipment in our NTS plan because the separations classifications may change in the future. We are, nevertheless, including separate elements for traffic sensitive and non-traffic sensitive portions of Category 6 central office equipment in this part of our plan for the initial access charges because it appears unlikely that any changes in the separations classifications for Category 6 central office equipment could be implemented in 1984.

209. In the *Fourth Supplemental Notice*, we stated that we still found it "reasonable to expect interexchange carriers to compensate exchange carriers for traffic sensitive costs on a traffic sensitive basis." 90 FCC 2d at 152. The tentative plan in the *Second Supplemental Notice* called for interexchange carriers to compensate exchange carriers for traffic sensitive costs on a traffic sensitive basis. In their responses to the *Fourth Supplemental Notice*, some participants stated that end users should be charged directly for all

[70] Examples of such facilities and services include the lines or trunks between a telephone company end office and an interexchange switch and billing and collection services.

costs associated with access services, including traffic sensitive costs.[71] This, they asserted, would reduce administrative expenses and eliminate the inaccuracies of separations and settlements. We believe it would accomplish neither. With the adoption of our access rules, the settlements process for access service compensation will end. While billing end users for all access costs might indeed reduce administrative expenses for the interexchange carriers, such an approach would impose a tremendous burden on the exchange carriers and end users. If the customer originating the call had to pay directly for the costs of the facilities used to terminate his interstate call, this would require the terminating exchange carrier, apparently through recourse to the interexchange carrier involved, to identify the end user originating the call and then to bill that user directly for the costs associated with the type of interconnection provided to the interexchange carrier. This would not only impose substantially greater administrative burdens upon these exchange carriers, but also would constitute a drastic change in the relationships among end users, local telephone companies and interexchange carriers, a change that we cannot perceive to be in the public interest. If instead all end users are expected to bear the costs of all plant in their exchange area used to provide access service to interstate carriers, whether the resulting charge is flat, usage sensitive or a combination of both, almost certainly that approach will result in costs being recovered from customers who have not caused the exchange carrier to incur those costs. In particular, end users will be subsidizing the use of their local facilities by those terminating calls in their exchange area. Such an unfair result cannot be in the public interest. Moreover, this approach would not eliminate any alleged inaccuracies in the separations process.

210. In general, those participants addressing the appropriate structure for charges to recover traffic sensitive costs agreed that the rates should be usage sensitive.[72] In its comments to the *Fourth Supplemental Notice*, Southern Pacific adds that these charges should be sufficiently unbundled to assure that each interexchange carrier pays only for the local access facilities it receives. We believe that the rules we have adopted to recover the costs of access facilities are sufficiently refined to achieve this result. Southern Pacific also asserts that these charges should be adjusted to reflect the diminished value of interexchange service resulting from unequal interconnection. We have already explained why we have chosen to rely

[71] *See, e.g.*, Comments of United States Transmission Services, pp. 12, 20; Comments of the Association of Long Distance Telephone Companies, p. 8 at n. 10, pp. 25–26; Joint Comments of Tel. Systems Management Corporation, Satelco, Inc. and Teltec Saving Communications Co., p. 2; Comments of Curtis M. Bushnell, Public Utility Consultant, pp. 15, 19.

[72] *See, e.g.*, Comments of Centel, SBS and USITA.

upon a premium access charge to account for differences in the quality of interconnection offered to different interexchange carriers. *See* Part III.C, *supra*. Consequently, our rules for computing charges to recover traffic sensitive costs rely only upon cost causation to compute charges.

211. In developing our access charge rules we have considered exchange access for interexchange carriers providing switched services to be composed of two categories or groups of elements. The first category consists of the transmission (and related switching) facilities which carry interexchange traffic between the interexchange carrier's facilities and the Class 5 (end) office at which this traffic originates or terminates. This plant always includes some dedicated trunks which carry only that interexchange carrier's traffic to a switch within the exchange. It also includes the interface between the dedicated transport line and the exchange carrier's switch. For the OCCs, it would correspond to Rate Element 1 in the ENFIA A tariff (BSOC-8) and in the ENFIA B and C tariff (BSOC-9). This is the element we have called "Dedicated Transport." If the local switch is not the end office switch used to terminate or originate an interexchange call, additional trunks and possibly local tandem switches will be required to complete transmission between that end office switch and the interexchange carrier facilities. Most of this equipment is traffic sensitive (TS) and because it may be shared by several carriers, we call the associated access element "Common Transport."

212. The second category, called the "end office" category, corresponds to the central office equipment in the end office at which the interexchange carrier's traffic originates or terminates. This element includes all the traffic sensitive central office equipment (COE) used to provide switching and related services, including operator assistance services. In this Part, we describe the guidelines we have developed to recover the costs allocated to the different plant elements within the categories. We also discuss the rules that will govern recovery of costs for such special services as Billing and Collection.

A. *End Office Charges*

213. To complete transmission of interstate or foreign switched communications to and from the premises of an end user, an interexchange carrier must rely upon facilities located at the end office to which that end user's telephone is directly linked. In particular it must use local dial switching equipment and may use operator services to assure successful transmissions. We refer to the charges associated with the use of this equipment generically as "end office charges." In this section we unbundle these charges into five elements: (1) Line Termination; (2) Local Switching; (3) Intercept services; (4) Information services; and (5) Operator Assistance

services. The first two elements reflect an interexchange carrier's use of local switching equipment, which the *Separations Manual* classifies as Category 6 central office equipment; the remaining three elements reflect an interexchange carrier's use of equipment that the *Separations Manual* classifies as Category 1 central office equipment. For this reason we are adopting these *Separations Manual* categories as the basis for defining the direct costs allocated to each of these elements.[73]

1. *Category 6 Central Office Equipment*

214. *Line Termination Element.* The *Separations Manual* divides Category 6 Central Office Equipment (COE) into non-traffic sensitive (NTS) and traffic sensitive (TS) subcategories to distinguish the fixed costs of terminating lines in the switch from the usage sensitive costs of switching.[74] The Line Termination element consists of the portion of the investment in the local switch that separations considers non-traffic sensitive and the associated indirect investment and expenses. Such costs should be recovered from all interstate carriers providing switched services and allocated among these carriers based on their relative conversation minutes.[75]

215. Separations has relied upon factors developed by Bell-USITA studies to determine the portion of investment in different types of switches that is and is not traffic sensitive. In CC Docket No.

[73] The procedures for computing charges for those elements are described in Section 69.106-69.110 of the rules.

[74] That portion of non-traffic sensitive category 6 central office equipment used to provide trunk conditioning and signalling between the carriers' switching facilities is included in the Dedicated Transport element.

[75] The allocation of NTS Central Office Equipment on a usage basis represents an apparent inconsistency with the approach we have taken to recover almost all other non-traffic sensitive plant. We believe, however, that this apparent inconsistency is resolved by a closer examination of the facilities involved.

Non-traffic sensitive facilities the costs of which are to be recovered through end user charges are all dedicated to particular subscribers or, in the case of party lines, groups of subscribers. (The only exception is pay phone service, the costs of which are apportioned on a usage basis).

As compared to older electro-mechanical facilities, a far larger fraction of modern central office facilities has been classified as non-traffic sensitive. Such modern facilities can offer subscribers many more or improved service options than could the facilities that they replace. Not all subscribers require or even desire such additional services. It does not seem appropriate, therefore, to treat these facilities as if they were dedicated.

The Joint Board will have the opportunity more closely to investigate whether the *Separations Manual's* treatment of the costs associated with these electronic switches should be revised. It is possible that after its investigation is completed we shall perceive a need to revise the rate structure for this element so that it reflects cost causation more accurately.

80-286, the Joint Board is considering whether these factors should be revised.[76] We believe, however, that to assure that our access charge plan becomes effective on January 1, 1984, we must provide carriers with specific guidelines for developing their access charges as early as possible. Consequently, we must proceed to establish these guidelines without the benefit of the Joint Board's recommendations. We have concluded that in developing the access charges to become effective in 1984 it is reasonable to rely upon existing Bell-USITA factors to distinguish NTS from TS Category 6 COE. If Joint Board recommendations result in the revision of these factors, we would expect these changes to be reflected in access charges for later years.

216. Our tentative plan in the *Second Supplemental Notice* had assigned Line Termination costs to private lines even though they do not terminate in a Class 5 (end office) switch. We intended that apportionment to serve as a surrogate for certain costs, including those attributable to "leaky PBXs", that cannot be easily identified.[77] In the plan we adopt today, we have already allocated to private lines the costs of other NTS plant that could serve to ensure recovery as a surrogate for these less easily identifiable costs. We also believe that the leaky PBX phenomenon may become much less significant in the future as cost-based access charges produce a shift to MTS by those private line customers capable of "leaking." For these reasons we are not assigning any Line Termination costs to private line services.

217. *Local Switching Element.* Through charges associated with this element, local carriers will recover the costs associated with interexchange carriers' use of traffic sensitive (TS) Category 6 central office equipment (COE) to complete interstate switched services.[78]

218. In the *Second Supplemental Notice* we had concluded that no traffic sensitive costs should be assigned to services not using the local exchange's switching facilities. Consequently, we proposed that these costs be allocated on a usage basis among three switched service categories: MTS/WATS; FX/CCSA open end access; and

[76] *See Joint Board Order, supra,* 47 Fed. Reg. at 54498.

[77] These costs include the costs of "hard wiring" these lines into place or otherwise providing special arrangements or treatment for private lines. They also include costs attributable to the "leaky PBX" phenomenon that we described in the *Second Supplemental Notice* . *See* 77 FCC 2d at 241. This phenomenon arises whenever an interstate call is "patched" through a PBX from a private line to a common subscriber line. That common line, the local exchange switch, another subscriber's common line and another subscriber's station equipment are all used to complete the call, but such private line usage of those facilities is not presently reflected in the computation of private line access service compensation.

[78] Some services classified as private line are, in fact, switched (*e.g.* , CCSA). If costs of some traffic sensitive switching equipment are now directly assigned to such services, we intend such direct assignment to continue.

OCC-ENFIA. Weighted dial equipment minutes (DEMs) were used as the unit of measurement.

219. The *Separations Manual* uses DEMs as the unit of measurement for purposes of allocating the traffic sensitive portion of Category 6 COE between the interstate and intrastate jurisdictions. However, Section 24.83 of the *Manual* applies a weighting factor known as TWF (Toll Weighting Factor) to the "toll" DEMs to reflect the difference in average cost per toll minute of use as compared to the average cost per exchange minute of use. The present *Manual* does not specify the TWF factors.[79] Different factors were developed for different types of switches in the Bell-USITA studies that developed NTS-TS ratios for the same categories of switches. The TWF factor differs from the subscriber plant factor (SPF) in that TWF is related to cost causational principles. Long distance calls require switching capabilities that local exchange calls do not. the TWF factor was designed to segregate costs that are peculiar to long distance calls.[80]

220. In comments filed in response to the *Second Supplemental Notice* , Southern Pacific suggested that costs that are assigned to the interstate jurisdiction as a result of the application of the TWF factor should be excluded from the computation of ENFIA A access charges because ENFIA A services use the local exchange in the same manner as local exchange service.[81] (Comments, pp. 47-50). In Reply Comments to the same *Notice* , AT&T agreed that some adjustment would be reasonable. It noted that at the open-end FX also uses local exchange switching in the same manner as local exchange service. (Reply, p. 63).

221. In the recent *Joint Board Order* ,[82] the Joint Board proposed that both interstate FX/CCSA open-end access services and interstate ENFIA services be explicitly recognized in the *Separations Manual* as interstate services. It also recommended that for apportioning costs of traffic sensitive switching equipment, all FX/CCSA,

[79] The Joint Board has tentatively recommended that this continue. *See Joint Board Order , supra* , 47 Fed. Reg. at 54505.

[80] Although the TWF factor was designed to reflect cost causational principles, it is not based on a historical cost causational principle. The *Manual* was designed to allocate costs between two "old" services that will continue to exist. Allocations are based upon actual relative use during a prior period rather than projected use during some future period.

[81] At the time these comments were filed, the ENFIA B and ENFIA C service offerings did not exist. ENFIA B and ENFIA C provide access through trunk side connections to end offices and through trunk side connections to tandem offices respectively. ENFIA B provides more signaling information to the interexchange carrier than does ENFIA A, as well as automatic number identification and answer supervision. ENFIA B also permits subscriber use of rotary dial telephones to reach OCC switches. While ENFIA C does not provide these additional services, it permits an OCC switch to serve subscribers in more than one exchange directly.

[82] *See Joint Board Order , supra* , 47 Fed. Reg. at 54495, 54498.

ENFIA A and ENFIA C dial equipment minutes be treated like exchange service DEMs with no toll weighting factor applied to them. Recognizing that ENFIA B appeared to use the local switch more like MTS than like exchange service, the Joint Board is seeking to determine whether the similarity between ENFIA B and MTS warrants treating DEMs generated by ENFIA B use of local switches like DEMs generated by MTS use.

222. If the average costs associated with different interstate switched services' use of local dial switching equipment vary, these differences should be reflected in the rate structure of this element in order to assure that there will be no unlawful discrimination in rates for functionally equivalent services. As a first approximation to achieving this goal we are requiring that exchange carriers establish separate charges for two categories of service. The first category corresponds to local dial switching provided through line side termination at a Class 5 (or end) office or, for interstate services other than MTS and WATS, through termination in a local tandem switch. The second corresponds to local dial switching provided through trunk side termination at a Class 5 office for MTS/WATS equivalent services and switching provided for MTS and WATS. Based on available information we believe these service categories result in a grouping together of those interstate service offerings for which the average cost per minute of using the local switch is approximately the same. In particular, use of switching equipment by FX/CCSA open-end access, ENFIA A and ENFIA C services should fall within the first category of service while end office switching for MTS, WATS and ENFIA B should fall within the second category.

223. For computing 1984 access charges, the costs associated with local dial switching equipment shall be allocated between the two service categories based on relative DEMs, after the toll weighting factors developed in the separations process have been applied to DEMs generated by services in the second service category.[83] To convert these allocations to monthly per minute

[83] We recognize that the Joint Board deliberations may result in development of new TWFs to be applied exclusively to ENFIA B services. We anticipate that the scheme for allocating investment in TS local dial switching equipment we prescribe here would be altered so that these new TWFs would be applied to ENFIA B DEMs. We believe, however, that it is unrealistic to expect that development of such new TWFs could be completed before the end of the third quarter of 1983. The carriers require a reasonable time to develop and file their 1984 access charges and we shall require time to review these filings. For this reason, we conclude that 1984 access charges should not reflect the development of any new TWFs for ENFIA B services.

charges, the revenue requirement for each service category shall be divided by that category's projected average conversation minutes.[84] For a given month, the local switching equipment charge levied upon a carrier providing a service (or services) included in that service category will be the product of that category's unit charge and the conversation minutes generated by the carrier's service(s).

224. In responses to our *Second Supplemental Notice* , some participants had suggested that the tentative plan be modified in order to incorporate peak and off-peak pricing in the prescribed access charges. (Consumers Union Reply, pp. 9-10; NTIA Reply, pp. 32–33) Such a modification would presumably be limited to the traffic sensitive components like the Local Switching element inasmuch as non-traffic sensitive costs do not vary with usage. That suggestion warrants consideration as a long-run solution. However, we could not devise adequate rules for computing cost-based peak or off-peak access charges for this traffic sensitive plant from the information in this record. Therefore the rate structure, at least for 1984 access charges, will reflect no discount for off-peak usage of traffic sensitive exchange facilities.[85]

225. It should be noted that the efficiency benefits of peak pricing flow from the use of peak pricing in end user rates. The use of peak pricing in a carrier's carrier charge need not have any direct effect upon usage. Consistency between carrier's carrier charges and end user rates would be desirable, but time of day pricing of access service compensation is not a condition precedent for time of day pricing of end user services. MTS tariffs have established different rates for different times for a number of years even though the settlements formula for computing MTS access service compensation has never assigned different weights to different MTS minutes.

2. *Manual Switchboard Services*

226. Category 1 central office equipment consists of investment in manual switchboards. Manual switchboards are used primarily in connection with MTS and WATS service. In reply comments to the *Second Supplemental Notice* , however, AT&T asserted that the OCC-ENFIA and FX-CCSA services should share in costs relating to manual switchboards providing information and intercept services because both FX-CCSA open end access and OCC-ENFIA services

[84] These averages shall be developed through traffic studies, with necessary information being supplied by the interexchange carriers if the exchange carrier is unable to obtain such information directly.

[85] We intend shortly to establish a Joint Board that will consider the need for changes to the *Separations Manual* that will allocate investment and expenses between the jurisdictions based on peak and off-peak use of exchange facilities. When that Board has completed its work on this subject, we shall reconsider our decision concerning a peak/off-peak rate structure for traffic sensitive access charge elements.

also rely upon those operator services. AT&T indicated that directory and intercept switchboards can be identified without undue difficulty. Therefore, we propose to associate Category 1 investment allocated to the interstate access with one of three access elements: (a) the Intercept element; (b) the Information element; and (c) the Operator Assistance element.

227. *Intercept Element* . A local carrier provides Intercept services when it causes a telephone call directed to an improper telephone number to be redirected to an operator or a recording that tells the caller why the call, as dialed, could not be completed and if possible, provides the correct number. By its nature, this service must be provided either to all interexchange carriers or to none. We believe that because all rely upon this service to assure successful completion of their customers' interexchange calls, all should share in the costs associated with its provision. There do not appear to be any cost or value differences with respect to the use of Intercept services that would warrant the application of any weighting factors to distinguish one interexchange carrier's use from another's. Therefore, we have decided to subject all interexchange carriers to a per minute Intercept charge that is computed by dividing costs allocable to this element by total conversation minutes for all switched or partially switched interstate services.

228. *Information Element* . As its name suggests, Information service is provided when, by dialing the proper service code or number, a customer is connected to an operator who will tell him the telephone number of another customer, provided that the latter's number is or will be listed in the telephone directory. Based upon AT&T's *Second Supplemental Notice* Reply Comments we conclude that the costs associated with this service can be unbundled from those associated with the use of other Category 1 COE. We believe that these costs should be unbundled from other manual switchboard costs. At the present time directory information that is provided for long distance services is provided through transmission facilities of AT&T and its interexchange partners. These costs will accordingly be assessed upon those carriers unless other interexchange carriers establish connections with such directory assistance facilities.[86]

229. *Operator Assistance Element* . This element describes the remaining interstate operator services, primarily direct assistance in the completion of toll calls. To this element we allocate that investment in Category 1 COE not already allocated to either the Intercept or Information elements, as well as the indirect investment and expenses associated with this Category 1 investment under our

[86] If that contingency arises, exchange carriers that provide the information service will be required to devise an appropriate method to apportion such costs among all interexchange carriers that are connected with such directory assistance switchboards.

allocation rules. The costs associated with this element should be recovered through a non-discriminatory, usage-sensitive rate structure imposed only upon those interexchange carriers who in fact use these interstate Operator Assistance services.

B. *Transport Charges*

230. As part of its access service, each local exchange carrier will provide transmission (and possibly) switching facilities to carry interstate switched traffic between an interexchange carrier's facilities and the end office through which this traffic originates or terminates. This plant always includes some dedicated trunks or lines, which carry only that interexchange carrier's traffic to a switch within the area served by the local carrier.[87] We refer to the element corresponding to this plant as the "Dedicated Transport" element. If this exchange carrier switch is not the end office switch used to originate or terminate the interstate call, additional trunks, local office and local tandem switches will be required to complete the communications path between the originating (or terminating) end office and the interexchange carrier's facilities. We refer to the element corresponding to this plant as the "Common Transport" element.[88] The costs associated with both Dedicated Transport and Common Transport will be recovered as part of the carrier's carrier charge for access to the local company's facilities needed to complete interstate communications.[89]

1. *Dedicated Transport Element*

231. This element consists of the dedicated voice grade transmission facilities and the interface at which those facilities and the exchange carrier's switch are joined.[90] For non-premium carriers, *i.e*

[87] In some cases, two exchange companies jointly might provide such a trunking service.

[88] The procedures for computing charges for the Transport elements are described in Sections 69.111 and 69.112 of the Rules.

[89] We are not, however, including any use of switching in a local dial (Category 6) switch in the Common Transport element.

[90] The facilities included in this element and other elements are the subject of the Settlement Agreement between the Bell System companies and the OCCs that we accepted as a disposition of Docket 20099. *See* 52 FCC 2d 727 (1975). That agreement established interim rates for the OCCs' use of certain Bell System facilities. It also established procedures for revising such rates that are still in effect. In particular, it permitted a carrier-initiated increase in the rates only on six months' notice to the OCCs. *Id* . at 734–35. We predicated our acceptance of that agreement on our finding that "the responsibilities undertaken by the parties are in the public interest because they expedite and further the implementation of established Commission policy." *Id* . at 732. If applied to the access tariffs which will replace the existing tariffs under which the BOCs provide dedicated transport facilities to the OCCs, such a notice requirement could prevent the timely implementation of these access tariffs. We have not determined whether the agreement purports to establish a notice requirement under these circumstances. Because we find such delay contrary to the public

the OCCs, this element would correspond to what is now designated as rate element 1 in the ENFIA A tariff. To this element we allocate investment in the outside plant linking the carriers' switching facilities as well as any Category 8 and non-traffic sensitive Category 6 central office equipment used to provide trunk conditioning and signaling between the carriers switching facilities.

232. USITA has suggested that the costs associated with this element be recovered through rate structures reflecting "capacity ordered." A rate structure based on "capacity ordered" may bear little relationship to what is, in fact, provided. We believe that an interexchange carrier should pay only for facilities it in fact receives. We can appreciate that in order to plan its network to assure the highest quality of service to all its customers a local carrier requires advance information of an interexchange carrier's anticipated needs and demands upon the local system. We do not believe that this information bears any intrinsic relationship to the costs incurred in currently providing services to these carriers.[91]

233. We are requiring that the revenue requirement associated with the Dedicated Transport element be split into three parts on the basis of relative net investment in: (1) interface arrangements; (2) voice grade transmission facilities; and (3) equipment used to provide conditioning for such transmission facilities. As a result, the charge associated with the Dedicated Transport element will be the sum of a charge reflecting the costs of voice grade transmission facilities dedicated to an interexchange carrier's use, a charge reflecting the costs of conditioning those facilities and a charge reflecting the costs of any additional central office equipment located at the boundary between those facilities and the local carrier's switch to which they are joined. In requiring this unbundling of charges our aim is to assure that the charges imposed upon an interexchange carrier for its use of dedicated transport facilities reflect the costs associated with the facilities provided to that carrier.[92]

234. *Interface Arrangements* . To this subelement we have allocated all investment in central office equipment used to provide

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interest, we are abrogating any contractual notice requirement of the Settlement Agreement that might be applicable. Any other provision of that agreement or the subsequent ENFIA agreement that may be inconsistent with the Rules we are adopting will, of course, cease to be effective when access charges become effective. The decision in *MCI Telecommunications Corp. v. FCC* , 665 F.2d 1300 (D.C. Cir. 1981) does not preclude us from abrogating provisions that are inconsistent with our prescription of an access charge plan. That decision related to carrier-initiated tariff charges.

[91] *See* Reply Comments of United States Independent Telephone Association.

[92] We believe that this is very similar to the refinements within this rate element advocated by the Ad Hoc Committee and Southern Pacific in their comments submitted in response to the *Fourth Supplemental Notice* . *See* Report on Access Charges attached to Comments on the Fourth Supplemental Notice filed by the Committee and Comments of Southern Pacific Communications Company, Appendix B.

interface arrangements. We have taken this step because we recognize that exchange carriers will be offering to interexchange carriers access arrangements that rely upon central office equipment to provide different signaling and other capabilities. We shall require that each exchange carrier establish in its access tariff a separate charge for each additional kind of interface arrangement it proposes to offer.[93]

235. We shall require that each exchange carrier present a listing of subelements corresponding to all the interface arrangements it intends to offer. It is through these subelements that the carrier will recover the share of its projected revenue requirement for Dedicated Transport that our allocation rules have apportioned to interface arrangements. To provide carriers with sufficient flexibility to develop access charges reflecting the many kinds of interface arrangements they may choose to offer, we have refrained from prescribing rules specifying precisely how the charges associated with these subelements must be calculated. We do require, however, that differences in the charges for these interface arrangements reflect cost differences.

236. *Conditioning arrangements*. The quality of voice communications over transmission facilities may be impaired by such factors as trunk loss, noise or echo. Alone or in combination, these factors may partially or sometimes completely obscure the information content of voice transmissions. Transmission facilities, however, may be conditioned to control these parameters[94] in order to improve the quality of such transmissions.

237. We shall require that each exchange carrier present a system of subelements corresponding to all the conditioning arrangements it intends to offer. Subelement charges will also be designed to recover the aggregate conditioning revenue requirement and charges for particular subelements will be designed to reflect cost differences among conditioning arrangements.[95]

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[93] Such arrangement might include, for example, an E & M lead interface, which is:

> A specific form of interface between a switching system and a trunk in which the signaling information is transferred across the interface via 2-state voltage conditions on two leads, each with ground return, separate from the leads used for message information. The message and signaling information are combined (and separated) by a signaling system appropriate for application to the transmission facility.

Engineering and Operations in the Bell System (1977) at 652. For a general discussion of common interface arrangements, *see id*. 181–86, 384–403.

[94] *See, e.g.*, the family of "W types" of conditioning offered in the Bell System's Facilities for Other Common Carrier Tariffs.

[95] Association tariffs may contain exceptions for participating carriers that offer interface and conditioning arrangements that differ from any standard subelements in the association tariff. Similar exceptions will be permitted for Special Access subelements.

238. *Transmission facilities.* To this subelement we allocate investment in all dedicated voice grade transmission facilities to be provided to interexchange carriers to complete their interstate or international communications services. These dedicated facilities are analogous to the non-traffic sensitive subscriber line plant dedicated to an end user's use. Consequently, we shall require local telephone companies to recover the costs associated under our allocation rules with this subelement through a flat monthly charge imposed upon each interexchange carrier receiving access through such facilities. The costs associated with Dedicated Transport facilities are a function of two parameters. The first is the distance between the interexchange carrier's facilities and the "entry switch" through which that carrier's traffic enters the exchange area. The second is the number of voice grade channels provided to the interexchange carrier. The latter we shall call "conversation capacity." We shall require that the monthly charge levied upon an interexchange carrier for voice grade facilities dedicated to its use shall be based upon the conversation capacity provided by these facilities and a distance factor.

239. At this time all AT&T toll offices are linked to local offices through 4-wire or 4-wire equivalent voice grade facilities. At least some AT&T offices are collocated with end office switches. Other interexchange carriers, however, have never been allowed to collocate their switches with local telephone company switches. A strictly distance-sensitive rate structure for dedicated transmission facilities would thus give AT&T an unfair competitive advantage. Consequently, we shall require that for purposes of computing a monthly charge associated with this subelement, for an interexchange carrier other than AT&T the distance between the interexchange carrier's facility and the "entry switch" to which it is linked shall be deemed to be the minimum of the following: the airline distance between the entry switch and this interexchange carrier facility; and the airline distance between the entry switch and any AT&T toll switch within 5 miles of the interexchange carrier's facility.[96]

[96] This "five-mile" requirement is similar to one imposed in the MFJ upon any BOC-initiated tariff to reduce the competitive advantage AT&T enjoys over other interexchange carriers because of the location of some of its switches. The MFJ has required that under such tariffs until September 1, 1991, the charge for delivery or receipt of traffic of the same type between an end office and each interexchange carrier's facilities located within the exchange area (or any reasonable subzones) be equal per unit of traffic delivered or received for all such carriers. If the facilities of another interexchange carrier are located within 5 miles of an AT&T Class 4 switch, with respect to any end office served by that switch, the OCC facility is to be considered within the same subzone as the AT&T switch. This requirement applies even if a BOC uses different transmission and switching facilities to serve AT&T and the other interexchange carriers; it exists to assure that the OCCs are not charged more for transmission merely because AT&T's switches are more advantageously located with respect to or linked to an end office.

240. We recognize that the costs of providing Dedicated Transport to a particular interexchange carrier also depend upon the transmission media selected to carry its traffic between its facilities and the "entry switch." A purely cost-based rate structure would tie the charges imposed on an interexchange carrier to this factor also. With all the permutations and combinations of transmission media possible, however, such a rate structure could easily become unworkably complicated. The rate structure we have adopted today, while not purely cost-based, avoids the administrative problems associated with such a rate structure and provides local exchange carriers with the incentive to use the most efficient means of transmitting traffic and the flexibility they need in planning their network. We believe that these advantages warrant this limited departure from cost-based pricing, at least during the first year in which access charges are in effect.

2. *Common Transport Element*

241. To this element we allocate the investment in all outside plant used in whole or in part to transmit an interexchange carrier's switched traffic between the end office at which it originates or terminates and the transport facilities dedicated to that carrier's use. We also allocate some investment in intermediate switching facilities such as local tandem offices.[97]

242. The costs associated with this access element are both usage and distance sensitive. Consequently, we are prescribing a rate structure that is both usage and distance sensitive. The measure of usage shall be conversation minutes of use, while the measure of distance shall be the airline distance from "entry switch" to the end office at which a call originates or terminates.

C. *Other Charges*

1. *Billing and Collection Services*

243. To this element we are allocating all the costs associated with a local carrier's providing billing and collection services to an interexchange carrier. In particular this would include investment in Category 4 central office equipment, automatic message recording equipment, and most of the revenue accounting expenses allocated to the interstate jurisdiction.[98]

244. The MFJ would permit a BOC to restrict its offer of billing

[97] We note that the plan we adopt today for developing a carrier's carrier charge will accommodate access arrangements provided by the independent telephone companies and by the divested BOC, regardless of the shape of the local access and transport areas (LATAs) ultimately approved by the court in United States v. Western Electric Company, D.D.C. Civil Action No. 82-0192.

[98] Computation of charges for this element is described in Section 69.114 of the Rules.

and collection services to only some interexchange carriers unless the BOC threatened to withhold service from a customer failing to pay charges levied by such interexchange carriers.[99] The MFJ does require, however, that if a BOC offers billing and collection services to even one interexchange carrier, that the charge for this service must be in the BOC's access tariff. Only common carrier services can be tariffed. The hallmark of a common carrier service is that it is offered to all indifferently. *See CCIA* v. *FCC*, *supra*, slip op. at 25. Consequently, to assure a result consistent with our powers under Title II of the Communications Act of 1934, as amended, 47 U.S.C. 201 *et seq.*, and the intent of the MFJ, we shall require that an exchange carrier offering billing or collection or billing information services to one interexchange carrier must offer them to all.

245. In contrast with our treatment of rates related to other access elements, the only restrictions we shall place upon a local carrier offering Billing and Collection services is that it not discriminate among carriers selecting these services. Any differences in charges levied for these services must be cost justified.

2. *Special Access*

246. Special Access includes a variety of services and facilities that we have decided to include in our system of access charges in order to ensure that tariffed access charges of all exchange carriers encompass services and facilities that the divested BOCs will be offering pursuant to tariffed access charges.[100] If the MFJ did not exist, we would probably exclude these facilities from the access charge scheme and classify them as "interexchange" for this purpose. Most services that use these facilities—such as program transmission, telex, etc.—are not close substitutes for MTS and changes in existing rate structures would not be required in order to eliminate discrimination or preferences among MTS and services that are close substitutes for MTS.

247. The Special Access category also includes a portion of interstate or international private lines that terminate in a PBX or similar equipment and interstate WATS lines. We limit the Dedicated Access Line element to the portion of those lines on the customer side of an end office in order to create a Dedicated Access Line element that is analogous to the Common Line element. We use that demarcation in order to establish parity for comparable elements. A portion of such private lines and a portion of some WATS access lines that are not included in the Dedicated Access Line element are included in access service for purposes of the MFJ. We are assigning

[99] In the latter case the MFJ does require the BOC to offer billing and collection services to all.

[100] Computation of charges for this element is described in Section 69.113 of the Rules.

those portions of those lines to Special Access in order to make access changes for all carriers correspond with the BOC access charges.

248. Although we have described Special Access as an element for cost allocation purposes, the Special Access category in fact encompasses a number of elements that must be priced separately. The same charges could not be applied to video "lines", telex lines and pieces of WATS access lines without creating unlawful preferences. Such facilities have very different cost characteristics and are used for very different purposes.

249. We have not attempted to provide guidelines for apportioning the Special Access revenue requirement among the rate elements or subelements within that category and we have not described the subelements that should be used. This proceeding was not designed to develop criteria for designating such subelements or for apportioning costs among appropriate subelements and the record in this docket does not contain much information that would be useful for those purposes. Such questions have been or will be addressed in other Commission proceedings.[101] We are accordingly directing exchange carriers to establish subelements and methods for computing subelement charges that are consistent with applicable Commission rules and decisions.

V. *COMPUTATION OF ACCESS CHARGES*

250. In order to compute a charge for an access element it will generally be necessary to compute a revenue requirement for that element. Under the rate base - rate of return method of ratemaking costs or revenue requirements consist of two components. The return component is computed by multiplying the rate base or investment by an allowed rate of return. The expense component covers the carrier's allowable operating expenses.

251. We have decided that the usual rate base - rate of return method should be used to compute access charges for each element except Billing and Collection. We are not imposing any constraint upon the return carriers may earn for that service because local exchange carriers do not possess sufficient market power with respect to that service to warrant a rate of return prescription. If the local exchange carriers establish excessive Billing and Collection charges, the interexchange carriers can, and undoubtedly will, do their own billing and collection.

A. *Rate of Return*

252. We will require the exchange carriers to compute charges for all the other access elements that are targeted to earn the same return. We are not, however, specifying a prescribed return in the

[101] *See AT&T Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979).

text of the access charge rules. Such prescriptions necessarily must be revised from time to time in *ad hoc* proceedings that are designed for that purpose. It would not be appropriate to effect changes in a prescribed rate of return through amendments to the rules. We are, however, requiring exchange carriers to use the currently authorized rate of return to compute access charges until that prescription is superseded by further order of this Commission.

253. We have already prescribed a rate of return of 12.75% for AT&T interstate operations. This targeted rate was established after consideration of all AT&T interstate capital costs, including capital costs associated with the provision of access service. Although that prescription has not been imposed directly upon other telephone companies, the existing partnership interstate settlements arrangement has been designed to enable every telephone company to realize the same achieved rate of return that AT&T realizes on interstate operations. Thus, the use of any rate of return other than 12.75% for the purpose of targeting access charges for BOCs or independent telephone companies would be a departure from the *status quo*.

254. Although the *Second Supplemental Notice* did propose to use the AT&T authorized rate of return for purposes of targeting access charges, the *Fourth Supplemental Notice* invited comment on the desirability of prescribing a different return inasmuch as BOC costs of capital may diverge from AT&T costs of capital after divestiture.[102] Most participants who have discussed this subject have suggested that the 12.75% return be used for the initial access charges. No evidence has been developed in this record that would enable us to predict any future divergence in AT&T and BOC costs of capital. Therefore, we will require that a 12.75% return be used to target access charges of any exchange carrier and interexchange services of AT&T until a different authorized rate of return is established in subsequent proceedings. We may or may not conduct separate proceedings to consider any future revisions in the prescribed rate of return for access and interexchange services.

B. *Identification of Access Costs*

255. Several steps are necessary to identify the investment and expense that is attributable to a particular access element. Invest-

[102] The *Fourth Supplemental Notice* also suggested that returns allowed by state commissions might be used if access charges are disaggregated on a state-by-state basis. The Executive Agencies of the United States recommended that procedure (Comments, p. 18), but Southern New England Telephone Company said (Comments, p. 12) that it would probably be "inappropriate" to use a state rate of return for any interstate service. Inasmuch as we have decided that such disaggregation would not be appropriate, there is no reason to give further consideration to that approach. Any nationwide charges necessarily must be based upon a nationwide rate of return.

ment and expenses relating to telephone operations must be segregated from other investment and expense. Interstate telephone operations investment and expense must be segregated from intrastate investment and expense. The access charge or exchange plant portion of interstate investment and expense must be segregated from other interstate investment and expense. The access portion must be allocated among the access elements.

256. Carriers are already obliged to perform the first two steps in order to compute revenue requirements for interstate services. This Commission has provided guidance for the identification of regulated service costs through accounting rules and decisions in tariff proceedings. We have also prescribed rules for the separation of investment and expense between the interstate and intrastate jurisdictions. Those rules are contained in the *Separations Manual* that has been incorporated as Part 67 of our Rules, 47 C.F.R. Part 67. The telephone companies have developed detailed and elaborate procedures to implement the separations rules.

257. The tentative plan described in the *Second Supplemental Notice* would have used the division of revenue or "DR" procedure that AT&T developed to implement the *Separations Manual* in order to determine interstate investment and expense for the computation of access charges. Several comments that were filed in response to that *Notice* questioned the wisdom or propriety of using the DR procedures for that purpose. MCI noted that there is no single fixed document describing Bell System DR procedures that could be incorporated by reference in access charge computation rules. MCI observed that the 11-volume DR Manual is revised monthly and does not contain a complete description of the procedures used to separate interstate and intrastate costs. In its *Second Supplemental Notice* comments, MCI said (p. 55):

> The operative steps are actually taken by a computer located in Atlanta referred to as ISIS. AT&T has informally advised MCI that the programming for ISIS was developed sequentially over a period of many years and that there is no complete set of program inputs in existence.

258. Inasmuch as there is no fixed set of DR procedures we could not incorporate the DR procedures in access charge rules even if we could warrant that the DR procedures have produced accurate results in the past. Moreover, we are not in a position to give such a warranty. The SBS *Second Supplemental Notice* comments observed (p. 48) that the 11-volume DR Manual implements a 96-page *Separations Manual*. SBS implied that some errors of interpretation must have been introduced into the separations implementation process in the course of amplifying the prescribed rules. Although our staff does monitor these processes, this Commission has not formally addressed the myriad of interpretation questions that are lurking within the separations implementation process.

259. USTS filed a petition for evidentiary hearing that was based in large part upon its contention that an evidentiary hearing would be required to compile a record that would enable us to prescribe any separations implementation procedures. We agree that an evidentiary hearing may be necessary to prescribe separations implementation procedures. We have, however, concluded that it will not be necessary to prescribe such procedures in order to prescribe rules for the computation of access charges. We are adopting rules for the computation of access charge revenue requirements that are based upon the premise that investment and expense attributable to regulated interstate operations has already been identified. We can proceed on that assumption without sanctioning separations implementation procedures that may be questionable or foreclosing interested persons from raising questions with respect to the accuracy of the underlying data when access service tariffs are filed.

260. We recognize that the information filed pursuant to Rule 61.38 may not at present be sufficient to enable this Commission or affected persons to identify all questions with respect to the accuracy of interstate costs that might be raised in a tariff proceeding. We have, however, decided that we should not delay the adoption of access charge rules to resolve data problems that are not unique to access charges. Any errors in the separations implementation process affect all state and federal tariffs for services offered by telephone companies. Proceedings other than this docket can and will be used to make separations implementation more visible to regulators and all affected persons.[103]

261. The allocation rules we are adopting do establish procedures for segregating access investment and expense from other interstate investment and expense and procedures for apportioning the access investment and expense among access elements. We have generally used the term "interexchange category" to describe investment, etc., that is not apportioned to any access element. For convenience, we have combined apportionments between interexchange and access and apportionments among access elements in a single set of rules. We have included the Billing and Collection element in that apportionment scheme even though our rules do not require the computation of a revenue requirement for that element because it is necessary to apportion costs to that element in order to identify the costs that are attributable to the other elements.

262. The plan we have adopted for the allocation of certain non-traffic sensitive costs between end user and carrier's carrier charges requires a further step in order to compute charges for the End User Common Line and Carrier Common Line elements. The combined charges for those elements will be designed to recover a revenue

[103] The exchange plant Joint Board has invited comments upon a proposal that may serve that purpose. *See Joint Board Order, supra*, 47 Fed. Reg. at 54490.

requirement for the provision of common lines. Subpart F describes the procedure for segregating that revenue requirement among those elements. We have described the combined revenue requirement for those elements as the Common Line element in the investment and expense allocation rules.[104]

C. *Apportionment of Investment*

263. Investment can be described as direct investment or indirect investment. The direct investment includes the facilities and equipment such as terminals, lines and switches that are actually used in the telephone operations. Indirect investment includes land, buildings, vehicles, office furniture, etc.

264. The allocation of direct investment is generally determined by the nature of the access elements we have described in Parts III and IV of this *Report and Order*. The elements encompass functions that usually correspond to particular categories of facilities and equipment.[105] For example, the Intercept element encompasses the switching facilities and operator services that perform the intercept function and the portion of manual switchboard facilities that are used for that purpose are assigned to the Intercept element.

265. The direct investment allocation rules (Sections 69.303–69.306) relate the description of access elements in Parts III and IV to the plant categories that have traditionally been used for separations purposes. The *Separations Manual* describes three major categories of direct investment - station equipment, outside plant or OSP and central office equipment or COE.

266. Station equipment consists primarily of equipment included in Accounts 231 (station apparatus), 232 (station connections) and 234 (large PBXs). All such equipment is normally described as non-traffic sensitive plant. Some station equipment is used exclusively in connection with Special Access or Pay Telephone services and is assigned to those access elements. Some station equipment is used by the telephone companies in their own operations and should be viewed as indirect investment that is not directly associated with any access element. That investment will be apportioned in the same manner as furniture, office equipment, vehicles, etc.

267. Most of the station equipment is used in conjunction with common lines, but this same equipment is often used in connection with WATS access lines or private lines. Whenever a private line terminates in a PBX, the PBX, the terminals and the inside wiring

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[104] Total revenue requirements for some other elements such as Local Switching, Dedicated Transport and Special Access will also have to be segregated to compute subelement charges.

[105] In view of the functional nature of the access charge elements, the rules for apportionment of direct investment in subpart D essentially define each access element except the End User Common Line and Carrier Common Line elements.

between the terminals and the PBX are used to originate or terminate calls that are transmitted over the private line. Therefore, this category must be apportioned between the Common Line element and the Dedicated Access Line element. We have decided to use an equivalent line concept that is similar to the Mixed 1 proposal for that purpose. The total number of common or local exchange subscriber lines will be multiplied by the applicable interstate separations factor to determine the Common Line element line count that will be used for purposes of that apportionment.

268. The Joint Board in Docket 80–286 is considering a new formula in order to replicate the results that would be produced by the present transitional plan for the elimination of CPE from the interstate rate base in an environment in which some local exchange telephone companies may not own any CPE. We have generally described such an interstate apportionment as surrogate CPE in the access charge rules. Inasmuch as any surrogate CPE investment or expense is indirectly attributable to the use of CPE, surrogate CPE will be apportioned in the same manner as CPE investment or expenses if we adopt such a transitional separations factor.

269. The apportionment of Outside Plant or OSP reflects the basic scheme of the access charge plan. The rules use the term "Customer OSP" to describe lines that are included in our NTS plan and comparable portions of Special Access lines. That category does not include any line that connects an interexchange carrier or an enhanced service provider with the local exchange switch. The Customer OSP lines in use will, of course, be assigned to the Common Line, Pay Telephone, Dedicated Access Line or Special Access elements. An equivalent line apportionment will be used to apportion the unused voice grade lines among those elements.

270. The present separations formula includes common lines and WATS access lines in the same category for purposes of determining interstate investment. If we elect to retain that approach in the separations proceeding, an adjustment will be necessary in the apportionment between the Dedicated Access Line and Common Line elements in order to assign an amount to the Dedicated Access Line element that reflects unseparated investment in interstate WATS access lines. The access charge rules describe such a contingent adjustment.

271. OSP that is not classified as Customer OSP must be apportioned between access elements and the interexchange category. The MFJ demarcation points will be used for that purpose in order to produce traffic sensitive access elements for the independent telephone companies and the undivested BOCs that will be comparable to the access elements of the divested BOCs.

272. The remaining OSP will be apportioned between Special Access and the Transport elements. Special Access not only includes the portion of lines or trunks used for special services such as telex

and video that are not located on the customer side of the end office, but also includes comparable portions of lines or trunks that are used for the "Dedicated Access Line" services. We have used this demarcation in order to produce charges for a Dedicated Access Line element that are comparable to the NTS common line charges.

273. The Transport elements encompass the trunks between the end office and the interexchange facility. These may include exchange trunks between Class 5 offices or Class 5 offices and tandem offices. The assignment to Dedicated Transport or Common Transport is, of course, determined by the definition of those elements that is described in Part IV. If the line or trunk is used exclusively for interexchange services of a particular interexchange carrier it is assigned to Dedicated Transport. Other lines or trunks that are classified as Transport facilities are assigned to the Common Transport element.

274. The description of traffic sensitive elements in Part IV of this *Report and Order* necessarily determines the apportionment of Central Office Equipment that is included in COE Categories 1 and 6 in the present *Separations Manual*. COE 1 equipment will be apportioned among the Intercept, Information and Operator Assistance elements. COE 6 equipment will be apportioned between the Line Termination and Local Switching elements.

275. Inasmuch as the Transport elements encompass facilities between the end office switch and the interexchange switch, tandem switch investment (COE Category 2) and any portion of COE Category 3 investment that is classified as exchange investment for purposes of the MFJ will be included in the Common Transport element. We are not, however, assigning any COE 6 investment to Common Transport when an interexchange transmission is routed through more than one local dial switch at the originating or terminating end. The apportionment formula for COE 6 investment has been designed to take such usage into account.

276. The *Separations Manual* classifies Automatic Message Recording Equipment as COE Category 4. Inasmuch as information recorded by such equipment is used primarily for billing purposes that investment will be assigned to the Billing and Collection element.

277. Although COE Category 5 is described as Other Toll Dial Switching Equipment, it includes equipment "used primarily for operator dialed toll . . . traffic." Any Category 5 equipment that may be classified as exchange for MFJ purposes will accordingly be assigned to the Operator Assistance element. Category 5 equipment that is not exchange equipment for MFJ purposes will, of course, be assigned to the interexchange category.

278. COE Category 7 includes the type of switching equipment that is used for services we have described as Special Access. Such

investment will accordingly be assigned to Special Access unless it would be classified as interexchange for MFJ purposes.

279. The circuit equipment that is included in the COE 8 category will be assigned or allocated in the same manner as the associated OSP.

280. The *Second Supplemental Notice* proposed to use factors in the 1978 AT&T FDC 7 Central Submission for purposes of apportioning indirect investment and expenses. 77 FCC 2d at 243. Upon further reflection we have concluded that we should not use those factors for this purpose. Those factors were developed for an analogous but somewhat different allocation purpose and would accordingly have to be modified to fit our access charge plan.[106] Even if each factor could be adapted, it would not be desirable to use a cost allocation methodology that employs such a large number of different factors. Both BOC and independent telephone company data must be used to compute access charges. Some limitation must be placed upon the number of different categories that are used in order to enable independents to develop or provide data for the computation of access charges and the computation of distributions from any access charge revenue pools. We have accordingly used indirect investment and expense categories that are more aggregated than either the 1978 Central Submission categories or the categories described in the appendix to the AT&T *Second Supplemental Notice* comments.

281. Land and building investment represents the bulk of the indirect investment. We have accordingly concluded that we can strike an appropriate balance between excessive disaggregation and excessive aggregation by apportioning subcategories of Land and Building investment in a particularized manner and apportioning all other indirect investment on the basis of the apportionment of combined direct investment and land and building investment.

282. We have decided to use the space categories in the *Separations Manual* for purposes of apportioning building investment. This should not impose an undue burden on the carriers because such investment has already been assigned to those categories in order to identify the interstate investment. Many of the space categories are closely related to equipment categories that we are using for purposes of apportioning the direct investment.

283. The *Separations Manual* divides Space Category 1 (Operating Room and Central Office Equipment Space) into three subcategories - Manual Switchboard, Circuit equipment, and Dial switching - that do correspond with identifiable equipment categories. Each of those categories will be apportioned in the same proportions as the

[106] Categories and factors that were subsequently adopted in the *ICAM* would also have to be adapted because they were designed for four service categories that are quite different from the functional access categories described in this *Report and Order*.

associated COE. Space Categories 2 and 3 also consist primarily of operator space and will be apportioned in the same proportions as manual switchboard investment.

284. Space Categories 4, 6 and 9 (Commercial Office, Revenue Accounting and General Office) are associated with major expense categories and will be apportioned in the same manner as combined expense in each such category.

285. Space Categories 5, 8 and 11 describe investment that is not related to any access service. Such investment will accordingly be assigned to the interexchange category.

286. Space Category 7 includes garage and storeroom space. Inasmuch as equipment that would be contained in such space is likely to be used primarily for OSP installation and repair that investment will be apportioned in the same proportions as combined OSP investment.

287. Space Category 10 investment (Antenna Support) will necessarily be apportioned in the same proportions as the antenna supported.

288. Most land investment can and will be apportioned in the same manner as the buildings that occupy the land. Storage space is likely to be used in the same manner as garage and storage space in buildings and will accordingly be apportioned in accordance with the same formula. Land other than storage space that is not occupied by a building obviously cannot be related to any particular category. Such investment will be apportioned in the same proportions as combined land investment in the other land categories.

D. *Apportionment of Expenses*

289. Expenses can also be classified as direct or indirect expenses. Certain expenses such as depreciation and maintenance can be directly associated with particular tangible investments in buildings, facilities and equipment. Such expense will be apportioned in the same manner as the associated investment. Property taxes can also be associated with a particular investment and will be apportioned in the same manner.

290. We have concluded that rental payments for the use of a switch or a building, etc., should be apportioned in the same manner that investment would have been apportioned if the carrier owned the equipment or the facility. Therefore, we are also describing such rental payments as direct expense.

291. Indirect expense includes taxes and certain hypothetical taxes that are treated as expenses for ratemaking purposes as well as the expenses in the 600 series of accounts. We have departed somewhat from the separations methodology for apportioning income taxes because that methodology includes some steps that

appear to be unnecessary when charges for almost all the relevant categories are to be targeted to earn the same rate of return.[107] Inasmuch as the income taxes are taxes upon profits and the profits will be directly related to net investment, such tax expense will be apportioned upon the basis of relative net investment.

292. Hypothetical tax expenses, such as expense related to investment tax credits that are claimed for tax purposes, are associated with particular investments. Such expenses and related credits will accordingly be attributed to the associated investment and apportioned in the same manner as such associated investment.

293. Traffic expenses consist primarily of operator activities and will accordingly be apportioned among the three operator elements in the same proportions as the COE 1 investment.

294. A substantial portion of Commercial Expenses are generated by sales and advertising activities that should be excluded from access charges because there is no reason to anticipate that the local exchange carriers will have any reason to advertise exchange access services. We have accordingly assigned expenses in Accounts 642 and 643 to the interexchange category.

295. Commercial expense also includes Connecting Company Relations, Local Commercial expense, Public Telephone Commissions, Directory expenses and other commercial expenses. The public telephone commissions are obviously attributable to the Pay Telephone element and the directory expenses are obviously attributable to the Information element. Local Commercial expense consists primarily of billing and collection activities and will accordingly be assigned to the Billing and Collection element.

296. At the present time a substantial portion of Connecting Company Relations expense is attributable to the administration of the settlements process. That process will be replaced in large part by access charges. Companies will still incur expenses in connection with the computation of access charges and the computation of distributions from access charge revenue pools. We have, however, decided to classify the access charge expenses as revenue accounting expenses for purposes of this expense apportionment. Inasmuch as most of the expenses that will remain in the Connecting Company Relations category will be attributable to interexchange settlements, the Connecting Company Relations expense will be assigned to the interexchange category.

297. The remaining commercial expenses cannot readily be attributed to any category or element. Those expenses will be apportioned in the same proportions as the combined commercial

[107] The separations methodology computes taxable income separately for interstate and intrastate services and uses that ratio to apportion tax expense. That step appears to be necessary for separations purposes because state and federal regulators authorize different returns.

expenses that have been directly assigned to an access element or the interexchange category.

298. Revenue accounting expenses that are not attributable to access charges will be assigned to the Billing and Collection element because such expenses are generated primarily by such activities. We have also established a formula for the allocation of access charge revenue accounting expenses among access charge elements. Most of those expenses will be allocated to end user access elements because the billing and collection of end user charges is likely to generate greater expense.

299. The Big 4 Wage Factor from the *Separations Manual* will be used to apportion certain expenses such as social security taxes and pensions that are closely related to wage expenses. The Big 4 Wage Factor is based upon the wage portion of maintenance, traffic, commercial and revenue accounting expenses.

300. The *Separations Manual* also uses the Big 4 Wage Factor to apportion general office expenses other than engineering expenses. We have concluded that it would be appropriate to use the same factor or this purpose. Inasmuch as engineering expense is related to the equipment and facilities that are used in telephone operations, we have decided to apportion that expense on the basis of the apportionment of the combined direct investment.

301. Although the existing license contracts between AT&T and the BOCs will be terminated before access charges become effective, it will still be necessary to apportion this type of expense because some independents have similar arrangements and the BOC central organization will probably perform some services that AT&T General Departments have performed in the past. We believe expenses for services that are performed by an affiliated company should be apportioned in the same manner as expenses for services that a company performs for itself. We are accordingly requiring that license contract expense be apportioned in that manner.

302. Expenses and income charges and credits that are not included in one of the specific categories described in the rules will be apportioned on an aggregate basis. The Other Investment factor for indirect investment that is not land and building investment will be used for that purpose.

VI. *LEVELS OF AGGREGATION*

A. *Prior Proposals*

303. The tentative plan described in the *Second Supplemental Notice* proposed nationally averaged carrier's carrier access charges and the creation of an access charge revenue pool. Uniform charges necessarily require revenue pooling because different exchange carriers have different costs. Some carriers would be overcompensated and others would be deprived of a compensatory return if each

carrier kept the proceeds from access charges that are computed to reflect the average costs of all carriers.

304. The *Second Supplemental Notice* said that distributions from an access charge revenue pool would reallocate total access charge revenues "among the exchange carriers in order to enable each exchange carrier to receive its interstate exchange plant costs and a share of the residue that reflects its pro rata share of the interstate exchange plant investment." 77 FCC 2d at 233.

305. Some comments that were filed in response to the *Second Supplemental Notice* observed that we did not specify whether distributions taken from a pool would be based upon the authorized or the achieved rate of return. We always contemplated that any pool distributions would be based upon an achieved return although the charges would, of course, be designed to produce revenues that are equal to the authorized revenue requirement.

306. The *Fourth Supplemental Notice* invited comments upon the desirability and feasibility of some alternatives to nationwide uniform charges. One of those alternatives—separate access charges on a state-by-state basis—would have required revenue pooling. The other two alternatives—a separate schedule for a limited number of classes of exchange carriers or a separate schedule for a limited number of classes of exchanges—would not require revenue pooling.

307. All four alternatives were based upon the assumption that all exchange carriers would be participating in common tariff arrangements. We assumed that this would be the case because none of the telephone company comments that were filed in response to the *Second Supplemental Notice* expressed a desire to opt out of such arrangements. Inasmuch as some telephone company comments that were filed in response to the *Fourth Supplemental Notice* do express such a desire, the advantages or disadvantages of the alternatives described in that *Notice* may be academic unless we conclude that we can and should compel unwilling carriers to participate in common tariff arrangements.

B. *Compulsory Common Tariffs*

308. Most comments that discuss the advantages and disadvantages of common tariff arrangements apparently assume that this Commission does have discretion to require averaging or deaveraging, but a few participants have raised questions with respect to the scope of our discretion. Some carriers who do not desire to join in common tariff arrangements apparently believe that any carrier has an absolute right to establish its own rates based on its own costs.[108] Other participants who state that averaging is essential to achieve Communications Act goals contend, or at least imply, that it would

[108] *See* especially Rochester Telephone Corporation Reply, p. 14.

be unlawful for us to permit any carrier to withdraw from averaged common tariff arrangements.

309. No provision of the Communications Act explicitly supports either position. That Act does not expressly require averaged rates and it does not confer any express right to deaverage. Neither this Commission nor the courts have been required to determine whether a carrier has a right to establish separate charges because no carrier has ever attempted to withdraw completely from the uniform MTS rate structure.[109]

310. We believe that our general powers under Section 4(i) of the Act, 47 U.S.C. §154(i), are sufficient to enable this Commission to compel carriers to participate in common tariff arrangements if we find that such arrangements are necessary to accomplish Communications Act goals. Section 4(i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.[110]

311. A rule that requires a common tariff arrangement would not conflict with any express provision of the Act. A rule that makes participation in such arrangements voluntary also would not conflict with any express provision of the Act. Therefore, we do have discretion to compel, or to refrain from compelling, participation in a common tariff arrangement.

312. We believe that our power to compel participation in such arrangements should be used sparingly. A carrier should not be prohibited from pursuing a course that its management believes to be in its best interests unless the public interest requires such a prohibition. A carrier obviously should not be precluded from filing separate access charge tariffs that reflect the costs of that carrier if such a prohibition would produce results that are less consistent with Communications Act goals than results that the filing of a separate tariff would produce.

313. In view of these conclusions we have decided that the advantages and disadvantages of mandatory common tariff arrangements should be examined separately for different groups of access

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[109] Rochester Telephone cites *American Telephone and Telegraph Company v. FCC*, 487 F.2d 864 (2d Cir. 1973) and *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375 (D.C. Cir.), *cert. denied*, 434 U.S. 1040 (1977), to support its claim that it has an absolute right to file its own tariffs. Neither case involved any question with respect to separate or common tariffs. Moreover, the general language with respect to carrier's rights related to revisions of carrier-initiated tariffs that had never been found to be unlawful. Those courts were not describing the scope of the remedial powers we may exercise after we have found that the entire telephone industry has been maintaining an unlawful rate structure.

[110] Those powers have been construed very broadly in the past. *See, e.g., U.S. v. Southwest Cable Co.*, 392 U.S. 197 (1968); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).

elements. We have reached different conclusions for different groups.

314. The Carrier Common Line element was designed in part to mitigate the effects that unlimited deaveraging would produce. Therefore, we believe it is essential to recover those charges through interexchange carrier assessments that are computed on a uniform nationwide basis and to create a pool arrangement for the distribution of such revenues. Our purpose would be frustrated if some exchange carriers recovered the carrier's carrier portion of the Common Line revenue requirement directly from the interexchange carrier. Such a practice could lead to a deaveraging of MTS and other switched service rates that would reflect cost differences among carriers. This would impose burdens upon the customer of high cost or high SPF carriers that the Carrier Common Line charge was designed to avoid.

315. A common tariff arrangement is also necessary at this time because a large portion of the Carrier Common Line revenue requirement will be recovered through the premium access assessment during the early years of the transition. Differences in the quality of interconnection will vary from place to place and from month to month during the transition period. Any effort to measure premium value in a particular exchange in a particular month would create significant administrative burdens for all carriers and for this Commission. We have decided that it would be preferable to compute an annual premium on a national basis that reflects our best estimate of the premium access that will exist during a particular year. It may be impossible to compute a premium access charge in any other manner.

316. The considerations that require a uniform nationwide charge for the carrier's carrier portion do not apply to the end user portion of the Common Line revenue requirement. Premium access is not a factor and separate tariffs for the end user portion need not impose hardships in high cost or high SPF areas.[111] There is accordingly no reason to preclude a carrier from devising its own charges if it wishes to do so.

317. Moreover, a compulsory common tariff arrangement for that element would not only be unnecessary, but would also be undesirable. We have designed transitional rules for End User Common Line charges that give carriers considerable discretion in designing a transition to flat rates for all end users. Flexibility is desirable because different approaches are likely to be appropriate for different carriers in different areas.

318. Our effort to achieve parity among services would be frustrated if a carrier filed a tariff for one or two end user elements

[111] Universal Service Factor costs and transitional SPF costs will, of course, be assigned to the carrier's carrier portion. *See* Subparts III.B and III.C, *supra*.

that reflected its own costs and joined a common tariff for other end user elements that reflected average costs of a group of carriers. Some restriction upon the filing of separate end user tariffs is accordingly necessary in order to achieve the primary objective of this phase of this proceeding. Section 69.3 of our Rules permits a carrier to file a separate tariff for an end user access element if, but only if, that carrier files a separate tariff for all end user access elements.[112]

319. We do not perceive any significant advantage from requiring a common tariff for the other carrier's carrier elements that we have described as traffic sensitive. Any deaveraging of the access charges will not, of course, automatically lead to a deaveraging of the interexchange carrier's end user rates. Even if that result did occur, it appears doubtful that the differentials would be large enough to impose a significant hardship upon end users in particular areas. Present and proposed separations methods for the apportionment of traffic sensitive plant do not create the same kind of discrepancies that are or may be reflected in interstate NTS costs. Therefore, we will not preclude separate tariffs for the traffic sensitive elements.

320. We will, however, preclude a carrier from filing a separate tariff for any traffic sensitive element if the carrier does not file a separate tariff for all traffic sensitive elements. Many of these elements are closely interrelated and a combination of separate and common tariffs for the same carrier could produce anomalous results that are inconsistent with the goals and requirements of the Communications Act.

321. The existence of multi-carrier extended area arrangements also requires a further restriction upon the filing of separate tariffs for traffic sensitive elements. If an extended area arrangement exists an interexchange carrier that interconnects with any local exchange carrier in the extended area necessarily obtains access to the entire extended area. The local exchange carriers are essentially providing a joint access service. Therefore, we will not permit any local exchange carrier to file separate traffic sensitive tariffs for a portion of an extended area. We will permit carriers in an extended area to file a joint tariff for traffic sensitive elements that differs from any national common tariff if all of the participating carriers concur in the rate and agree upon an apportionment of the revenues. Such a joint tariff must, of course, reflect the combined costs of all participating carriers.

322. If carriers in an extended area cannot agree upon a rate for a particular area, common tariff arrangements that have been established nationally will have to be used for that purpose. Such a requirement is necessary to assure that some access charge will be

[112] All of the restrictions upon separate tariffs and deaveraging are described in Section 69.3.

effective in all areas even if the participating exchange carriers cannot agree upon rates or the division of revenues.

C. *Deaveraging By A Carrier*

323. A separate tariff for end user or traffic sensitive elements might be computed to reflect the average costs of a particular carrier or group of carriers. A tariff could also be devised to reflect greater disaggregation. The comments indicate that a few carriers may wish to file separate tariffs that are highly disaggregated.

324. Our discussion of deaveraging in the *Third Supplemental Notice* noted that past efforts to devise deaveraged rates for a particular carrier or group of carriers have not produced lawful rates. We also concluded that our past decisions have established a policy that precludes selective deaveraging by a carrier in the absence of a showing that such deaveraged rates reasonably approximate actual cost differences. 81 FCC 2d at 194. We said that we would continue to enforce that policy and we noted that Central Submission data submitted by AT&T indicates that AT&T did not have the data that would be necessary to justify a deaveraged rate schedule. 81 FCC 2d at 195.

325. We have not received any information in or out of this record during the intervening two years that would indicate that any carrier is presently in a position to devise highly disaggregated access tariffs that will not create new forms of discrimination. We have, therefore, concluded that unlimited deaveraging within tariffs of a particular carrier or group of carriers should not be permitted at this time.

326. Data that are collected on a study area basis may, however, be sufficient to enable a carrier to justify rate differentials among different study areas. We will, therefore, permit a carrier to file access tariffs with different rates in different study areas if it chooses to do so. Our decision to permit such filings does not, of course, relieve such a carrier of its duty to submit cost support data that will justify any such differentials.

D. *Voluntary Common Tariffs*

327. Most participants in this proceeding agree that exchange carriers who wish to enter into a voluntary common tariff arrangements and a voluntary revenue pool should be permitted to do so. Some participants have, however, observed that any averaging and pooling arrangement has some disadvantages. Some have said that such arrangements do not create incentives for users or carriers that promote economic efficiency.

328. AT&T observed (Comments, p. 71): "Because rate averaging separates prices from local costs, averaging encourages the overuse of the more costly but underpriced facilities and the underuse of the less costly but overpriced facilities."

329. Voluntary common tariff arrangements for access elements other than the Carrier Common Line element would not be likely to produce significant distortions because the lowest cost carriers are likely to withdraw from such pooling arrangements in due course. An access plan that includes such arrangements will probably ultimately produce common tariffs and revenue pools for a large number of relatively small companies that do in fact have comparable costs.

330. Some comments have observed that pooling does not create efficiency incentives for carriers that participate in a pool. For example, Rochester Telephone said (Comments, p. 34):

> If the pooled revenues are distributed according to each carrier's costs, as presumably they would have to be, there is little or no economic incentive to reduce the cost of access under this system. Indeed, an exchange carrier that reduces its costs becomes relatively more disadvantaged, for it receives from the pool a smaller proportion of the interstate revenues contributed by its subscribers to the pool.

331. The present partnership settlements arrangement for BOCs and independent telephone companies that are described as "cost study" companies essentially provides cost plus compensation for each carrier. This method of compensation does appear to create little or no incentive to improve efficiency. Many participants do believe, however, that any access charge revenue pool should be designed to provide a uniform return for all pool participants.[113]

332. Although a uniform common tariff arrangement necessarily requires a revenue pool, it does not inevitably require pool distributions that are based upon the settlements partnership model. It may be possible to create greater efficiency incentives by devising a pool distribution formula that does not guarantee a uniform return for all participants. Since such questions apply to involuntary as well as voluntary pools, we believe this possibility warrants further study. We do not, however, have sufficient information at this time to devise pool distribution rules that differ from the settlements model. The public interest would not be served by delaying initial access charges to devise such an alternative. We have accordingly decided to adopt distribution rules that do follow the settlements model.[114]

333. Rochester Telephone also asserts (Comments, p. 39) that companies that participate voluntarily in a common tariff and pooling arrangement "would run the risk of antitrust liability under the Sherman Act." It appears doubtful that common tariff and

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[113] *See* GTE, p. 23; United Telephone System, Inc., p. 2; Ketchikan Public Utilities, p. 7, Curtis M. Bushnell, p. 21.

[114] The distribution of revenues to carriers that are not average schedule companies is described in Sections 69.607–69.610 of the Rules.

revenue pooling arrangements that are limited to access services could provide a basis for a colorable antitrust claim. The Sherman Act does not prohibit concerted activities, it merely prohibits concerted activities that are likely to produce an unreasonable restraint of trade.

334. We observed in the *Second Supplemental Notice* that such arrangements are unlikely to produce anticompetitive effects. That *Notice* said (77 FCC 2d 235):

> Local exchange facilities are presently provided exclusively on a monopoly basis and carriers providing such service do not compete with each other in the provision of that service. We recognize that this situation may change with time as improving technology (*e.g.*, direct satellite, cellular radio) makes exchange competition more economically feasible. However, these changes will not occur in the short run. (footnote omitted).

335. Access service competition between the carriers that are likely to participate in a pool is not likely to occur even in the more distant future. Alternative access that bypasses wireline facilities of a local exchange carrier is likely to be offered in conjunction with an interexchange service. Therefore, a local exchange carrier is not likely to be providing bypass in the franchise area of another local exchange carrier if that carrier is not providing interexchange services. The MFJ bars the divested BOCs from the interexchange market and most smaller independents do not have the means to enter that market. One can imagine large independents offering bypass services in BOC exchanges, but the BOCs are not likely to remain in any pools by the time that becomes a realistic possibility. Therefore, any common tariff and pooling arrangements that we are mandating or permitting cannot be viewed as price-fixing or profit-pooling by actual or potential competitors in an access service market.

336. The Justice Department apparently shares our perception of the competitive implications of voluntary access pools. The Justice Department comments do not oppose voluntary common tariffs or voluntary pools as such.

337. Such voluntary arrangements not only do not have disadvantages that would warrant a prohibition, but also have important advantages. The telephone industry is composed of a limited number of large companies that serve over 90% of the local exchange subscribers and a very large number of small companies that serve the remaining subscribers. Most of these smaller companies have never filed any tariff of any kind with this Commission. It would be totally unrealistic to expect such companies to prepare and justify separate tariffs in accordance with the rules we are adopting in this *Report and Order*. It would also be unrealistic to suppose that this Commission could review 1500 access tariffs in a meaningful manner if they did choose to do so. A common tariff arrangement that most

of the exchange carriers can use is clearly necessary to make any access charge rules work. Such arrangements would, therefore, presumably be immune from antitrust sanctions because they are necessary to make the regulatory scheme work even if this Commission did not mandate or sponsor such arrangements. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

338. The involuntary arrangements for universal service charges should not, of course, present any antitrust question because participation in those arrangements would be the product of regulatory coercion.[115]

E. *Creation of the Association*

339. A voluntary or involuntary common tariff arrangement necessarily requires that some entity compute the charges and prepare and justify the tariffs on behalf of all the participating carriers. A revenue pool requires that some entity compute the distributions that each participant is entitled to receive from the pool.

340. In the past AT&T has acted as a tariff filing agent for the entire industry and has also performed most of the administrative functions in connection with the settlements pooling arrangement. The AT&T role as a tariff filing agent is implicitly recognized in Section 203(a) of the Act. Section 203 requires every common carrier "except connecting carriers" to file tariffs with this Commission for interstate and international services. It also requires that the tariffs describe charges between points on the carrier's system and between points on the carrier's system and "points on the system of its connecting carriers." This essentially relieved a "connecting carrier" of the burden of filing its own tariffs with this Commission and imposed that burden upon the carrier that is not described as a "connecting carrier." The term "connecting carrier" encompasses most independent telephone companies and probably encompassed almost all non-Bell companies when the Act was adopted. Thus, Congress effectively made AT&T a tariff filing agent for the entire industry.

341. The *Fourth Supplemental Notice* invited comment on a proposal to create a new intra-industry entity to perform the tariff filing and pool distribution functions because such an AT&T role in the post-divestiture environment would appear to conflict with the spirit, and possibly the letter, of the then proposed consent decree. Most comments from participants who do not oppose any common tariff or pooling arrangement have endorsed the industry association concept.

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[115] The decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), would not be analogous because the regulatory coercion in the rules we are adopting does not have the same *pro forma* character as the actions of the Michigan Commission.

342. A few comments have questioned the desirability or legality of Commission action to mandate the creation of such an association. Such participants apparently believe that we should allow institutional arrangements for common tariffs and pools to emerge spontaneously. We do not believe that would be a feasible option if an access charge system is to be in place by the beginning of 1984. Such an association must have a functioning organization by the time the divestiture occurs. We necessarily must mandate the creation of an exchange carrier association and adopt some rules with respect to its organization and functions in order to ensure that an access charge system will work.[116]

343. Rochester Telephone has questioned our authority to mandate the creation of such an association and has described such an action as a delegation of powers to a private organization. Comments, p. 39; Reply, p. 13. We do not believe it would be appropriate to describe our action as a "delegation" because the preparation of tariffs and the administration of revenue pools is not a governmental function. It would probably be more accurate to describe our action as an exercise of our Section 203(b)(2) power to modify the requirements of Section 203 by creating a new entity to perform functions that Section 203(a) assigned to AT&T. If we failed to exercise our power to transfer such functions from AT&T to a new entity we would be creating an unnecessary conflict between the regulatory scheme and the MFJ. Moreover, as previously noted, the creation of such an association is essential to the success of an access charge system and is accordingly within our Section 4(i) power to issue orders that are necessary to the performance of our statutory functions.

344. Although the Justice Department did not oppose common tariffs or voluntary pooling of access charge revenues, the Department has expressed the view that this Commission should not sponsor a carrier association. That view may reflect a concern that a Commission-sponsored association could become a vehicle for other concerted activities that might have anti-competitive implications. We feel that such activities are unlikely. Nevertheless, we have decided that we should impose some restrictions upon the scope of the association's activities. We will preclude the association from engaging in activities that are not directly related to the preparation of access charge tariffs or the distribution of access charge revenues unless such additional activities are expressly authorized by this Commission. We will, of course, expect the association to seek prior approval for any additional association activities.

F. *Organization of the Association*

345. We have concluded that membership in the association

[116] Those rules are set forth in Subpart G.

should be limited to exchange carriers that participate in access charge revenue pools that are administered by the association and that the governing board should be composed exclusively of exchange carrier representatives. Although the *Fourth Supplemental Notice* invited comment upon the advisability of including a Commission representative on the association board, further reflection leads us to conclude that it would be unwise to do so. This Commission will be obliged to review the tariffs that the association files and to determine the merits of any petitions to investigate, suspend or reject such tariffs. An appearance of a conflict of interest might be created if a Commission representative participated in the association decisions that might be challenged in such proceedings. We have also decided not to accept suggestions that state commissions, interexchange carriers or consumers be represented on the governing board of the association. As we stated in the *Fourth Supplemental Notice*, "the Communications Act already provides safeguards adequate to protect the interests of these groups in the fair, evenhanded implementation of any access charge plan we might adopt." 90 FCC 2d at 150.

346. We have concluded that we should adopt a rule describing the membership of the governing board in order to establish appropriate representation for different classes of carriers. We are not, however, adopting that rule at this time. We will issue a supplemental order in this docket adopting such a rule and prescribing some organizational steps after the notice period expires for carriers that may choose not to participate in common tariffs for 1984.[117]

347. We do not plan to adopt rules that would restrict the association's discretion in acquiring staff or borrowing staff from its members or contracting with accounting firms, banks or others to perform some of the association's tasks. The observation in the *Fourth Supplemental Notice* that the BOC central organization might continue to perform many tariff preparation and pool distribution functions that have traditionally been performed by AT&T personnel was presented as a possible solution to staffing problems the association may encounter. We do not believe, and have never believed, that it would be necessary or desirable for this Commission to prescribe the staffing arrangements the association would be required to adopt.

348. The association will be responsible for filing the Carrier

[117] We do not plan to invite further supplemental comments before we issue that supplemental order.

Common Line tariffs and common tariffs for every other access element for those carriers that choose to join in association tariff[118] In general, carriers may choose to participate in common tariffs for the end user elements or the traffic sensitive carrier's carrier elements or both. In order to enable the association to adjust its tariffs to reflect the costs of carriers that do choose to participate in common tariffs, we shall require that any exchange carrier that does not desire to participate in a common tariff provide ample advance notice that it has chosen to file a separate tariff.

349. The costs of managing the pooling and distribution, along with the costs of actually filing tariffs, are to be included among costs recovered through association charges.

G. *AT&T Role in Preparation of Initial Tariffs*

350. It appears doubtful that the association could have an organization in place in sufficient time to prepare the initial access service tariffs that must be filed by October 3, 1983. We have accordingly decided that AT&T should continue to perform its traditional role in the preparation of tariffs for the telephone industry until the initial access charge tariff is ready for filing.[119] AT&T should, of course, respond to policy directives from the association directors when a governing board has been selected.

351. AT&T participation in the preparation of the initial access charge tariffs would probably be necessary even if the association could create a functioning organization immediately. AT&T will necessarily be required to file new end user tariffs for interstate and international services in order to reflect the effect of the access charges. In view of the magnitude of the changes that the implementation of initial access charges will produce, access charges and new end user charges for interexchange services should become effective simultaneously. We could not responsibly permit massive changes in end user rates to become effective upon less than 90 days notice and it appears doubtful that we could require more than 90 days notice for access tariff filings. In these circumstances, coordination in the development of access charge tariffs and new end user tariffs for AT&T services is essential to ensure a smooth transition.[120]

352. Such coordination problems should not be as significant in subsequent years because the changes in access charges probably

[118] This will, of course, take the form of a single tariff with multiple elements. We will permit carriers who do not join some elements to cross-reference the association tariff for elements such carriers join.

[119] Inasmuch as the association will be relieving AT&T of burdens imposed by Section 203, we expect that AT&T will lend funds to the association to permit it to function until it receives a disbursement from access charge revenues.

[120] End user rates of other interexchange carriers will undoubtedly also be changed to reflect access charges. We do not, however, expect to require 90 days notice from those carriers.

will not be significant enough to require simultaneous changes in end user rates. It should be possible to achieve a smooth transition by mandating an AT&T role in the preparation of common tariffs for access charges that ends when the initial access charges are filed. We do not envision, mandate or sanction any AT&T role in the preparation of access charge tariffs or the distribution of access charge revenues after divestiture of the BOCs occurs.

353. The Justice Department comments indicate that the Department does not object to a pre-divestiture AT&T role in the preparation of access charge tariffs. We accordingly assume that the procedure we envision will not conflict with the letter or the spirit of the MFJ.

354. The preparation of the initial access charge tariffs will undoubtedly be a difficult task. In order to enable AT&T to begin collecting the necessary data, we are making this *Order* effective on the day after the date of publication in the *Federal Register*. We have decided to require exchange carriers that choose to file any separate tariffs for 1984 to notify AT&T of their decision within 40 days after the release of this *Report and Order*. We are also requiring that AT&T notify all the affected carriers that this notice requirement exists within 10 days of the release of this *Report and Order*.

355. It is vitally important that acceptable access tariffs become effective by the day on which divestiture of the BOCs occurs. We therefore feel compelled to monitor the progress of access charge preparation. To this end, we require AT&T to file progress reports until the initial access charges have been filed. The first report will be filed 8 weeks after the release of this *Report and Order* and subsequent reports will be filed at 6-week intervals.

356. We also expect that AT&T and any carrier that may choose to file a separate tariff will file petitions for waiver if shortcuts must be used to adapt readily available data to the methods we are prescribing for the computation and assessment of access charges. We recognize that some carriers will not be able to provide all of the data that would be required and that some kind of sample procedure will be necessary to develop data for average schedule companies. The filing of such waiver petitions will provide an additional opportunity to monitor the progress of access charge preparation.[121]

357. We believe the procedures we are adopting will achieve the purposes of this proceeding without imposing undue burdens upon any carrier or creating administrative burdens that exceed the capabilities of our staff.[122]

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[121] The Chief of the Common Carrier Bureau will, of course, act upon any waiver petitions that do not present fundamental policy questions that require a Commission decision.

[122] We have necessarily been obliged to impose some restrictions upon the options of carriers that do not choose to join in common tariffs in order to prevent the filing

H. *Regulatory Flexibility Certification*

358. For the following reasons, we certify that the Regulatory Flexibility Act is not applicable to the rules we are adopting in this proceeding.

359. A few of the comments have questioned the adequacy of the initial regulatory flexibility analysis in the *Fourth Supplemental Notice*.[123] The Regulatory Flexibility Act is not literally applicable to this proceeding. That Act was apparently designed for the protection of small businesses that are directly subject to administrative rules rather than businesses that are indirectly affected by the results that any rules will produce. The access charge rules are, of course, imposed upon the local exchange carriers that will be required to compute and collect access charges in accordance with those rules. Those carriers are accordingly the only businesses that might be entitled to claim some protection under that Act.

360. Although some local exchange carriers are very small, no telephone company appears to fall within the Regulatory Flexibility Act's very special definition of a "small entity." That Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as a definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. This Commission has found all exchange carriers to be dominant in the *Competitive Carrier Rulemaking*, 85 FCC 1, 23–24 (1980). Indeed the smallest exchange carriers are probably even more dominant than the large ones because bypass competition is very unlikely to develop in the areas they serve.

361. Although the Regulatory Flexibility Act is not applicable to this proceeding, Congress did express essentially the same policy objective in the Communications Act. Sections 2(b) and 203(a) of the 1934 Act were designed to relieve most small telephone companies from many reporting and other burdens that the Act imposed upon AT&T.

362. We recognize that we cannot and should not expect a telephone company with eight employees to do everything that Pacific Telephone is expected to do. We have designed the access charge rules to minimize the administrative burdens that are imposed upon smaller companies. We have mandated the creation of an association that will perform tariff preparation and pool distribution functions and we have designed requirements for those func-

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of tariffs that could not be adequately reviewed. For example, the rules we are adopting preclude tariffs that are disaggregated within a study area. We may relax such restrictions in the future after we have acquired more experience with access service tariffs.

[123] *See* especially Small Business Administration comments.

tions that will adapt the existing average schedule settlements procedures to an access charge system. We believe that we have complied fully with the requirements of the Communications Act and the spirit of the Regulatory Flexibility Act.

VII. *CONCLUSION*

363. We emphasize how difficult and how important has been the task of devising an access charge plan. In this proceeding, we have focused on the present and the future rather than the past. The monopoly telecommunications environment of the past has ended. The approaches taken in the past to balance the four goals of universal service, non-discriminatory, cost-based prices and a viable, efficient telecommunications network—goals which we believe have been the aim of the Communications Act since its passage—are no longer appropriate. These past approaches have essentially been nothing more than the development of special, discriminatory rates for different customers making identical use of access plant in interstate service. It is readily apparent that in an era of facilities-based competition and resale such approaches are not viable. Any attempt to insure continued support for local telephone service through the prohibition of bypass systems would lead to a stifling of innovation and, quite probably, to the transformation of the nation's telephone system—currently the best in the world—into an outmoded and technically inefficient system. Such a system would almost certainly be unable to attract sufficient capital to maintain, much less upgrade, the system.

364. In our *Fourth Supplemental Notice* we put forth for comment four differing approaches to the resolution of the principal question in the access charge docket. These were not presented as specific plans subject to a vote of the parties. Rather they were propounded as examples of the types of plans which could be developed. In issuing that *Notice* we hoped that participants would propose methods to combine or improve upon the simplistic approaches we described. Our hope was well justified. The comments filed by participants in this proceeding have, in overwhelming measure, been constructive and of tremendous value to us in fulfilling our task. Our task, we state once again, is to devise that access charge plan which best balances the many objectives of the Communications Act.

365. The plan we adopt today is largely based upon those comments. It recognizes both the need for some national averaging and the clear advantages of disaggregation when such disaggregation is desired by the carriers and is in the public interest. It clearly recognizes the need for a smooth transition from the existing system of discriminatory but largely usage based carrier charges to a new system relying chiefly upon flat customer charges. Such a movement is, in our opinion, necessary to serve the public interest and to insure

the maintenance of our nationwide network of telephone service. Despite this we have, through our plan, insured that universal service will not be eliminated. The inclusion of a permanent, nationally averaged, carrier's pool to direct revenues to high cost areas is a central feature of this plan. We have not been limited by the traditional division between "traffic sensitive" and "non-traffic sensitive" costs in determining which costs should ultimately be placed upon individual customers. Rather, we have attempted to differentiate network functions, which may appropriately be recovered through carrier's carrier charges, from end user service, which can only be ordered by end users, which is dedicated to individual end users, and which must, in our opinion, be recovered from those end users.

366. We have directed the Common Carrier Bureau to develop a monitoring function to insure that the changes that will result from this *Report and Order* do not impair universal service. Such a monitoring function must and will be in place before the institution of access charges. Along with our transition plan, this will insure that, should unforeseen circumstances arise, we have an ample opportunity to act before irreparable harm to the universal character of telephone service takes place. We now commit ourselves to taking such action should, contrary to our expectations, it be necessary. Such actions might include adjusting end user flat charges, adjusting the Universal Service Fund, adjusting the degree of nationwide pooling, or requiring that certain transitional benchmarks be met.

367. Finally, we have provided a two-year period after individual phone companies are responsible for collecting most dedicated NTS costs from their subscribers before equal flat customer access charges will be required. We recognize that during the transition period some telephone companies may develop mechanisms for recovering those costs from their customers which will better balance the four goals of the Communications Act than can a single national plan. We will conduct a further notice and comment phase of this proceeding in the fifth year and will evaluate nationwide and local effects of the transition before proceeding with the final steps in the transition plan. We recognize that a plan that may be ideal for most of the country may not be ideal for all of the country. This *Report and Order* recognizes that individual carrier flexibility is fully consistent with the Communications Act. We expect to work with State regulatory commissions, and State legislatures, during the transition period to continue to seek better ways to reconcile the need for an efficient, cost-based recovery scheme with the need for a universal telephone system and to harmonize our efforts so as not to frustrate the achievement of our policies and objectives.

368. The task we have faced in designing our access charge plan has been, perhaps, the most difficult ever to come before the

Commission. It is also, quite probably, the most important to have come before us. The correct resolution of this phase of this docket is an essential prerequisite for the development of meaningful competition in interstate telecommunications, for the assurance that common carrier telecommunications can play the central role in our nation's economy and, indeed, in the world economy that is warranted by its value to citizens and by its unique characteristic of being substitutable for a wide variety of goods and services. No one, and no commission, can predict the future of telecommunications with any degree of certainty. Our access charge plan is, in our opinion, the best plan for the present and immediate future that can be devised based upon our present level of knowledge. We remain committed to careful monitoring of developments in the field of common carrier telecommunications and to making any adjustments that may be warranted, based upon these future developments, to serve the public interest.

VIII. *ORDERING CLAUSES*

369. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. §§154(i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. §553, Part 69 IS ADDED to the Rules of this Commission as set forth in the attached Appendix A, effective on the date following publication in the *Federal Register*.

370. IT IS FURTHER ORDERED, That each revenue requirement that is computed in accordance with such rules shall be based upon a 12.75% return until further order of this Commission.

371. IT IS FURTHER ORDERED, That in accordance with the rules in Appendix A and the directives of this *Report and Order*, AT&T shall prepare the initial tariffs for interstate access services provided by members of telephone company association and shall file these tariffs no later than October 3, 1983.

372. IT IS FURTHER ORDERED, That AT&T file reports describing its progress in preparing these initial access tariffs with the Chief, Common Carrier Bureau. These reports shall continue until AT&T has filed the initial access tariffs. The first report shall be filed eight (8) weeks after the release of this *Report and Order*. Subsequent reports shall be filed thereafter at six (6) week intervals.

373. IT IS FURTHER ORDERED, That within ten (10) days of the release of this *Report and Order* AT&T shall notify each telephone company that has participated in the division of revenues or settlements process that the company is required to decide whether to file any tariffs separate from those filed by the association and to notify AT&T of its decision.

374. IT IS FURTHER ORDERED, That each telephone company that has participated in the division of revenues or settlements process shall notify AT&T of its decision to file any separate tariffs within forty (40) days of the release of this *Report and Order*.

375. IT IS FURTHER ORDERED, That the Petition for Evidentiary Hearing of the United States Transmission Systems, Inc. filed on June 26, 1980, IS DENIED.

376. IT IS FURTHER ORDERED, That the Motions for Leave to File Late Comments filed by the Federal Executive Agencies and the Council on Wage and Price Stability ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION*
WILLIAM J. TRICARICO *Secretary*

NOTE: Appendices B, C, D, E, F, G and attachments are available for public inspection in FCC Dockets Branch, Room 239 and FCC Library, Room 639, 1919 M Street, N.W., Washington, D.C. 20554.

APPENDIX A

Part 69 is added to Chapter I of Title 47 of the Code of Federal Regulations to read as follows:

Part 69. Access Charges

Subpart A: - General

Sec. 69.1. Application of access charges.

Sec. 69.2. Definitions.

Sec. 69.3. Filing of access service tariffs.

Sec. 69.4. Charges to be filed.

Subpart B: - Computation of Charges

Sec. 69.101. General.

Sec. 69.102. Dedicated Access Line.

Sec. 69.103. Pay Telephone.

Sec. 69.104. End User Common Line.

Sec. 69.105. Carrier Common Line.

Sec. 69.106. Line Termination.

Sec. 69.107. Local Switching.

Sec. 69.108. Intercept.

Sec. 69.109. Information.

Sec. 69.110. Operator Assistance.

Sec. 69.111. Common Transport.

Sec. 69.112. Dedicated Transport.

Sec. 69.113. Special Access.

Sec. 69.114. Billing and Collection.

Subpart C - Computation of Transition Charges

Sec. 69.201. General.

Sec. 69.202. End User Common Line charges.

Sec. 69.203. Minimum charges.

Sec. 69.204. Usage charges.

Sec. 69.205. Maximum charges.

Sec. 69.206. Transitional surcharges.

Sec. 69.207. Premium Access.

Sec. 69.208. Transitional Carrier Common Line.

Subpart D - Apportionment of Net Investment

Sec. 69.301. General.

Sec. 69.302. Net investment.

Sec. 69.303. Station equipment.

Sec. 69.304. Customer OSP.

Sec. 69.305. Carrier OSP.

Sec. 69.306. Central office equipment.

Sec. 69.307. Buildings.

Sec. 69.308. Land.

Sec. 69.309. Other investment.

Subpart E - Apportionment of Expenses

Sec. 69.401. Direct expenses.

Sec. 69.402. Current taxes.

Sec. 69.403. Deferred tax expenses.

Sec. 69.404. Traffic expenses.

Sec. 69.405. Commercial expenses.

Sec. 69.406. Revenue Accounting expenses.

Sec. 69.407. General Office expenses.

Sec. 69.408. Relief and Pensions.

Sec. 69.409. License Contract expenses.

Sec. 69.410. Other expenses.

Subpart F - Segregation of Common Line Element Revenue Requirement

Sec. 69.501. General.

Sec. 69.502. Base factor apportionment.

Sec. 69.503. Apportionment of transitional portion.

Subpart G - Exchange Carrier Association

Sec. 69.601. Exchange carrier association.

Sec. 69.602. Board of directors.

Sec. 69.603. Association functions.

Sec. 69.604. Billing and collection of access charges.

Sec. 69.605. Distribution of Carrier Common Line revenues.

Sec. 69.606. Computation of average schedule company payments.

Sec. 69.607. Disbursement of Carrier Common Line residue.

Sec. 69.608. Carrier Common Line hypothetical net balance.

Sec. 69.609. End User Common Line hypothetical net balances.

Sec. 69.610. Other hypothetical net balances.

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

69.1. Application of access charges.

(a) This Part establishes rules for access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984.

(b) Charges for such access services shall be computed, assessed and collected and revenues from such charges shall be distributed as provided in this Part. Access service tariffs shall be filed and supported as provided under Part 61 of this chapter, except as modified herein.

69.2. Definitions.

For purposes of this Part:

(a) "Access Service" includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication that is subject to regulation pursuant to Title II of the Communications Act or provided for the origination or termination of any interstate or foreign enhanced service that is exempt from tariff regulation pursuant to Subpart G of Part 64 of this chapter;

(b) "Annual revenue requirement" means the sum of the return component and the expense component;

(c) "Association" means the telephone company association described in Subpart G of this Part;

(d) "Big 4 Wage Factor" means that ratio of combined wage expense except building maintenance wage expense attributable to general office space in the following expense categories:

(1) Maintenance;

(2) Traffic;

(3) Commercial; and

(4) Revenue Accounting;

(e) "Buildings" includes investment that is described as building investment in the *Separations Manual*;

(f) "Carrier Outside Plant" or "Carrier OSP" means all outside plant that is not Customer OSP;

(g) "Central Office Equipment" or "COE" includes all equipment or facilities that are described as Central Office Equipment in the *Separations Manual*;

(h) "Commercial Expenses" includes all expenses that are described as Commercial Expenses in the *Separations Manual*, except for any expense incurred in computing, billing or collecting access charges which shall be deemed to be Revenue Accounting expense;

(i) "Current taxes" includes taxes other than property taxes that are actually accrued during the relevant period less credits attributable to past deferrals and does not include hypothetical taxes that are allowable expenses for ratemaking purposes or taxes assessed upon end users;

(j) "Customer Outside Plant" or "Customer OSP" means all lines or trunks on the customer side of a Class 5 or end office switch, including lines or trunks that do not terminate in such a switch, except lines or trunks that connect an interexchange carrier or enhanced service provider facility with such a switch;

(k) "Dedicated access line" means a WATS access line or a private line that does not terminate in customer premises equipment that is used exclusively for a particular interexchange service;

(l) "Direct Expense" means expenses that are attributable to a particular category of tangible investment described in Subpart D of this Part and includes:

(1) Maintenance;

(2) Depreciation and amortization;

(3) Rental payments for buildings, facilities or equipment; and

(4) Property taxes;

(m) "End user" means any customer of an interstate or foreign telecommunications service or enhanced service that is not a carrier or enhanced service provider except that a carrier other than a telephone company or an enhanced service provider shall be deemed to be an "end user" when such carrier or enhanced service provider uses a telecommunication service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller;

(n) "Entry switch" means the telephone company switch in which a dedicated transport line or trunk terminates;

(o) "Expense component" means the total expenses and income charges for an annual period that are attributable to a particular element or category;

(p) "Expenses" include allowable expenses in the 600 series of the Uniform System of Accounts apportioned to interstate or international services pursuant to the *Separations Manual* and allowable income charges apportioned to interstate and international services pursuant to the *Separations Manual*;

(q) "General Office Expenses" includes Executive (Account 661) expense, Treasury (Account 663) expense, Law (Account 664) expense, Other General (Account 665) expense and the portion of Accounting (Account 662) expense that is not Revenue Accounting expense;

(r) "Interexchange" or the "interexchange category" includes services or facilities provided as an integral part of an interstate or foreign telecommunications or an

interstate or foreign enhanced service that is not described as "access service" for purposes of this Part;

(s) "License contract" means an agreement to reimburse an entity that is jointly owned by telephone companies or companies that own telephone companies or an entity that directly or indirectly controls or is controlled by, or is under direct or indirect control with, a telephone company, for services, facilities, patents or other know-how;

(t) "Line" or "trunk" includes transmission facilities such as microwave towers, satellites, earth stations, etc. as well as wire and cable;

(u) "Net investment" means allowable original cost investment in Accounts 100.1–100.4 and 122 that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* from which depreciation, amortization and other reserves attributable to such investment that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* have been subtracted and to which working capital that is attributable to interstate and foreign services has been added;

(v) "Origination" of a service that is switched in a Class 4 switch or an interexchange switch that performs an equivalent function ends when the transmission enters such switch and "termination" of such a service begins when the transmission leaves such a switch, except that:

(1) Switching in a Class 4 switch or transmission between Class 4 switches that is not deemed to be interexchange for purposes of the Modified Final Judgment entered August 24, 1982, in *United States v. Western Electric Co.*, D.C. Civil Action No. 82–0192, will be "origination" or "termination" for purposes of this Part, and;

(2) "Origination" and "termination" does not include the use of any part of a line, trunk or switch that is not owned or leased by a telephone company;

(w) "Origination" of any service other than a service that is switched in a Class 4 switch or a switch that performs an equivalent function ends and "termination" of any such service begins at a point of demarcation that corresponds with the point of demarcation that is used for a service that is switched in a Class 4 switch or a switch that performs an equivalent function;

(x) "Outside Plant" or "OSP" includes all equipment or facilities that are described as outside plant in the *Separations Manual*;

(y) "Private line" means a line that is used exclusively for an interexchange service other than MTS or WATS, including a line that is used at the closed end of an FX or CCSA service or any service that is substantially equivalent to a CCSA service;

(z) "Return component" means net investment attributable to a particular element or category multiplied by the authorized annual rate of return;

(aa) "Revenue Accounting Expenses" includes all expenses that are described as Revenue Accounting Expenses in the *Separations Manual* and expenses associated with the preparation of access charge tariffs and the distribution of access charge revenues;

(bb) "Station equipment" includes all equipment or facilities that are described as station equipment in the *Separations Manual* except station equipment that is used by telephone companies in their own operations;

(cc) "Telephone company" means a carrier that provides telephone exchange service as defined in Section 3(r) of the Communications Act of 1934;

(dd) "Traffic Expenses" includes all expenses that are described as traffic expenses in the *Separations Manual*;

(ee) "Unit of capacity" means the capability to transmit one conversation; and

(ff) "WATS access line" means a line or trunk that is used exclusively for WATS service.

69.3. Filing of access service tariffs.

(a) A tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days notice, with a scheduled effective date of January 1.

(b) The requirement imposed by paragraph (a) of this Section shall not preclude the filing of revisions to those annual tariffs that will become effective on dates other than January 1.

(c) Any access service tariff filing, the filing of any petitions for rejection, investigation or suspension and the filing of any responses to such petitions shall comply with the applicable rules of this Commission relating to tariff filings.

(d) The association shall file a tariff as agent for all telephone companies that participate in an association tariff.

(e) A telephone company or group of telephone companies may file a tariff that is not an association tariff. Such a tariff may cross-reference the association tariff for some access elements and include separately computed charges of such company or companies for other elements. Any such tariff must comply with the requirements hereinafter provided:

(1) Such a tariff must cross-reference association charges for the Carrier Common Line element or elements if such company or companies participate in the distribution of revenues from such elements;

(2) Such a tariff that cross-references an association charge for any end user access element or the transitional surcharge must cross-reference association charges for all end user access elements and the transitional surcharge;

(3) Such a tariff that cross-references an association charge for any carrier's carrier access element other than the Carrier Common Line element or elements and the transitional surcharge must cross-reference association charges for all carrier's carrier access charges other than the Carrier Common Line element or elements and the transitional surcharge;

(4) Any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

(5) A telephone company or companies that elect to file such a tariff for 1984 access charges shall notify AT&T on or before the 40th day after the release of the Commission order adopting this Part;

(6) A telephone company or companies that elect to file such a tariff for any year subsequent to 1984 shall notify the association not later than June 30 of the preceding year if such company or companies did not file such a tariff in such preceding year or cross-referenced association charges in such preceding year that will not be cross-referenced in the new tariff;

(7) Such a tariff shall not contain charges for any access elements that are disaggregated or deaveraged within a study area that is used for purposes of jurisdictional separations;

(8) Such a tariff for a company that provides extended area local exchange telephone service shall not establish any charge for a carrier's carrier access element that does not apply to the entire extended area; and

(9) Such a tariff shall not include a charge other than an association charge for an extended area that is served by two or more telephone companies without the concurrence of all telephone companies that serve such extended area.

69.4. Charges to be filed.

(a) The end user charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Dedicated Access Line;

(2) Pay Telephone; and

(3) End User Common Line.

(b) Except as provided in Subpart C of this Part, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Carrier Common Line;

(2) Line Termination;

(3) Local Switching;

(4) Intercept;

(5) Information;

(6) Operator Assistance;

(7) Common Transport;

(8) Dedicated Transport; and

(9) Special Access.

(c) The carrier's carrier charges for carriers that offer a billing and collection or billing information service shall also include a Billing and Collection element.

Subpart B: Computation of Charges

69.101. General.

Except as provided in Subpart C of this Part, charges for each access element shall be computed and assessed as provided in this Subpart.

69.102. Dedicated Access Line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users for each interstate or foreign dedicated access line.

(b) Such charge will be computed by dividing one-twelfth of the projected annual revenue requirement for the Dedicated Access Line element by the projected average number of interstate or foreign dedicated access lines in use during such annual period.

69.103. Pay Telephone.

(a) A charge that is expressed in dollars and cents per call shall be assessed upon end users for each interstate or foreign call that is placed from a pay telephone, except that collect or third number billing calls will not be assessed.

(b) Such charge shall be computed by dividing the projected annual revenue requirement for the Pay Telephone element by the projected annual number of calls that are subject to assessment.

69.104. End User Common Line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service. Such charge shall be assessed for each line between the premises of an end user and a Class 5 office that is or may be used for local exchange service transmissions.

(b) Charges to multi-line subscribers shall be computed by multiplying a single line rate by the number of lines used by such subscriber.

(c) Charges to party line subscribers shall be computed by dividing a single line rate by the number of users that share such line.

(d) The single line rate or charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the End User Common Line element by the projected average number of local exchange service subscriber lines in use during such annual period.

69.105. Carrier Common Line.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Carrier Common Line element by the projected annual conversation minutes for all interstate or international services that use local exchange switching facilities. Each minute of use of any local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

69.106. Line Termination.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange facilities for the provision of interstate or foreign telecommunications services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Line Termination element by the projected annual conversation minutes for all interstate or foreign services that use local exchange switching facilities. Each minute of use of any termination in a local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

69.107. Local Switching.

(a) Charges that are expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services.

(b) Separate charges shall be established for two categories of service. The first category, or LS 1, shall consist of local dial switching for services other than MTS or WATS that is provided through a line side termination in a Class 5 switch or through a termination in a local tandem switch. The second category, or LS 2, shall consist of local dial switching for MTS and WATS and local dial switching for a service other than MTS or WATS that is provided through a trunk side termination in a Class 5 switch.

(c) The projected annual revenue requirement for Local Switching shall be apportioned between LS 1 and LS 2 on the basis of weighted relative usage. LS 1 dial equipment minutes shall be counted as one. LS 2 dial equipment minutes shall be

multiplied by the Toll Weighting Factor or TWF that is used for jurisdictional separations purposes to allocate investment in a particular type of switch.

(d) A per minute charge for the LS 1 category shall be computed by dividing the LS 1 portion of the annual revenue requirement by the projected annual LS 1 conversation minutes.

(e) A per minute charge for the LS 2 category shall be computed by dividing the LS 2 portion of the projected annual revenue requirement by the projected annual LS 2 conversation minutes.

(f) If end users of an interstate or foreign service that uses local switching facilities pay message unit charges for such calls in a particular exchange, a credit shall be deducted from the Local Switching element charges to such carrier for access service in such exchange. The per minute credit for each such exchange shall be multiplied by the monthly conversation minutes for such service to compute the monthly credit to such a carrier.

(g) If all local exchange subscribers in such exchange pay message unit charges, the per minute credit described in paragraph (f) of this Section shall be computed by dividing total message unit charges to all subscribers in a particular exchange in a representative month by the total minutes of use that were measured for purposes of computing message unit charges in such month.

(h) If some local exchange subscribers pay message unit charges and some do not, a per minute credit described in paragraph (f) of this Section shall be computed by multiplying a credit computed pursuant to paragraph (g) of this Section by a factor that is equal to total minutes measured in such month for purposes of computing message unit charges divided by the total local exchange minutes in such month.

69.108. Intercept.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use local exchange facilities for the provision of interstate or foreign telecommunication services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Intercept element by the projected annual conversation minutes for all interstate or foreign services that use local exchange switching facilities.

69.109. Information.

(a) A charge shall be assessed upon all interexchange carriers that are connected to assistance boards through interexchange directory assistance trunks.

(b) If such connections are maintained exclusively by carriers that offer MTS, the projected annual revenue requirement for the Information element shall be divided by 12 to compute the monthly assessment to such carriers.

(c) If such connections are provided to additional carriers, charges shall be established that reflect the relative use of such directory assistance service by such interexchange carriers.

69.110. Operator Assistance.

(a) A charge shall be assessed upon all interexchange carriers that offer an operator-assisted service that uses local exchange switching facilities and uses the services of telephone company operators.

(b) If such service is provided exclusively to the carriers that offer MTS, the projected annual revenue requirement for the Operator Assistance element shall be divided by 12 to compute the monthly assessment to such carriers.

(c) If such a service is provided to additional carriers a charge that is expressed in dollars and cents per call shall be assessed upon each carrier that receives such a service.

(d) Such a per call charge shall be computed by dividing the projected annual revenue requirement for the Operator Assistance revenue requirement by the projected annual number of operator-assisted calls.

69.111. Common Transport.

(a) A charge that is expressed in dollars and cents per conversation minute shall be assessed upon all interexchange carriers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment.

(b) The per minute charge shall be weighted by a distance factor that reflects the airline distance between the Class 5 or end office switch that serves an end user and the entry switch.

(c) Charges shall be designed to produce annual revenue that is equal to the projected annual revenue requirement for the Common Transport element.

69.112. Dedicated Transport.

(a) The projected annual revenue requirement for Dedicated Transport shall be divided into three parts. The revenue requirement shall be apportioned on the basis of relative net investment in the following investment categories:

(1) interface arrangements;

(2) voice grade transmission facilities; and

(3) conditioning arrangements.

(b) Appropriate subelements shall be established for the use of interface arrangements. Charges for such subelements shall be assessed and computed as follows:

(1) Such charges shall be assessed upon all interexchange carriers for the interface arrangements they use to provide interstate or foreign services;

(2) Charges for all such subelements shall be designed to produce total annual revenues that are equal to the portion of the projected annual revenue requirement for Dedicated Transport that has been apportioned to the interface arrangements subelements; and

(3) Charges for individual subelements shall be designed to reflect cost differences among such subelements in a manner that complies with applicable Commission rules or decisions.

(c) A charge for the use of voice grade transmission facilities shall be assessed upon interexchange carriers that use such facilities to provide interstate or foreign services. Such charges shall be expressed in dollars and cents per unit of capacity. Total units of capacity provided to an interexchange carrier shall be measured by ascertaining the number of conversations that could be transmitted simultaneously without producing blocking in the dedicated transport facilities. The capacity unit charge for carriers that offer MTS shall be weighted by a distance factor that reflects the airline distance between the entry switch and the interexchange facility. The capacity unit charge for other carriers shall be weighted by a distance factor that reflects the lesser or least of the airline distance between the entry switch and such carrier's interexchange facility or the airline distance between the entry switch and any interexchange facility of carriers that offer MTS that is located within 5 miles of such carrier's interexchange facility.

(d) Appropriate subelements shall be established for the use of conditioning arrangements. Charges for such subelements shall be assessed and computed as follows:

(1) Such charges shall be assessed upon all interexchange carriers that use conditioning arrangements in their provision of interstate or foreign services;

(2) Charges for all such subelements shall be designed to produce total annual revenues that are equal to the portion of the projected annual revenue requirement for Dedicated Transport that has been apportioned to the conditioning arrangements subelements; and

(3) Charges for individual subelements shall be designed to reflect cost differences among such subelements in a manner that complies with applicable Commission rules or decisions.

69.113. Special Access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment.

(b) Charges for all subelements shall be designed to produce total annual revenue that is equal to the projected annual revenue requirement for the Special Access element.

(c) Charges for an individual subelement shall be assessed upon all interexchange carriers or enhanced service providers that use the equipment or facilities that are included within such subelement.

(d) Charges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions.

69.114. Billing and Collection.

(a) Billing and collection service shall be offered to all interexchange carriers if such a service is offered to any interexchange carrier. Charges shall be assessed upon all interexchange carriers that elect to use such services.

(b) Any difference in charges for such service or for a billing information service shall reasonably approximate cost differences in the service provided.

Subpart C: Computation of

Transition Charges

69.201. General.

Notwithstanding sections 69.4, 69.104 and 69.105, charges for the access elements described in this subpart shall be computed in the manner described in this subpart for the period commencing January 1, 1984 and ending December 31, 1990.

69.202. End User Common Line charges.

(a) Common line charges shall consist of a minimum charge that is expressed in dollars and cents per line per month, a maximum charge that is expressed in dollars and cents per line per month, and a usage charge that is expressed in dollars and cents per conversation minute or dollars and cents per call. Except as provided for in Section 69.206, all End User Common Line charges shall be assessed upon end users.

(b) The transitional End User Common Line charges shall be computed as provided in Sections 69.203–69.205.

69.203. Minimum charges.

(a) A minimum charge shall be assessed upon each local exchange service subscriber that does not pay the maximum charge. A minimum charge may be established at any level that does not exceed the charge that would have been computed pursuant to section 69.104(d) for the year in question, provided that the minimum charge for a single line residential or party line subscriber shall not be less than $2 and the minimum charge for a single-line business local exchange service customer shall be not be less than $4 or more than 200% of the residential minimum charge.

(b) The minimum for a multi-line local exchange service subscriber shall be computed by multiplying the applicable single line rate by the number of local exchange subscriber lines such subscriber uses.

(c) For purposes of this section, a line shall be deemed to be a residential line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff. All other lines shall be deemed to be business lines.

69.204. Usage charges.

(a) A usage charge shall be assessed for each originating conversation minute or originating call except originating minutes or calls for a collect MTS call, an In-WATS call or an open end FX, CCSA or CCSA equivalent call until the combined minimum and usage charges equal or exceed the maximum charge in a particular month. Third party billing calls shall be assessed to the line billed. Usage charges for a multiline local exchange service subscriber shall be attributed equally to each line for purposes of determining whether such a subscriber shall pay the maximum charge for any line in any month.

(b) The usage charge shall be computed by subtracting projected annual revenues from maximum and minimum charges and the surcharges described in Section 69.206 from the projected End User Common Line annual revenue requirement. That residual revenue requirement shall either be divided by the projected annual conversation minutes of end users that do not pay the maximum charge to compute a per minute charge or divided by the projected annual number of calls by such end users to compute a per call charge.

69.205. Maximum charges.

(a) A maximum charge may be established at any level that is not less than the charge that would have been computed pursuant to section 69.104(d) for the year in question, provided that the maximum shall not be more than the charges described in paragraph (b) of this section unless a charge described in paragraph (b) of this section is less than the applicable section 69.104(d) charge.

(b) The maximum for each transition year shall be as follows:

(1) 1984- the Dedicated Access Line per line rate;

(2) 1985- 90% of the 1985 Dedicated Access Line per line rate;

(3) 1986- 80% of the 1986 Dedicated Access Line per line rate;

(4) 1987- 60% of the 1987 Dedicated Access Line per line rate; and

(5) 1988–1990 - 50% of the 1988 Dedicated Access Line per line rate.

69.206. Transitional surcharges.

(a) During the period that a usage charge is assessed upon end users, a surcharge shall be assessed upon interexchange carriers that offer MTS, In-WATS, FX, CCSA or CCSA equivalent service as a surrogate for usage charges upon an end user that

originates a collect MTS call or originates an In-WATS call or an FX, CCSA or CCSA equivalent call that originates at the open end.

(b) If usage charges are assessed upon a per minute basis, the transitional surcharge shall be computed by multiplying the conversation minutes of such originating calls transmitted to a particular interexchange carrier by a per minute charge that is computed by multiplying the end user per minute usage charge by a factor that is equal to projected annual non-collect MTS conversation minutes of end users that do not pay maximum charges divided by total projected annual non-collect MTS conversation minutes.

(c) If usage charges are assessed upon a per call basis, the transitional surcharge shall be computed by multiplying such originating calls transmitted to a particular interexchange carrier by a per call charge that is computed by multiplying the end user per call usage charge by a factor that is equal to projected annual non-collect MTS calls of end users that do not pay maximum charges divided by total projected annual non-collect MTS calls.

69.207. Premium Access.

(a) Until the Commission determines that equivalent access arrangements are being offered to all interexchange carriers in all or almost all exchanges a portion of the Carrier Common Line revenue requirement shall be designated by Commission order as premium access. Such premium access shall be assessed to the carriers that offer MTS and WATS and shall be billed in equal monthly installments.

(b) In the absence of a Commission order designating the premium access portion, the premium access portion shall be equal to a projected annual revenue requirement for CPE other than Category 2 CPE or any surrogate for CPE costs that may be assigned to interstate and foreign services, but in no event shall premium access exceed the total annual Carrier Common Line revenue requirement.

69.208. Transitional Carrier Common Line.

Premium access revenues shall be deducted from the projected Carrier Common Line annual revenue requirement to determine the Transitional Carrier Common Line annual revenue requirement. Charges for the Transitional Carrier Common Line element shall be assessed and computed in the same manner as the post-transition Carrier Common Line element.

Subpart D: Apportionment of Net Investment

69.301. General.

(a) For purposes of computing annual revenue requirements for access elements net investment shall be apportioned among the interexchange category and access elements as provided in this subpart and expenses shall be apportioned as provided in Subpart E of this Part.

(b) The End User Common Line and Carrier Common Line elements shall be combined for purposes of this subpart and Subpart E of this Part. Those elements shall be described collectively as the Common Line element. The Common Line element revenue requirement shall be segregated in accordance with Subpart F of this Part.

69.302. Net investment.

(a) Investment in Accounts 100.1 and 122 shall be apportioned among the interexchange category and appropriate access elements as provided in Sections 69.303-69.309.

(b) Investment in Accounts 100.2-100.4 shall be apportioned in the following manner:

(1) COE investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 COE investment;

(2) OSP investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 OSP investment;

(3) Buildings investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 Buildings investment; and

(4) Investment that is not COE, OSP or Buildings investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as total Account 100.1 investment that is not COE, OSP or Buildings investment.

69.303. Station equipment.

(a) Investment in station equipment that is included in Separations Category 2 shall be assigned to the Special Access element.

(b) Investment in pay telephones and appurtenances shall be assigned to the Pay Telephone element.

(c) Investment in all other station equipment shall be apportioned between the Dedicated Access Line and Common Line elements on the basis of the relative number of equivalent lines in use. Each interstate or foreign dedicated access line shall be counted as one Dedicated Access Line. Local exchange subscriber lines shall be multiplied by the applicable interstate separations factor to determine the number of equivalent local exchange subscriber lines attributable to the Common Line element.

(d) Any investment that is apportioned to interstate and foreign services as a surrogate for customer premises equipment shall be apportioned between the Dedicated Access Line and Common Line elements in the same manner as investment apportioned pursuant to paragraph (c) of this section.

69.304. Customer OSP.

(a) Interstate and foreign private lines that are described as dedicated access lines in this Part shall be assigned to the Dedicated Access Line element. All other private lines shall be assigned to the Special Access element.

(b) Interstate WATS access lines shall be assigned to the Dedicated Access Line element. In the event that a portion of investment in interstate WATS access lines is allocated to intrastate services and a portion of intrastate WATS access lines is allocated to interstate services, the total unseparated investment in interstate WATS access lines that are described as dedicated access lines shall be assigned to the Dedicated Access Line element and investment apportioned to the Common Line element shall be adjusted to reflect the difference between unseparated interstate WATS access line investment and the WATS access line investment apportioned to interstate services pursuant to the *Separations Manual*.

(c) Investment in pay telephone lines shall be assigned to the Pay Telephone element.

(d) Investment in local exchange subscriber lines shall be assigned to the Common Line element.

(e) Investment in voice grade lines that are not in use shall be apportioned among the Dedicated Access Line, Pay Telephone, Common Line and Special Access elements on the basis of the relative number of equivalent voices grade lines in use. Each

interstate or foreign dedicated access line shall be counted as one line. Pay telephone lines and local exchange subscriber lines shall be multiplied by the applicable interstate separations factor to determine the number of equivalent pay telephone or local exchange subscriber lines.

(f) Investment in unused lines that are not voice grade shall be assigned to the Special Access element.

69.305. Carrier OSP.

(a) Carrier OSP that is not used for "origination" or "termination" as defined in sections 69.2 (v) and 69.2 (w) shall be assigned to the interexchange category.

(b) Carrier OSP other than WATS access lines not assigned pursuant to paragraph (a) of this section that is used for interexchange services that use switching facilities that are also used for local exchange telephone service shall be apportioned between the Dedicated Transport and Common Transport elements. Such OSP shall be assigned to the Dedicated Transport element if it is used exclusively for the interexchange services of a particular carrier.

(c) All Carrier OSP that is not apportioned pursuant to paragraphs (a) and (b) of this section shall be assigned to the Special Access element.

69.306. Central office equipment.

(a) The *Separations Manual* categories shall be used for purposes of apportioning investment in such equipment except that any Central Office Equipment attributable to a Dedicated Transport subelement shall be assigned to the Dedicated Transport element.

(b) Category 1 COE (Manual Switchboards) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance access elements. COE 1 of a telephone company that is not required to transfer assets pursuant to the Modified Final Judgment in *United States v. Western Electric Co.*shall be assigned to the interexchange category if such equipment would have been transferred to an interexchange carrier pursuant to that Modified Final Judgment. COE 1 that is used for intercept services shall be assigned to the Intercept element. COE 1 that is used for directory assistance service shall be assigned to the Information element. COE 1 that is not assigned to the interexchange category or the Intercept and Information elements shall be assigned to the Operator Assistance element.

(c) Category 2 COE (Tandem Switches) shall be assigned to the Common Transport element.

(d) Category 3 COE (Intertoll Dial Switching Equipment) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *Unites States v. Western Electric Co.*shall be assigned to the Common Transport element. All other COE 3 shall be assigned to the interexchange category.

(e) Category 4 COE (Automatic Message Recording Equipment) shall be assigned to the Billing and Collection element.

(f) Category 5 COE (Other Toll Dial Switching Equipment) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *United States v. Western Electric Co.shall be assigned to the Operator Assistance element. All other COE 5 shall be assigned to the interexchange category.*

(g) Category 6 COE (Local Dial Switching) that is classified as non-traffic sensitive for purposes of jurisdictional separations shall be assigned to the Line Termination element except as provided in paragraph (a) of this section. COE 6 that is classified as traffic sensitive for jurisdictional separations purposes shall be assigned to the Local

Switching element. In the event that any COE 6 is not used for local dial switching, such equipment shall be deemed to be Category 7 equipment for purposes of this Part.

(h) Category 7 COE (Special Services Switching) that is deemed to be exchange equipment for purposes of the Modified Final Judgment in *United States v. Western Electric Co.* shall be assigned to the Special Access element. All other COE 7 shall be assigned to the interexchange category.

(i) Category 8 COE (Circuit Equipment) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. COE 8 shall be apportioned in the same proportions as the associated OSP except as provided in paragraph (a) of this Section.

69.307. Buildings.

(a) The *Separations Manual* space categories and subcategories shall be used for purposes of apportioning Buildings investment.

(b) Category 1A space investment (Manual Switchboard) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance elements. Such investment shall be apportioned in the same proportions as COE 1 investment.

(c) Category 1B space investment (Circuit Equipment) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as COE 8 investment.

(d) Category 1C space investment (Dial Switching) shall be apportioned among the interexchange category and the Line Termination, Local Switching, Operator Assistance, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as combined investment in COE categories 2, 3, 5, 6 and 7.

(e) Category 2 space investment (Operator Quarters) and Category 3 space investment (General Traffic Supervision) shall be apportioned among the interexchange category and the Intercept, Information and Operator Assistance elements. Such investment shall be apportioned in the same proportions as COE 1 investment.

(f) Category 4 space investment (Commercial Office) shall be apportioned among the interexchange category and the Pay Telephone, Information and Billing and Collection elements. Such investment shall be apportioned in the same proportions as combined commercial expenses.

(g) Category 5 space investment (Used Interstate by Another Company) and Category 11 space investment (Constructed for Another Company for interstate use) shall be assigned to the interexchange category.

(h) Category 6 space investment (Revenue Accounting) shall be apportioned among the interexchange category and all access elements in the same proportions as combined revenue accounting expenses.

(i) Category 7 space investment (Garages and Storerooms) shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special access elements. Such investment shall be apportioned in the same manner as combined OSP investment.

(j) Category 8 space investment (Rented to others) shall be assigned to the interexchange category.

(k) Category 9 space investment (General Office) shall be apportioned among the interexchange category and all access elements in the same proportions as combined General Office expenses.

(l) Category 10 space investment (Antenna Support) shall be apportioned among the interexchange category and the appropriate access elements in the same manner as the antenna supported.

69.308. Land.

(a) Investment in land other than storage space that is occupied by a building or buildings or a building or buildings under construction shall be apportioned among the interexchange category and the appropriate access elements in the same manner as the buildings on such land.

(b) Investment in parcels of land other than storage space that are contiguous with a parcel described in paragraph (a) of this section shall be apportioned in the same proportions as investment in such contiguous parcel.

(c) Investment in storage space shall be apportioned among the interexchange category and the Dedicated Access Line, Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as combined OSP investment.

(d) Investment in land that is not apportioned pursuant to paragraphs (a), (b) and (c) of this section shall be apportioned among the interexchange category and all access elements in the same proportions as the combined land investment that is apportioned pursuant to paragraphs (a), (b) and (c) of this section.

69.309. Other investment.

Investment that is not apportioned pursuant to Sections 69.303–69.308 shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment that is apportioned pursuant to Sections 69.303–69.308.

Subpart E. Apportionment of Expenses

69.401. Direct expenses.

(a) Direct expense shall be assigned to the appropriate investment category and shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

(b) Amortization of embedded inside wiring investment and installation of new inside wiring and any maintenance or depreciation expense that is apportioned to interstate and foreign services as a surrogate for CPE maintenance or depreciation shall be deemed to be associated with section 69.303(c) other station equipment investment for purposes of the apportionment described in paragraph (a) of this section.

69.402. Current taxes.

(a) State income taxes and state gross receipts or gross earnings taxes that are collected in lieu of a corporate income tax shall be apportioned among the interexchange category and all access elements in the same proportions as the combined Station Equipment, OSP, COE, Buildings and Land investment attributable to property that is located within the state that imposed the tax.

(b) Social Security taxes shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

(c) All other current taxes including federal income taxes shall be apportioned

among the interexchange category and all access elements in the same manner as Section 69.309 Other Investment.

69.403. Deferred tax expenses.

(a) Account 304 investment tax credits shall be assigned to the investment category that produced the tax credit. Credits from amortization of past investment tax credits shall be deducted from the balance for the relevant investment category. The net balance shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

(b) Other deferred tax expenses, including Account 308.1 and 308.2 expenses and comparable expenses in Account 307, shall be assigned to the investment category that produced the hypothetical tax. Such expense shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment.

69.404. Traffic expenses.

Traffic expenses shall be apportioned among the interexchange category and the Intercept, Information and Operation Assistance elements in the same proportions as COE 1 investment.

69.405. Commercial expenses.

(a) Sales, Advertising and Connecting Company Relations expenses (Accounts 642, 643 and 644) shall be assigned to the interexchange category.

(b) Local Commercial expenses (Account 645) shall be assigned to the Billing and Collection element.

(c) Public Telephone Commissions expense (Account 648) shall be assigned to the Pay Telephone element.

(d) Directory expenses (Account 649) shall be assigned to the Information element.

(e) All other Commercial Expenses shall be apportioned among the interexchange category and the Pay Telephone, Information and Billing and Collection elements in the same proportions as the combined expense apportioned pursuant to paragraphs (a)-(d) of this section.

69.406. Revenue Accounting expenses.

(a) Revenue Accounting Expenses that are attributable to End User access billings shall be apportioned among the Dedicated Access Line, Pay Telephone and Common Line elements. Such expense shall be apportioned on the basis of relative investment other than revenue accounting space investment apportioned to each such element.

(b) Revenue Accounting Expenses that are attributable to carrier's carrier access billings shall be apportioned among all carrier's carrier access elements except the Common Line element. Such expenses shall be apportioned on the basis of relative investment other than revenue accounting space investment apportioned to each such element.

(c) All other Revenue Accounting Expenses shall be assigned to the Billing and Collection element.

69.407. General Office expenses.

(a) The portion of Account 665 expense that is attributable to engineering expenses shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment in Station Equipment, OSP and COE.

(b) All other General Office Expenses shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

69.408. Relief and Pensions.

Relief and pensions expense shall be apportioned among the interexchange category and all access elements in accordance with the Big 4 Wage Factor.

69.409. License Contract expenses.

License contract expenses shall be assigned to expense categories in the same manner as expenses that are incurred directly by the telephone company and shall be apportioned in the same manner as such directly incurred expenses.

69.410. Other expenses.

Expenses that are not apportioned pursuant to Sections 69.401 - 69.409 shall be apportioned among the interexchange category and all access elements in the same manner as Section 69.309 Other Investment.

Subpart F: Segregation of Common Line Element Revenue Requirement

69.501. General.

(a) Any portion of the Common Line element annual revenue requirement that is attributable to the application of a jurisdictional separations factor that is described as a High Cost Factor or a Universal Service Factor shall be assigned to the Carrier Common Line element or elements.

(b) Any portion of the Common Line element annual revenue requirement that is attributable to CPE investment or expense or surrogate CPE investment or expense shall be assigned to the Carrier Common Line element or elements.

(c) Any portion of the Common Line element annual revenue requirement that is attributable to inside wiring investment or expense shall be assigned to the Carrier Common Line element or elements.

(d) Any portion of the Common Line element revenue requirement that is not assigned to Carrier Common Line elements pursuant to paragraphs (a), (b) and (c) of this section shall be apportioned between End User Common Line and Carrier Common Line pursuant to Sections 69.502 and 69.503. Such portion of the Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this Subpart.

69.502. Base factor apportionment.

(a) The base factor portion shall be divided by the projected average number of subscriber local exchange lines in use during the relevant year in order to determine a base factor per line annual revenue requirement.

(b) If the base factor per line annual revenue requirement is $48 or less per year the base factor portion shall be assigned to the End User Common Line element.

(c) If the base factor per line revenue requirement is more than $48 per year -

(1) an amount that equals $48 multiplied by the projected average number of local exchange subscriber lines in use during the relevant year shall be assigned to the End User Common Line element; and

(2) the remainder of the base factor portion or transitional portion shall be apportioned in accordance with Section 69.503.

69.503. Apportionment of transitional portion.

(a) The transitional portion shall be assigned to the Carrier Common Line elements in 1984 access charges.

(b) In 1985 access charges 80% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(c) In 1986 access charges 60% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(d) In 1987 access charges 40% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(e) In 1988 access charges 20% of the transitional portion shall be assigned to the Carrier Common Line elements. The residue shall be assigned to the End User Common Line element.

(g) The transitional portion shall be assigned to the End User Common Line element in access charges for 1989 and subsequent years.

Subpart G: Exchange Carrier Association

69.601. Exchange carrier association.

(a) An association shall be established in order to prepare and file access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements.

(b) All telephone companies that participate in the distribution of Carrier Common Line revenues collected by the association shall be deemed to be members of such association.

69.602. Board of directors.
[reserved]

69.603. Association functions.

(a) The association shall not engage in any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues unless such additional activity is expressly authorized by order of the Commission.

(b) Participation in Commission or court proceedings relating to access charge tariffs, the billing and collection of access charges, or the distribution of access charge revenues shall be deemed to be authorized association activities.

69.604. Billing and collection of access charges.

(a) The association shall bill and collect all Carrier Common Line access charges including any premium access assessment.

(b) Telephone companies shall bill and collect all other End User or Carrier's Carrier access charges.

(c) All access charges shall be billed monthly.

69.605. Distribution of Carrier Common Line revenues.

(a) Carrier Common Line revenues received by the association shall be distributed monthly in accordance with this Subpart.

(b) Association expenses incurred during the month that are allowable access charge expenses shall be reimbursed before any other funds are disbursed.

(c) Except as provided in paragraph (b) of this section, payments to average schedule companies that are computed in accordance with Section 69.606 shall be disbursed before any other funds are disbursed. For purposes of this Part, a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company except that:

(1) Any company that directly or indirectly controls, is directly or indirectly controlled by, is under direct or indirect control with, or merges with a telephone company that did not participate in average schedule settlements on December 1, 1982, shall not be deemed to be an average schedule company; and

(2) Any company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company.

(d) The residue shall be disbursed to telephone companies that are not average schedule companies in accordance with Sections 69.607–69.610.

69.606. Computation of average schedule company payments.

(a) Payments shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to Section 69.607 by a company that is representative of average schedule companies.

(b) AT&T shall submit a proposed 1984 formula to the Commission on or before June 30, 1983. The association shall submit a proposed revision of the formula for each year after 1984 or certify that a majority of the directors of the association believe that no revisions are warranted for such year on or before June 30 of the preceding year.

69.607. Disbursement of Carrier Common Line residue.

(a) The association shall compute a monthly net balance for each member telephone company that is not an average schedule company. If such a company has a negative net balance, the association shall bill that amount to such company. If such a company has a positive net balance, the association shall disburse that amount to such company.

(b) The net balance for such a company shall be computed by multiplying a hypothetical net balance for such a company by a factor that is computed by dividing the Carrier Common Line residue by the sum of the hypothetical net balances for such companies.

(c) The hypothetical net balance for each company shall be the sum of the hypothetical net balances for each access element except the Billing and Collection element. All Carrier Common Line elements shall be deemed to be one element and all End User Common Line elements including transitional surcharges assessed to interexchange carriers shall be deemed to be one element for purposes of computing such hypothetical net balances. Such hypothetical net balances shall be computed in accordance with Sections 69.608–69.610.

69.608. Carrier Common Line hypothetical net balance.

The hypothetical net balance shall be equal to a Carrier Common Line revenue requirement for each such company that is computed in accordance with Subpart F of this Part.

69.609. End User Common Line hypothetical net balances.

(a) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(b) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by multiplying an amount that is computed by deducting access revenues collected by such company for such element from an End User Common Line revenue requirement for such company that is computed in accordance with Subpart F of this Part by a factor that is computed by dividing access revenues collected by all such companies for such element by an End User Common Line revenue requirement for all such companies that is computed in accordance with Subpart F of this Part.

69.610. Other hypothetical net balances.

(a) The hypothetical net balance for an access element other than Billing and Collection or a Common Line element shall be computed as provided in this section.

(b) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(c) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by deducting access revenues collected for such element from the sum of expense attributable to such element and the element residue apportioned to such company. The element residue shall be apportioned among such companies in the same proportions as the net investment attributable to such element.

(d) The element residue shall be computed by deducting expenses of all participating companies attributable to such element from revenues collected by all participating companies for such element.

Statement of
FCC Commissioner James H. Quello

In Re: Report and Order in CC Docket No. 78–72, Phase 1, In the Matter of MTS and WATS Market Structure

To state that this was a difficult decision would be to carry the use of understatement to its extreme. The decision was difficult because of its complexity, to be sure, but it was made even more difficult because it is so far-reaching. It's difficult to imagine that any American will be untouched by the action the Commission has taken today.

It would have been easy to resist taking any action at this time, merely postponing action until it was forced upon us. But delay would not serve the public, the telecommunications industry nor would it serve the Commission itself. The die was cast long ago and we are rapidly moving into a new era of telecommunications in this country and throughout the world. Moving toward competition and away from monopoly requires that the industry move toward cost-based pricing. Equal access to the network has been mandated by both this Commission and by the Court in its approval of the Modified Final Judgment. It is also mandated by competition and by technology. We cannot turn back the clock.

This decision was bounded by two very strong considerations. The first is the abiding concern of this Commission and the Congress that the concept of universal service not be sacrificed. In my mind, this is the overriding concern as we attempt to fashion a new rate structure. It bears very heavily upon our second constraint; i.e., the threat that the local exchange will be bypassed by large users. Bypass, while not widely understood and appreciated, provides perhaps a greater threat to universal service

than do increased local rates of a magnitude far above those implied by our action today. For example, AT&T has claimed that 5 percent of its customers generate 63 percent of its revenues. By ignoring the threat of bypass, we could only encourage more and more of those large users to leave the local exchanges across the country leaving those exchanges with most of their present costs but without present revenues. Bypass is a phenomenon which feeds upon itself. As more large users leave the exchange, those which remain must bear a larger share of the costs, encouraging more bypass and even higher costs. Clearly, we do not want to encourage such a scenario.

The Report and Order, in my view, is a measured, carefully considered step along a path which will lead to an even better telecommunications service in the future without destroying what we must rely upon in the present. Is it a perfect approach to this very complex problem?

In the words of Voltaire:

Perfection is attained by slow degrees; it requires the hand of time.

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase I

The adoption by the Federal Communications Commission of this Access Charge Order is of historic importance. This decision marks the culmination of a long and tortuous inquiry into a proper access charge structure.[1] Because this Order prescribes the manner of compensation that all exchange carriers will receive for the origination and termination of all interstate and international telecommunications or enhanced service, every ratepayer in this country will be affected. In the first year alone, the access charge plan will require the restructuring of rates for 11 to 13 billion dollars in non-traffic sensitive (NTS) and traffic sensitive (TS) plant.

Given the magnitude of our decision, I believe that I am correct in asserting that the *MTS and WATS Market Structure* rulemaking is one of the most important proceedings which has come before the Commission during my tenure, if not during the entire history of the Commission. The issues before the Commission in Phase I were not only technically complex, but also raised several important and competing policy considerations. In adopting this access charge plan, the Commission has succeeded admirably in balancing these competing values. The Commission has resisted the Siren-song lure of theoretical purity, recognizing the reality of the need for reasonable rates and maintenance of universal service. In the process, we have

[1] *See MTS and WATS Market Structure*, CC Docket No. 78–72, Notice of Inquiry and Proposed Rulemaking, 67 FCC 2d 757 (1978); Supplemental Notice of Inquiry and Proposed Rulemaking, 73 FCC 2d 222 (1979), Second Supplemental Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 224 (1980); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); and Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, 90 FCC 2d 135 (1982).

developed a plan which advances the overall public interest and is the best solution that could be fashioned under the circumstances. I wholeheartedly support this decision.

Section 1 of the Communications Act mandates that this Commission regulate "so as to make available, so far as possible, to all the people of the United States a rapid, efficient. . . communications service with adequate facilities at reasonable charges." In my judgment, the most critical factor in this proceeding has been the need to structure an access charge plan which would protect this principle and value of universal service. While local exchange service is not so elastic as toll service, it certainly is not inelastic.[2] In the monopoly environment of the past, the FCC and the State commissions made deliberate compromises in favor of the immediate, pragmatic objective of universal service at the expense of more theoretical objectives, such as economic efficiency. The dilemma created by technological progress and competition is that such compromises have become increasingly difficult to forge, implement, and maintain. No longer are regulators free to increase the load of NTS costs on long distance users in order to keep local residential rates low. Technological advance now affords major toll users the option of bypassing the public network altogether to avoid uneconomic charges. This phenomenon of bypass, with its negative revenue consequences, must still be weighed, however, against the harm that the direct assignment of all NTS costs to end users might cause. Even though bypass would be discouraged, such a strategy of total direct assignment could result in an unacceptable loss in the subscriber base as rural users, the poor and the elderly would be put to a hard choice between essentials.

The access charge structure adopted by the Commission meets this concern by striking an appropriate balance between the need to encourage efficiency and the need to preserve universal service. Under this structure, uneconomic bypass should be discouraged while at the same time there should be no substantial service dislocations. Universal service in rural, high cost areas will be protected by the universal service factor element of the carrier common line charge. Similarly, service discontinuance by those too poor to absorb large rate increases will be discouraged by the implementation of a reasonable maximum end user charge based upon the anticipated Joint Board recommendation in Docket 80–286.[3]

In achieving this balance, the access charge plan affords both

[2] *See generally*, Appendix G.

[3] The alternative of a government-sponsored "phone stamps" program is not viable. Among the many problems with such a plan are the fact that the program would be difficult to target and the fact that it would call for increased government expenditures at a time when such expenditures are not feasible.

protection to ratepayers and flexibility to telephone companies. The transition period is structured so that the increase in the end user charge to its maximum cost will be gradual, starting with a $4 per month average revenue requirement. Heavy toll users will be protected by a cap on the amount that they may be charged for NTS costs. Telephone companies will be afforded the flexibility to determine how customer charges will be collected during the transition through a combination of usage and flat charges. As a consequence, those low-cost companies facing significant bypass problems and little threat of subscriber loss may move quickly to their full end user charge, while those companies with less significant bypass problems may move more slowly. In addition, the Exchange Carriers Association will allow companies the option to pool their costs in a manner somewhat reminiscent of current practice. This is crucial because for many small carriers developing and administering access charges would present an impossible burden.

Flexibility is also granted to the States as this decision permits them to recover intrastate NTS costs in any fashion they desire. This is important because the amount of NTS plant in the intrastate jurisdiction dwarfs the amount of interstate NTS plant. Further, the circumstances differ between the States, and it may be impossible to develop uniform Federal rules for the access charge treatment of intrastate NTS costs.[4] Leaving this discretion with the States will promote the regulatory flexibility and experimentation which has proved so beneficial in the past.

Of even more importance is the fact that there will be a monitoring system, in place by January 1, 1984, designed to ensure that any unforeseen developments that threaten universal service are discovered in time for corrective action to be taken. This built-in flexibility is critical because of the uncertainties involved. In addition, the requirements of periodic staff reports to the Commission and further Commission action before continuing the plan beyond the fifth year will ensure the fulfilment of our statutory mandate.

In addition to striking a realistic balance between the new imperative of economic efficiency and the continuing mandate of universal service, this decision takes the long overdue step of ending what has been an intolerable discrimination between MTS/WATS and ENFIA. Under the rules we have adopted, the OCCs will finally pay the full cost of interconnection—even during the transition. There will be no more discounts. Further, open-end Private Line and FX will also contribute fully for the first time to the recovery of

[4] We face a very different situation here on access charges than that which we recently confronted on depreciation policy. *See Amendment of of Part 31*, on reconsideration, — FCC 2d — (1985).

common costs. This is only fair. For too long MTS and WATS ratepayers have been picking up costs which should have been borne by ENFIA and open-end Private Line and FX users.[5] Although during transition AT&T will pay a premium access charge theoretically based on its superior interconnection, the differential will be smaller than the current ENFIA discount and will end at approximately the same time as the OCCs are afforded equal access under the divestiture decree.[6]

In conclusion, I believe that the Commission has succeeded in developing the best possible access charge plan—a plan which carefully balances competing policy values and recognizes a continuing need for surveillance and possible adjustment in the public interest.

SEPARATE STATEMENT OF COMMISSIONER ANNE P. JONES CONCURRING AND DISSENTING IN PART

In Re: MTS and WATS Market Structure, CC Docket 78–72, Phase I

The FCC's decision in this proceeding is undoubtedly the most significant one that the agency will make during my tenure as a Commissioner. I believe it is vitally important that the FCC's access charge plan (ACP) be clear, practical and carefully crafted to support the pro-competitive policies this agency has adopted for the telecommunications industry. From a public policy perspective, competition in the telecommunications industry is simply a means to an end, namely, a form of economic discipline that encourages telecommunications suppliers to provide consumers a broad choice of products and services at the least possible cost. The Commission's encouragement of telecommunications competition is intended, therefore, to improve the welfare of consumers of telecommunications products and services. While I believe that the basic thrust of the Commission's access charge plan is a step in the right direction, I fear that the specific plan adopted is improperly focused, needlessly complex, and not fully committed to the goal of promoting vigorous competition in the telecommunications industry. As I explain herein, I would prefer a simpler, more comprehensive approach that would encourage the rapid development of telecommunications competition and the early realization of its benefits for consumers.

[5] *See* Dissenting Statement of Commissioner Joseph R. Fogarty, *Extension of ENFIA Agreement*, 90 FCC 2d 6, 20–21 (1982).

[6] *See* Modified Final Judgment, *United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C., entered August 24, 1982).

This proceeding was initiated as a market structure inquiry. Following the court's directions in *Execunet I*,[1] the Commission set out to determine whether MTS and WATS services should be offered on a sole source or competitive basis. *Notice of Inquiry and Proposed Rulemaking*, 67 FCC 2d 757 (1978). As part of that inquiry, the Commission specified that it would reexamine the separations process. *Id.* at 759. Finding it "necessary to formulate policy in this area," the Commission proposed to determine what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causational basis; what additional charges, if any, should be levied on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services.

Id.

Following the ENFIA negotiations,[2] the Commission seemed to lose sight of this resolve. Instead of addressing the broader concern of reforming the separations process and moving toward cost causational pricing of network access, the Commission narrowed its focus merely to adjusting prices so that it could eliminate discriminations in current access arrangements for MTS, WATS, and certain private line services and in the interstate rates for these services. Thus, rather than beginning its analysis of access charges from the perspective of establishing economically-efficient network access prices, the Commission framed the issue as a "discrimination problem" when it proposed an access charge plan in the *Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224 (1980). This orientation is still evident in the current access charge plan. (*See e.g.*, p. 30 description of various plans as "Alternative Strategies for Reducing Discrimination.") I now believe this change in perspective was unwise.

By reorienting the focus of the access charge issue as a rate discrimination problem, the Commission diverted its attention from causes to symptoms of anomalous pricing of both local exchange access and interstate switched network services. The fundamental problem is *not* that interstate MTS and WATS rates are discriminatory compared with interstate private line rates. Rather, the basic problem is that neither the current compensation mechanism for local exchange access for interstate telecommunications services nor rates for MTS and WATS are priced on a cost causational basis.[3] By neglecting the goal of cost causation in favor of treating the symptoms of non-cost-based rates, the Commission's access charge

[1] *MCI Telecommunications Corp. v. FCC*, 651 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

[2] *See Exchange Network Facilities*, 71 FCC 2d 440 (1979).

[3] *MTS and WATS Market Structure*, 67 FCC 2d 759 (1978).

plan has introduced new distortions in the pricing of private line services and, paradoxically, has created new rate discriminations in the pricing of local exchange access lines.

The shift in emphasis from close adherence to the principle of cost causation to "alternative strategies for reducing discrimination" is more than a semantic difference or a subtlety with no substantive impact. Encouraging non-discriminatory access to local exchange facilities at cost-based rates is essential to the realization of the Commission's goal of fostering a competitive MTS and WATS market. By assigning a higher priority to achieving "equitable access" to local exchange facilities than to encouraging efficient, cost-based pricing of the usage of local telephone plant, the Commission may have adopted an access charge plan that will discourage new entry into the MTS and WATS market, slow considerably the growth rate of the other common carriers (OCCs), and provide the basis for continuing dominance of AT&T in the MTS and WATS market.

The following discussion will outline the specific reasons why I feel that the access charge plan adopted by the Commission may severely frustrate the realization of the open entry policy for the MTS and WATS market adopted by the Commission in this proceeding. I also propose a more comprehensive alternative plan that is fully consistent with the goal of an open entry, competitive MTS and WATS market.

The Access Charge Plan and Its Impact on Economic Efficiency and Competition in the MTS and WATS Market

Much of my concern over the ACP centers on the treatment of non-traffic sensitive (NTS) costs during the transition period. The ACP correctly recognizes the need to shift the recovery of interstate NTS local exchange costs from interexchange carriers to local exchange end users as a flat charge rather than on a usage-sensitive basis.[4]

Given this recognition of where we need to go, I find it both unfortunate and ironic that usage-sensitive recovery of NTS costs remains such a major component of the Commission's transition plan. To a limited extent, usage-sensitive charges may be sensible expedients for the recovery of NTS costs that the Commission has ordered phased out, or may decide to phase out of the interstate jurisdiction, such as customer premises equipment (CPE) or inside

[4] This principle of cost causation is fundamental to *any* access charge plan, a point that I have emphasized in earlier phases of this docket. See "Statement of Commissioner Anne P. Jones in which Commissioners Mimi W. Dawson, Henry M. Rivera and Abbott Washburn Join *In Re*: MTS and WATS Market Structure, CC Jones," Session on *Separation Changes and the Joint Board in Light of the AT&T Divestiture*, Twenty-First Annual Iowa State Regulatory Conference, Ames, Iowa, May 20, 1982.

wiring. There is little point in building transitional costs into flat charges that will be reduced following the transition period. Rather, it is important that users clearly perceive the direction and magnitude of the significant change in the pricing and cost recovery policy that the Commission's ACP represents. Consequently, usage-sensitive recovery of CPE and inside wiring costs through a carrier's-carrier charge is a reasonable mechanism for recovering transitional costs. By adopting this transitional mechanism, the flat-rate recovery of NTS costs provides an accurate signal concerning the direction and magnitude of NTS cost recovery on a going-forward basis.

By contrast, the combination of an end-user flat fee and interstate usage fee ("mover") permitted by the ACP during the transition period appears discriminatory, needlessly complex, confusing, and highly accelerated in its first year revenue impact. The transition plan establishes different minimum end-user flat charges for residence and business customers (two and four dollars, respectively) with no empirical evidence that cost-justifies the differential.[5] It also requires that an exchange carrier that attempts to design an end-user usage charge for recovering the difference between the maximum and minimum interstate revenue requirement per line estimate, somehow, the price elasticity of demand for end-user access to an intercity carrier. It is not clear that the "pricing flexibility" provided by the transitional, usage-based mechanism for recovering NTS costs will provide a local exchange carrier much certainty concerning recovery of its interstate NTS revenue requirements, given the maximum charge and the unknown price elasticity of demand for interstate access. Thus, the risk of a revenue requirements short-fall appears substantial.

In addition, the combination of flat fee and mover charge introduces a billing complexity that many consumers may find difficult to understand. Also, large users that quickly reach the maximum monthly charge or "cap" may appear to receive a discriminatory "volume discount" unrelated to any economies of bulk usage. Low and moderate volume users will find their relative proportion of NTS costs sharply increased as compared with high-volume users. Since the ACP moves nearly one-half the interstate NTS revenue requirement onto end users in just the first year, local exchange carriers may have a reduced incentive to move steadily toward full flat rate recovery of end user NTS costs. In effect, the Commission has delegated to the local exchange carrier the responsibility for timing the implementation of its policy for assigning interstate NTS costs to end users.

The complexities and peculiar incentives induced by the "mover"

[5] Paragraph 177 alludes to the ". . . higher interstate revenue requirement generated by business lines as compared to residential lines" but does not indicate whether the prescribed differences in the transitional flat rate charges closely tracks actual differences in cost between these two user classifications.

and "cap" transitional cost recovery mechanism could be completely avoided by simply phasing in the end-user flat charge on a straightline basis over the transition period with no usage charges. In other words, the flat-rate end-user charge would simply increase in equal dollar increments per year until the end of the transition period where the flat rate would just equal the average interstate NTS revenue requirement per line. All end-user lines would be subject to the same flat rate with no discrimination in pricing between business and residential users. Over the transition period, all end-user NTS costs not recovered in the flat-rate line charge would be recovered by a carrier's-carrier charge. This approach narrowly circumscribes the use of a traffic-sensitive mechanism for recovering NTS costs and places both carriers and customers on a predictable path toward eventual full flat-rate recovery of end-user interstate NTS local exchange costs.

It is also unfortunate that the "Universal Service Fund" (USF) established by the ACP will be funded through a usage-sensitive carrier's-carrier charge. Unlike the end-user mover charge, a usage-sensitive mechanism is employed on a permanent rather than transitional basis to help recover the NTS costs in "high cost" exchanges. A more efficient alternative would be the imposition of a uniform surcharge or "tax" on every local exchange access line.[6] As Appendix G of the *Third Report and Order* suggests, the demand for access tends to be inelastic. A tax imposed on a good or service having an inelastic demand will minimize the loss in consumer welfare compared with a tax on a good or service with more elastic demand.[7]

Given the growing availability of alternative local distribution technologies, the demand for local exchange access by intercity carriers will probably become more elastic over time. Imposing such a surcharge will decrease the quantity demanded for access at the margin and impose a loss in economic welfare depending on the price elasticity of demand. This potential loss in economic efficiency induced by usage-sensitive recovery of NTS costs could be completely avoided through imposition of a line surcharge. Ironically, by funding the USF through a carrier's-carrier charge, interstate MTS and WATS rates must then recover the carrier's-carrier USF charge. Of course, this method is equivalent to present practice, except that the amount of subsidy embedded in MTS and WATS rates would be reduced given the phase-in of end-user line charges.

[6] For example, if the annual subsidy necessary to fund the USF were $410,000,000 annually, then the estimated uniform surcharge per line per month would be 36¢. See "Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure," Figure II.

[7] See Agnar Sandmo, "Optimal Taxation: An Introduction to the Literature," *Journal of Public Economics* 6 (1976): 37–54.

Apart from the economic inefficiency induced by funding the USF through usage-sensitive carrier's-carrier charges, I have serious reservations about the concept of the USF as developed in the ACP. While nominally intended to maintain "universal service," the USF is targeted toward the subsidy of "high cost" telephone companies, *not* consumers who might abandon telephone service at some higher but *unknown* level of telephone rates. Putting the matter plainly, the USF is first and foremost a mechanism for protecting telephone companies. This protectionist mechanism may produce "trickle down" benefits to local subscribers, although the potential subsidization of *all* users is a highly inefficient way to achieve a "universal service" goal.[8] Possibly the protection of "high cost" telephone companies is a worthy goal of public policy. If so, it should be addressed forthrightly and on its own merits and not treated as if it were equivalent to helping *targeted* consumers pay the costs of accessing the local telephone exchange.

Regulatory Cost Allocation. Essential to the design of nondiscriminatory rates for network access is avoiding the pitfalls of regulatory cost allocation.[9] By stressing equitable rather than cost-based access charges, the ACP ignores the history and lessons of the Commission's previous experience with regulatory cost allocation. This experience suggests that cost allocation procedures as prescribed by the Commission may result in rates filed by carriers that bear little relationship to the underlying economic costs of providing telecommunications services. As a result, regulatory cost allocation methodologies that result in "allocated costs" that depart from economic costs or regulatory cost allocation rules that grant dominant firms considerable discretion in implementing the regulatory costing methodology may encourage inefficient market entry or repel innovative competitors. In either case, regulatory cost allocation is both a controversial and a highly problematical regulatory tool for promoting competition in the telecommunications industry.

The ACP is a regulatory cost allocation methodology, not a pricing mechanism based on marginal cost or on general principles of efficient rate structure design. Since the ACP reflects little familiarity with the hazards of a regulatory costing methodology, I feel that some review of the Commission's experience with cost allocation in markets subject to competitive entry is essential to the further

[8] For further discussion of this point, see Bridger M. Mitchell, "Pricing Subscriber Access to the Telephone Network," *The Rand Paper Series #P-6815*, October, 1982.

[9] The term "regulatory cost allocation" refers to various costing procedures or rules that a regulatory agency prescribes for computing the costs of individual services provided by a regulated carrier. Regulatory cost allocation is distinguished from the Uniform System of Accounts that determines the level of total revenue requirements of a carrier but not the disaggregated costs attributable to any given service.

discussion of my reservations with the ACP. This discussion also helps to explain why my alternative approach, which largely eschews regulatory cost allocation, offers important advantages.

Regulatory cost allocation apportions both the operating expenses and the return on net depreciated assets of a regulated carrier among various "service" categories. The perceived regulatory need for cost allocation in interstate telecommunications was a direct byproduct of the Commission's *Above 890* decision in 1959 which permitted users to build their own private microwave transmission facilities.[10] To discourage large private line customers from building their own facilities, AT&T introduced its TELPAK bulk rate private line tariff that offered substantial discounts to large users of private line circuits. For the next fifteen years, the Commission attempted to determine in multiple dockets whether such rate adjustments by AT&T were simply a lawful pricing response to competition or pricing behavior intended to eliminate competition. The development of regulatory cost allocation procedures emerged as a focal point of such deliberations.

The relative merits of "long run incremental cost" (LRIC) versus "fully distributed cost" (FDC) were hotly debated before the Commission during the 1970s. Finally, in 1976, the Commission decided in Docket 18128 that FDC "Method 7" based on the principle of "historical cost causation" would provide the basis for the development of lawful tariffs for AT&T's interstate services.[11] Despite the potential loss in economic efficiency that a FDC pricing standard may induce, the Commission believed that only a FDC standard would ensure that AT&T was "accountable" for its ratemaking practices.[12]

Apart from the controversy over FDC versus LRIC as the appropriate regulatory cost standard, another fundamental difficulty in any regulatory costing methodology is the troublesome concept of a "service." Once the carrier has defined its service offering, the Commission has required the carrier to "cost-justify" the rates for the defined service.[13] Granting the carrier broad discretion in defining services creates incentives for the carrier to

[10] A review of the Commission's experience with regulatory cost allocation in various dockets is reviewed by Walter G. Bolter, "The FCC's Selection of a 'Proper' Costing Standard after Fifteen Years—What Can We Learn from Docket 18128?" in *Assessing New Pricing Concepts in Public Utilities*, ed. Harry M. Trebing (East Lansing, Michigan: Michigan State University, 1978), pp. 333–372.

[11] *Revision of Tariff FCC No. 260 Private Line Services*, 61 FCC 2d 587 (1976).

[12] A contemporary discussion of the carrier "accountability" standard is provided by William H. Melody, "Interservice Subsidy: Regulatory Standards and Applied Economics" in *Essays on Public Utility Pricing and Regulation*, ed. Harry M. Trebing (East Lansing, Michigan: Michigan State University, 1971), pp. 167–210.

[13] The Commission's requirements for cost justification are prescribed in Part 61.38 of the Commission's Rules.

implement regulatory cost allocation rules to achieve corporate objectives that may conflict with public interest goals, including that of encouraging competitive telecommunications markets. In other words, regulatory cost allocation can be used strategically by the regulated dominant firm to achieve corporate objectives and influence its market environment.[14] As Alfred Kahn has observed, " . . . what constitutes a separate product or service depends in a sense on what it pays the businessman to price or cost separately."[15]

By exercising its discretion in the definition of tariffed services, the regulated dominant firm can pursue some of the profit strategies of an unregulated monopolist. For example, an unregulated monopolist can implement a profit-enhancing price discrimination strategy by segmenting its market in accordance with perceived differences in the elasticity of demand and charging different profit-maximizing prices in each market.[16] Successful implementation of this pricing strategy, however, requires some mechanism to prevent resale and arbitrage between the high and low price market. A regulated dominant firm can implement a similar strategy by designing a tariff that "creates" separate services that, for all practical purposes, simply segments users in terms of differing elasticities of demand.[17] Tariff restrictions that prohibit resale or shared use can effectively segment the market to permit successful implementation of the price discrimination strategy.[18] Not all price discrimination schemes

[14] For further discussion of the incentives of a regulated dominant firm, see Jerry B. Duvall, "Emerging Rate Structures in Interstate Telecommunications," paper presented at the *Michigan State University Institute of Public Utilities Fourteenth Annual Conference* "Adjusting to Regulatory, Pricing, and Marketing Realities," Williamsburg, Virginia, December 14, 1982. A theoretical analysis of such incentives is developed in Gerald W. Brock, *The Telecommunications Industry: The Dynamics of Market Structure* (Cambridge, Massachusetts: Harvard University Press, 1981).

[15] Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, v. 1 (New York: John Wiley & Sons, Inc., 1970), p. 78.

[16] A clear discussion of this price discrimination strategy is provided by James M. Henderson and Richard E. Quandt, *Microeconomic Theory: A Mathematical Approach*, 3d ed. (New York: McGraw-Hill, 1980), pp. 181–184.

[17] Interstate MTS and WATS are possible examples of this market segmentation strategy. Large-volume users of switched message service are likely to have a more elastic demand for MTS than small-volume users, given the availability of both private and public alternative, high-volume transmission facilities. By constructing highly dissimilar rate structures for MTS and WATS, AT&T has been able to segment effectively the market for public switched network service to exploit the differences in the price elasticity of demand for small and large-volume users.

[18] To the extent rate of return regulation is binding, the regulated dominant firm is constrained from earning excess profits that an unregulated monopolist might obtain by implementing a market segmentation and price discrimination strategy. Of course, the regulated firm may still earn excess profits through a similar pricing strategy, although it may camouflage such earnings through "organizational slack" or operating inefficiencies. Perhaps more troublesome than the possibility that a regulated firm may evade regulation and earn excess

implemented by a regulated dominant firm are necessarily harmful to consumers. For example, price discrimination embedded in a volume-sensitive, nonlinear rate structure or a self-selecting, two-part tariff provides a mechanism for reconciling conflicting regulatory objectives such as wide subscribership to telephone service versus the pricing of usage to high-volume users at marginal cost.[19] Such rate structures, however, should be designed pursuant to regulatory rate structure guidelines to insure that the resulting price discrimination is welfare-enhancing rather than harmful to consumers and competitors. I propose this type of efficient price discrimination subject to federal regulatory guidelines as an aspect of my alternative access charge plan presented later in the statement.

In general, given the distorted pricing incentives that rate-base regulation may induce, including the entry of a regulated firm into competitive markets at rates below cost,[20] regulators should be especially sensitive to inefficient, discriminatory rate structures and to the definition of services proposed by regulated carriers. As Roger Sherman and Michael Visscher have observed,

> Price structures may not portray for consumers the full range of opportunities available. The consumer simply is not asked to make some choices, and by that fact alone the range of consumer choice is cut. This is so because the shape of the service can be seriously affected by the aspects of choice in which it is expressed and offered to consumers. Any failure of regulation to deal with the question of price structure is important, then, not simply because prices may be set at levels that are not optimal but also because the elements of products or services that are priced may not be the best ones. *So products and services can be defined inadequately for ideal pricing, before the pricing task itself is even undertaken.*[21]

To the extent a regulated carrier defines a service in order to segment the market and implement a price discrimination scheme,

profits through price discrimination is the possibility that a regulated dominant firm will define services and implement price discrimination schemes in order to accentuate the growth of its rate base or attempt to discourage the entry of competing suppliers. In short, price discrimination as a pricing strategy utilized by a regulated dominant firm may result in substantial economic inefficiency in the use of resources and may have a potential anticompetitive effect.

[19] For further discussion of these and other rate structure options, see Edward E. Zajac, *Fairness or Efficiency: An Introduction to Public Utility Pricing* (Cambridge, Massachusetts: Ballinger Publishing Company, 1978), Chapter 4. Also see the references cited in footnote 35.

[20] See Harvey Averch and Leland Johnson, "Behavior of the Firm Under Regulatory Constraint," *American Economic Review* 52 December 1962): 1053–69.

[21] Roger Sherman and Michael L. Visscher, "Rate-of-Return Regulation and Price Structure" in *Problems in Public Utility Economics and Regulation*, ed. Michael A. Crew (Lexington, Massachusetts: Lexington Books, D. C. Heath and Co., 1979), p. 129. (Emphasis added.)

it is highly probable that a substantial proportion of the "allocated costs" of the service will appear as "common costs" shared by other "services". This outcome is not surprising if the new service uses to a considerable extent the *same* facilities as existing services. Moreover, the regulatory rule which distributes the shared or common costs among the carrier's services may become itself a strategic variable that the carrier can vary to achieve corporate objectives. For example, the regulated firm can lower or raise its service-specific costs by increasing or decreasing total shared costs of production and by varying the ratio of direct to common costs for any given service.[22] Since the definition of services and implementation of regulatory cost allocation procedures by a regulated dominant firm may be driven by incentives such as keeping costs low on services facing competitive entry, it should not be surprising that the resulting "allocated costs" may bear little relationship to the underlying facility costs used to provide tariffed "services".

In recent years, the Commission has become aware of some of the pitfalls of regulatory cost allocation as a regulatory tool. In CC Docket 79–245, the Commission revised the fully distributed cost methodology prescribed in Docket 18128.[23] In this decision, cost allocation procedures were simplified and the number of "service categories" was reduced. In CC Docket 79–246, the Commission has begun to recognize the inevitable problems which result when a carrier is given broad discretion in defining services and designing tariffs for such services.[24]

From the Commission's experience with regulatory cost allocation in recent years, it is becoming increasingly apparent that the definition of "services" should closely track the underlying facilities used to transport and switch electronic information. Technical parameters rather than market segmentation strategies should provide the guiding principle for designing a tariff. In other words, the actual facilities used in providing a network service should drive the definition of the service. This principle implies that the pricing of the "rental services" of a telecommunications facility, either on a

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[22] For a recent theoretical analysis of such incentives, see David Sappington and William G. Shepherd, "Sustainability, Entry Restriction, and Induced Technical Bias," *Quarterly Review of Economics and Business* 22 (Winter 1982): 43–52. Also see Roger G. Noll and Lewis A. Rivlin, "Regulating Prices in Competitive Markets," *Yale Law Journal* 82 (June 1973): 1426–1434, Ronald R. Braeutigam, "An Analysis of Fully Distributed Cost Pricing in Regulated Industries," *Bell Journal of Economics* (Spring 1980): 182–96, and Jerry B. Duvall and Michael D. Pelcovits, "Reforming Regulatory Policy for Private Line Telecommunications Services: Implications for Market Performance," FCC Office of Plans and Policy *Working Paper* #4, December, 1980.

[23] *Report and Order in CC. Docket No. 79–245*, 84 FCC 2d 384, *recon. denied*, 86 FCC 3d 667 (1981), *aff'd. sub nom MCI Telecommunications Corp.* v. *FCC*, 675 F.2d 408 (D.C. Cir. 1982).

[24] *Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979).

dedicated or demand basis, should be indifferent to both the *identity* of the user and the *purpose* of the user's traffic placed on the network, unless a clear causal relationship exists between the purpose of the communications traffic and network operating costs. Of course, certain overhead costs in addition to directly-attributable labor expense must still be assigned to a service defined in terms of actual facilities used to provide the service. However, a facilities-driven concept of a tariffed service should more closely approximate the relevant opportunity costs that a user will consider when choosing between the rental of common carrier telecommunications facilities or the building of private communications systems.

This approach to the tariffing of network services simply replicates the reality of the contemporary telecommunications industry. If a large telecommunications user decides to build its own private communications network, it does not build "switched network services" or "dedicated private line services." Rather, it buys switching and transmission *facilities* with given technical parameters. It is the capital cost of these facilities together with their operating and maintenance expenses that provide the baseline comparison between the tariffed "services" of a common carrier and the decision to deploy private bypass facilities.[25] If the tariffed service does not bear a close relationship to the underlying facility costs, then uneconomic bypass may be encouraged.

Regulatory Cost Allocation and the Access Charge Plan. Despite some progress in recent years in recognizing and avoiding some of the pitfalls in the application of regulatory cost allocation, the Commission appears to have ignored this progress in its ACP. How the ACP prices the usage of access lines to the local exchange is especially troublesome in this respect. Rather than define access lines consistently in terms of the actual, physical facilities used to originate and terminate calls, the ACP defines categories of "access service" based on the kind of traffic and the identity of the user. Thus, end users may access the local switch through "common lines," "dedicated access lines," or "special access" arrangements. Interexchange carriers, however, must access the local switch through "dedicated transport" access lines. In some instances, both end users and interexchange carriers will access local exchange plant using *identical* facilities and use such facilities the same way, e.g., line-side terminations on the local switch.

In effect, the Commission, not unlike a regulated carrier, has

[25] It is important to emphasize that the difficult regulatory problem of allocating shared costs to various "services" is minimized if a facilities-orientation to regulatory cost allocation is adopted. After all, a large user which buys its own communications facilities will find few common costs to allocate among "services," since the notion of a "service" for its purposes becomes perfectly transparent, i.e., a regulatory fiction that may bear little relationship to the economic costs of the underlying network facilities.

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defined a group of "access services" in the ACP in order to implement a price discrimination scheme based *both* on the identity of the user and the intended use of the access service. For example, Part 69.303(a) of the ACP Rules requires that investment in station equipment included in Separations Category 2 (station equipment provided for private line services) be assigned to the "special access" rate element. However, if the identical voice-grade channel is provided as a "dedicated access line" or "common line," then Part 69.303(d) of the ACP Rules requires that any investment apportioned to interstate and foreign services as a surrogate for customer premises equipment (pursuant to the "Poponoe Plan") be allocated between dedicated access line and common line elements on the basis of the relative number of "equivalent lines" in use. If the same voice-grade channel is provided to an interexchange carrier as "dedicated transport," then no investment in station equipment is directly allocated to the dedicated transport rate element. Instead, transitional station equipment costs will be recovered from interexchange carriers through the usage-sensitive carrier's-carrier charge. Thus, the ACP as a regulatory cost allocation mechanism derives three different "costs" for the same voice-grade channel depending on the identity of the user and the purpose of network access.

Not only do the allocated costs of the same voice-grade channel differ by classification of access service, but also the pricing of the same facility differs from one type of access service to another. For example, after the costs of an end-user common line are jurisdictionally separated, the interstate allocation of costs will be recovered during the transition period by end-user flat rate and mover charges and the carrier's-carrier charge. If the same voice-grade channel is provided as dedicated transport to an interexchange carrier, the facility will be priced on a "per unit of capacity" basis with separate rate elements for interface and conditioning arrangements per Part 69.112 of the ACP Rules. If the same voice-grade channel is provided as special access, it is unclear how the facility will be priced, since Part 69.113 gives the exchange carrier considerable discretion in setting rates for this classification of access service.

The inefficient price discrimination embedded in the Commission's ACP is the inevitable consequence of four controversial assumptions, viz., the need to maintain the current mechanism for the jurisdictional allocation of NTS costs; the need to subsidize high cost telephone companies rather than consumers who may require subsidized access to telephone service to remain on the network at cost-based prices; the need to fund the subsidy of high cost telephone companies indirectly from end users through a carrier's-carrier charge rather than directly through a surcharge on end-user access lines; and the need to compensate for AT&T's competitive advantage as the major incumbent interexchange carrier. I question the validity of the first three assumptions, a position that I fully explain

in my proposed alternative plan. I agree with the validity of the last assumption, but I believe the Commission's ACP does not adequately address this issue.

It is not surprising that the Commission's ACP prescribes discriminatory, non-cost-based rates for network access given the four underlying assumptions of the plan. Clearly, if one group of users of network access, viz., interexchange carriers, must be singled out for purposes of "regulatory taxation," then the criteria for discriminatory treatment must be unabiguous and easily enforceable. Since it will be difficult for an interexchange carrier to pass itself off as an ordinary business line customer, it should be easy to enforce the discriminatory rate classifications of end users and interexchange carriers. Moreover, so long as the Commission's ACP prices out the entire allocated cost of some facilities (e.g., interstate dedicated access lines) but only portions of others (e.g., the interstate portion of common lines), then separate but discriminatory classifications of access service must be maintained to preserve the economically-irrational jurisdictional separation of NTS local exchange costs.

This outcome is truly paradoxical. Rather than adopting a plan fully supportive of its MTS and WATS open entry policy established earlier in this proceeding, the Commission has instead adopted a plan more supportive of the status quo, including jurisdictional cross-subsidies and discriminatory, non-cost-based prices for network access. Equally paradoxically, the Commission's ACP embodies the very pitfalls of regulatory cost allocation that the Commission in other dockets has attempted to correct. I object to these inconsistencies and hope that the Commission will closely examine them on reconsideration of this decision.

The Transition to Equivalent Network Access. The FCC's open entry decision in this proceeding is necessary for competition in the MTS and WATS market but alone is not sufficient. Over the years, AT&T engineered its local exchange facilities and long haul network as an integrated whole. As a result, competing interexchange carriers have been unable to access local exchange facilities in the same way as AT&T Long Lines. The OCCs generally have accessed the local exchange via line-side terminations on the local switch rather than the trunk-side terminations provided to AT&T Long Lines. An essential aspect of the Modified Final Judgment (MFJ) is the provision that requires the divested Bell Operating Companies (BOCs) to make available "premium" access to all interexchange carriers, not just AT&T Long Lines, by the conclusion of a prescribed transition period. Once equivalent access is made available to all interexchange carriers, the sufficient condition for intercity transmission competition will be satisfied, and all interexchange carriers will be able to compete on an equivalent basis of local exchange interconnection.

Until equal interconnection is available to all interexchange carriers, AT&T Long Lines receives a competitive advantage by virtue of its incumbency as the former monopoly interexchange carrier. This advantage exists even though new digital switches may be able to provide trunk-side access features as cheaply as line-side access. From an economic perspective, however, the implicit demand for premium access has increased with the entry of the OCCs, although the short run supply of premium access as provided by the BOCs is essentially fixed. Thus, the "opportunity cost" of premium access has increased. Efficient pricing of premium access during this short run transitional period requires that AT&T pay a "quasi-rent" per unit of premium access until the BOCs can increase the supply of premium access to accommodate more than a single intercity carrier.[26]

There are two aspects of the transitional pricing of premium access, viz. the pricing of the actual trunk-side connection to the local switch and the high-capacity transport facilities (trunks) that carry AT&T Long Lines' traffic from its toll office to the local switch. In my view, the Commission's ACP deals inadequately with both aspects of the transitional pricing of premium access as received by AT&T Long Lines.

The conceptual approach in the Commission's ACP for pricing the actual trunk-side connection to the local switch is correct. The ACP realistically acknowledges the practical difficulties in estimating the opportunity cost of premium access as provided to AT&T Long Lines. Linking the amount of the premium access charge, however, to interstate CPE costs or surrogate CPE costs as specified in paragraph 165 of the order is both arbitrary and nonsensical. Given the practical impossibility of "auctioning" premium access to the highest bidder, a better approach would simply begin with the proposition that AT&T should pay a premium access charge such that an "appropriate" differential is maintained between the price of line-side and premium interconnection that reflects the short term scarcity value of the superior interconnection that the BOCs provide AT&T. How large should the "appropriate" differential be? A reasonable answer to me is that the amount of the *initial* premium access charge paid by AT&T should be sufficient to maintain the existing *percentage* differential between the ENFIA per minute charge (SEP amount) paid by the OCCs and the effective per minute charge paid by AT&T for premium interconnection through separations and settlement. This differential could then be phased down to zero as premium access becomes available to all interexchange carriers.

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[26] This point is more fully discussed in Jerry B. Duvall, "Telephone Rates and Rate Structures: A Regulatory Perspective," paper presented at the *Workshop on Local Access: Strategies for Public Policy*, St. Louis, Missouri, September 16, 1982.

This approach to determining the amount of AT&T's premium access charge starts at the status quo and reflects a price differential that the Commission found to be in the public interest in its recent ENFIA decisions. Whether this differential accurately measures the quality differences between line-side and premium network interconnection is, of course, problematic. Nevertheless, I believe that the Commission, having found that competition in the MTS and WATS market is in the public interest, should err on the side of encouraging, *not* discouraging, entry. After all, new competitors enter the MTS and WATS market at their own risk and with private capital. Whether these entrants succeed or fail when the differential disappears following the transition period is a problem only for the competitors, not for a regulatory agency. The Commission's objective should be the support and maintenance of competition in the industry. As this competition develops, the Commission can begin to reduce and eventually eliminate the regulation of all participants in the MTS and WATS market and thereby reduce the social cost implied by such regulation.

By setting the initial amount of premium access at only $1.4 billion, the Commission's ACP adopts the view that the effective percentage differential paid by the OCCs and AT&T should narrow considerably effective January 1, 1984.[27] The ACP provides no rationale whatsoever for this important public policy decision, and I respectfully dissent from this part of the Commission's ACP.

The transitional pricing of the high volume transport facilities used by AT&T Long Lines to terminate its traffic on the local switch raises a problem analogous to the pricing of premium interconnection. By virtue of its large share of all interexchange traffic resulting from its former status as the monopoly interexchange supplier, AT&T in most cases transports traffic from its toll offices to the local switch via direct, high-volume, dedicated trunks, rather than intervening tandem switches. Such trunks provide AT&T with substantial economies of scale in transporting traffic to end offices. Lacking AT&T's market share advantage derived solely from AT&T's former monopoly status, the OCCs cannot as yet efficiently utilize high capacity dedicated trunks and in many cases must use common trunk capacity with tandem switching for transporting traffic from the OCC's point of presence to the local switch. As a result, the unit cost of transport for an OCC is probably higher than for AT&T and consequently provides AT&T with a competitive advantage that is unrelated to any "survival test" in the MTS and WATS market.

The Modified Final Judgment explicitly recognized this transitional problem and mandated that the BOCs provide exchange access on an unbundled, tariffed basis that is "equal in type, quality, and

[27] See "Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure," p. 12.

price to that provided to AT&T and its affiliates." The basic idea is to average the costs of transport over low and high capacity facilities to even out AT&T's cost advantage during the transition to equivalent interconnection and to give the BOCs an opportunity to reconfigure their exchange facilities to accommodate multiple interexchange carriers. The approach prescribed by the MFJ is certainly one way to deal with this transitional problem. I am not sure, however, that it is the best approach or whether the Department of Justice in fact has the authority to prescribe a pricing methodology for network access. In my opinion, this matter clearly falls within the purview of the Commission. Nevertheless, the problem is real, and the MFJ offers one possible solution.

As an alternative approach, the ACP Rules prescribing the computation of common and dedicated transport access charges could be amended to levy a "premium transport" charge on AT&T to reflect its competitive advantage during the transition to equivalent interconnection and reconfigured transport facilities. This approach would at least keep the rates for common and dedicated transport somewhat closer to cost for interexchange carriers other than AT&T in contrast to the MFJ approach where cost averaging insures that no transport rates will reflect costs for any interexchange carrier. Whatever the approach, it is not clear to me that the Commission's ACP adequately addresses this problem, especially if AT&T's current trunking capacity is defined by the ACP Rules in Part 69.112 as mostly "dedicated transport" while the OCCs' equivalent facilities are classified as mostly "common transport." The difficulty with assessing the significance of this particular problem is the lack of illustrative data in the decision that might have provided some sense of the quantitative impact of applying the Commission's ACP Rules. Lacking such data, it is impossible for me to evaluate the possible deleterious effect of this aspect of the ACP on competition in the MTS and WATS market. I believe, however, that this matter should be given a careful look by the Commission on reconsideration of the ACP decision.

The Effect of Surrogate Charges on Competition. During the phase-in period of end-user flat charges for network access, Part 69.206 of the ACP Rules prescribes that a surcharge be levied on all interexchange carriers that offer MTS, In-WATS, FX, CCSA or CCSA equivalent service as a surrogate for usage charges upon an end user that originates a collect MTS or In-WATS call or originates an FX, CCSA or CCSA-equivalent call at the open end. This rule will be costly to implement, will introduce needless temporary distortions in the pricing of private line services, and may have an anticompetitive effect.

It must be emphasized that this costly rule is needed only to compensate for a defect in the end-user mover charge mechanism. Rather than eliminate the mover charge mechanism and the

inefficiencies it creates (as already discussed), the ACP prescribes yet *another* distortionary rule to "patch up" the defects of the first. Together, the end-user mover charge mechanism and the surrogate charge rule create pointless complexity and economic waste that could be completely avoided. These two aspects of the ACP alone provide a clear example of needless social cost induced solely by regulation.

As a result of the surrogate charge rule, the total user cost of using interstate private line services such as FX lines will now include *two* types of interstate usage-sensitive charges during the transition period, viz., the surrogate charge and the interexchange carrier's-carrier charge. Although the surrogate charge is only a temporary phenomenom, it is unfortunate that the only category of interstate transmission service that has been priced efficiently in terms of its rate structure will now be priced inefficiently.

Taken by itself, the temporary distortion in the pricing of private line service may appear inconsequential. The cumulative effect, however, of other distortions in the ACP on private line services may have a significant effect on their "allocated" cost. For example, an ordinary business (non-carrier) subscriber to FX service will access the local exchange via a dedicated access line. As noted previously, Part 69.303(c) of the ACP Rules allocates a pro rata share of station equipment costs to the dedicated access line rate element. These costs are in addition to the actual costs of the facility itself. Consequently, the ACP requires that this component of FX service depart from its economic cost. Part 69.206 requires that the interexchange carrier providing the interexchange portion of FX service, i.e., an interstate private line, be assessed a carrier's-carrier charge on all calls plus a surrogate charge for all calls to an FX subscriber that originate at an FX open end. Presumably, the interexchange carrier will recover the carrier's-carrier and surrogate charges from the FX subscriber, possibly on a usage basis. However the interexchange carrier chooses to recover its carrier's-carrier and surrogate charges, the FX subscriber will ultimately have to absorb not only these charges but also the costs associated with the billing of surrogate charges.

An interexchange carrier that subscribes to the *identical* FX facility just described (e.g., for use as part of its public switched service) will pay different "allocated" costs under the ACP. The carrier will access the local exchange via dedicated transport facilities as prescribed in Part 69.112 of the ACP Rules. This facility may be exactly the same facility used by the ordinary business customer. Nevertheless, the allocated costs of the facility will differ given the different regulatory cost allocation rules for the various categories of access service. Among other differences, no station equipment investment is directly assigned to the dedicated transport rate element. By virtue of its status as an interexchange carrier, the

carrier will be subject to carrier's-carrier charges when using the leased FX facility in addition to any surrogate charges resulting from incoming open end FX usage. The effective cost of FX facilities to interexchange carriers is difficult to estimate, given the unknown effects of carrier's-carrier and surrogate charges. It seems clear, however, that the allocated costs of FX service will depart sharply from the economic costs of the underlying private line facilities. Thus, to achieve price "parity" or "equity" between interstate switched and private line services, the ACP has mandated substantial economic inefficiency for a transition period. Since telecommunications is both a final and intermediate good, the economic waste generated by such inefficient pricing will be incorporated into the pricing of virtually every good or service that requires telecommunications as an input to production and distribution. The conscious generation of such economic waste by a regulatory agency seems difficult to justify.

The ACP properly acknowledges in paragraphs 190 and 191 the technical problem that a local exchange carrier will have in measuring interstate usage of common lines for subscribers who use an OCC for their interstate long distance calling.[28] A local exchange carrier may find it very difficult to apply accurately the end-user mover charges for customers of interexchange carriers using ENFIA A line-side terminations to originate and terminate their long haul traffic. The ACP purports to deal with this problem by requiring all local exchange carriers to offer billing services to all interexchange carriers if they offer billing services to any. The ACP anticipates in paragraph 191 that the OCCs will in fact take advantage of this exchange carrier service that will make possible the accurate billing of end-user mover charges generated by OCC customers. As an alternative to having exchange carriers provide the OCCs with billing services, footnote 63 in the ACP allows exchange carriers to file waiver petitions to permit them to impose surrogate ENFIA A charges on the OCCs if the local exchange carrier can demonstrate that it is not otherwise feasible to collect the mover charges directly from end users who are OCC customers.

Given the costs that a local exchange carrier would have to incur in order to monitor the interstate usage of common lines by OCC customers for just a transition period, two factors suggest that exercise of the waiver option by exchange carriers is highly probable. First, local exchange carriers may not want to invest in line measurement equipment that may have little value following the end of the transition period. Second, the OCCs may have a major incentive to do their own billing rather than have the local exchange

[28] The difficulties involved in assessing the end-user mover charge for local exchange subscribers that use an OCC for long distance calling are essentially the same as those difficulties involved in estimating the same charges for incoming calls on an FX open end.

carrier do it for them. It must be recognized that the BOCs will in many cases be competing with the OCCs for intraLATA toll business. It is not obvious that an OCC would eagerly turn over its traffic data to its major intraLATA competitor for billing purposes.

Moreover, the billing services provided by the local exchange carriers will be unregulated. Thus, the local exchange carriers through strategic pricing of their billing services will be able to discriminate between high and low volume interexchange carriers and consequently be able to influence the OCCs' internal tradeoff between cost-effective billing services and the value of not releasing sensitive billing data to potential or actual intraLATA competitors.[29] For example, the BOCs could price their billing services above the OCCs' stand-alone billing costs and thereby discourage the OCCs from using BOC-provided billing service. The BOCs could then seek a waiver per footnote 63 and impose a surcharge on the OCCs. The OCCs would then have to collect the surrogate charges from their customers. Once the costs of this billing complexity are passed on to OCC customers, the OCCs may be competitively disadvantaged vis a vis other interLATA carriers that have premium network access that provides less costly measurement of end-user mover charges triggered by interstate toll calling. It is possible that the combination of the initial reduction in the differential in price between line-side and premium access plus the surrogate charges on ENFIA A lines may be sufficient to eliminate almost entirely the difference in price paid by the OCCs and AT&T for network access. Whatever the net impact on competition, the ACP is completely silent concerning the potential competitive problems that collection of mover charges might imply.

Implications of Pooling and ACP Administration. As the previous discussion has shown, the Commission's ACP is not closely linked to the principle of cost causation. Consequently, the ACP introduces a new set of inefficient, discriminatory rates for network access that presumably will reduce the discriminatory rate differentials between interstate MTS/WATS and private line service. Various provisions of the ACP that establish procedures for implementing and administering the plan exacerbate the deviation from cost-based pricing and increase the possibility of collusive, anticompetitive conduct among exchange carriers.

The funding of the Universal Service Fund and the recovery of transitional "carrier common line" costs through a carrier's-carrier charge not only creates economic inefficiency in the pricing of network access but also requires mandatory pooling of certain rate

[29] As local exchange carriers are increasingly subject to the threat of actual or potential entry of competitors that offer alternative local distribution services, the conduct of the incumbent exchange carriers will most likely resemble the strategic behavior of any dominant firm that desires to maintain its market position.

elements of the carrier's-carrier charges. Of course, no pooling arrangement would be necessary for purposes of the USF if a "tax" were imposed on all access lines with the proceeds collected by the telephone company and forwarded to an existing local public body for direct distribution to qualified telephone subscribers requiring financial support. Part 69.105 of the ACP Rules prescribes a uniform, nationwide charge per conversation minute for all interexchange carriers to recover the carrier common line charges. Since the costs of local exchange service will differ from one study area to another and even from one wire center to another, some pooling arrangement is necessary. Again, if local carriers were permitted to "bill and keep" such transitional charges to fund the carrier common line revenue requirement specific to a given study area, no pooling would be required.

The ACP notes in paragraph 314 that pooling of carrier common line charges is necessary to mitigate in part the effects that unlimited rate deaveraging might produce. This concern is puzzling, since the end-user mover charge will effectively result in the deaveraging of the rates of interexchange carriers as a function of the end user's geographic location and volume of interstate calling. Since interexchange rates are effectively deaveraged anyway through operation of the transition plan, there seems little point in incurring both the direct costs of administering a pooling arrangement and the social costs of the inefficient pricing of network access through transitional and permanent carrier's-carrier charges.

Notwithstanding the needless out-of-pocket and social costs generated by pooling, the ACP prescribes additional access charge inefficiencies by placing a severe constraint on the extent of disaggregation that an exchange carrier may use in deriving the allocated costs for access rate elements that are not pooled. The ACP Rules currently prohibit access tariffs that are disaggregated within a study area. Such a restriction is arbitrary and represents yet another instance where the ACP will drive the price of network access away from cost. Administrative convenience for tariff review purposes seems the only logical rationale for such a restriction. As an alternative, the extent of cost disaggregation could be left to the discretion of the state PUCs. If access charge tariffs were filed with state PUCs rather than the FCC, the administrative burden on the FCC could be lightened and access tariffs could move closer to the actual costs of local exchange access at the discretion of the state PUCs.

Paragraphs 321 and 322 of the ACP also place further restrictions on the ability of local exchange carriers to move toward cost-based access tariffs for traffic-sensitive costs. Any carrier that is part of an extended area service (EAS) agreement with other local exchange carriers must reach agreement with all participating carriers before a separate tariff for the traffic-sensitive rate elements of the access

tariff can be filed in lieu of the national common tariff. The necessity for such agreement among all EAS partners means that a high-cost EAS partner can effectively prevent a low-cost EAS partner from disaggregating its EAS costs and attempting to bring its traffic-sensitive access charge rate elements closer to cost for some portion of an extended service area. This restriction effectively nullifies any potential competition between EAS partners for providing access to interexchange carriers. Of course, the existence of EAS agreements complicates the design and administration of access tariffs. Such complexity, however, provides little justification for preventing competition among EAS partners for the access business of interexchange carriers. This restriction is both inefficient and anticompetitive in nature.

The Exchange Carrier Association (ECA) established by the Commission's ACP is necessitated by the pooling requirements of the plan. I object to the creation of the ECA and question the Commission's authority to mandate the existence of such an organization. As a matter of public policy, the ECA is unnecessary since pooling is unnecessary. Nevertheless, given the reality of the ECA, its organization and membership should not be an obstacle to the further competitive development of the telecommunications industry. I fear, however, that the ECA organization contemplated by the Commission's ACP will prove a hazard to telecommunications competition. Paragraph 345 of the ACP limits membership in the association to exchange carriers that participate in access charge revenue pools administered by the ECA. Moreover, the governing board will be composed exclusively of exchange carrier representatives.

It must be emphasized that the membership of the ECA will consist entirely of competitors in the market for network access, terminal equipment, and other communications services that will cross jurisdictional boundaries. Taking a narrow view of the extent of actual or potential competition among the membership, i.e., a view that perceives ECA members only as local monopoly suppliers of exchange access, completely overlooks the other dimensions of potential rivalry among the ECA membership. Thus, the ECA and the BOC central organization as prescribed by the MFJ will provide an opportunity for collusive behavior among local exchange carriers. This possible outcome is totally inconsistent with the Commission's general support of competition in the telecommunications industry.

Local Dial Switching Investment and the Rate of Return. Paragraphs 91 and 214 in the Commission's ACP prescribe the allocation of NTS central office equipment on a usage-sensitive basis. The explanation provided in footnote 75 to rationalize this departure from the *Separations Manual* is unpersuasive. The current Joint Board in CC Docket 80–286 may ultimately adopt this change in the classification of central office equipment. Until the Joint Board

makes this determination, however, it is inappropriate for the ACP to prescribe this change. If the intent of the ACP is to minimize the amount of NTS investment to be recovered through end-user flat charges, the ACP should be candid on this point and not attempt to anticipate the findings of the Joint Board.

Paragraph 254 of the ACP prescribes the exchange carriers target their access tariffs to earn AT&T's authorized rate of return on its interstate services, presently set at 12.75%. This rate of return prescription may create an incentive for exchange carriers to bias the assignment of expenses and investment toward access services if the rate of return authorized by the ACP exceeds the allowed rate of return on intrastate plant set by individual state PUCs. This incentive may be especially acute in areas where bypass of the exchange carrier is not a significant short term threat. A rule that simply requires an exchange carrier to target its access tariffs to recover the same rate of return as its intrastate operations would have avoided this incentive to misallocate resources.

Universal Service. A further objection that I have to this order rests in its discussion of the "universal service objective" of the Communications Act. *Access Order*, paragraphs 80–84. Although I agree with my fellow Commissioners that we should consider the impact that our rate decisions may have on telephone subscribers and, if possible, avoid decisions that might result in a large number of disconnects, I fear that the discussion of "universal service" contained in this order goes too far. This order concludes that "universal service" is an objective of the Communications Act and implies that any FCC action that might cause telephone subscribership to drop below its current level would be contrary to the Act. I do not believe that this is what Congress intended.

Section I of the Communications Act directs the Commission to make service "available, so far as possible, . . . at reasonable charges." 47 U.S.C. 151. Nothing in that language suggests that the Commission is restricted from making decisions that might cause a decrease in telephone subscribership, so long as service is "available" and the charges for that service are "reasonable." I fear that the discussion at paragraphs 80–84 of this order will encourage objectors to argue that the Commission has determined that any substantial change in rates for basic telephone service is contrary to the Communications Act. I believe that this is likely to make it more difficult for the Commission to maintain its competitive policies and enforce cost-based pricing. I therefore dissent from this portion of the order.

Conclusion. The Commission's ACP is a *reaction* to the emergence of competition in the telecommunications industry, not a forward-looking plan designed to accommodate new competitive entry into the industry consistent with the Commission's policy decision made earlier in this proceeding. Other than initiating the transition of

interstate NTS local exchange costs toward end-user flat charges, the ACP seems otherwise firmly committed to supporting, even defending, the status quo. As a result, the ACP has a strong protectionist flavor. Under the guise of "universal service," the ACP seeks to protect local exchange carriers from the vagaries of rapid technological change and to preserve those regulatory practices that have successfully suppressed competition in the past and have permitted the pricing of telecommunications services that is little related to the economic costs of production. As a result, it is not suprising that the old industry "partnership" with its settlements procedures intact (paragraph 332) has resurfaced as the Exchange Carrier Association. Moreover, discriminatory rate structures, a prominent feature of telecommunications pricing since Theodore Vail, remain firmly in place. Even the shifting of interstate NTS local exchange costs from interstate switched services to local exchange carriers is largely justified in the ACP by the real and present threat of local exchange bypass, not the $1.6 billion potential improvement in consumer welfare that cost-based pricing of telecommunications services will bring to the American public. It is both curious and odd that a federal regulatory agency charged with the welfare of interstate ratepayers has adopted a plan that seems less concerned with promoting and protecting their interests than with safeguarding the economic viability of local telephone companies.

I think the Commission must begin to realize that it can no longer have it both ways, i.e., pro-competition on some policy issues while "business as usual," monopoly-world regulation on others. The recent action by the Joint Board in CC Docket 80–286 is a dramatic case in point. The four "principles" which the Joint Board majority approved, and I dissented from, ignore completely the reality of telecommunications competition by failing even to mention it and by stressing the importance of protecting telephone companies by the "permanent protection of universal service." The reality is that monopoly-type regulation is fundamentally inconsistent with competition in the telecommunications industry. Pretending otherwise by clinging to the past will benefit neither consumers nor the industry as telecommunications emerges as the foundation of the information economy. Courageous regulatory leadership that peers beyond the past and present is needed now to rationalize pricing in this vital sector of the American economy.

As I have attempted to show in some detail, many of the complexities of the Commission's ACP are wholly unnecessary and do not result from any unique complexities inherent in the pricing of network access. A far simpler but comprehensive plan keyed to the future of the industry rather than its past offers major advantages to consumers.

The Pricing of Local Exchange Access: A Federalist Approach[30]

My approach to the pricing of local exchange access is straightforward and administratively simple. Moreover, it reflects a modern view of the appropriate role of government intervention in monopoly markets, namely, assuring nondiscriminatory access to facilities that represent substantial "sunk cost" barriers to entry and *exit*.[31] Clearly, local telephone facilities involve substantial sunk costs that make market entry by competing telephone companies exceedingly costly, even if such entry were lawful. Therefore, rules which prescribe the terms and conditions of access to local exchange facilities will promote efficient use of such facilities and will permit the further development of intercity transmission competition.

Federal Jurisdiction Over All NTS Costs. The first step in my access charge plan is the assertion of federal jurisdiction by the FCC over all non-traffic sensitive (NTS) and appropriate traffic-sensitive (TS) costs involved in accessing local exchange facilities for originating and terminating long haul traffic. It is time to accept and deal with the simple truth that an arbitrary allocation of NTS costs between the intrastate and interstate jurisdiction has no economic or technological reality. An access charge plan that maintains this legal dichotomy (and economic fiction) leads inevitably to at least three network access classifications, viz., "interstate toll access," "intrastate toll access," and "local service access." If the actual physical connection to the local exchange is a line-side termination, then the same, identical facility may be tariffed at three different rates under three different rate structures. Wholly arbitrary cost allocations are then necessary to implement "cost-based" pricing of such "service categories," since the defined services are regulatory fictions—they simply do not exist in a technological sense.

These arbitrary allocations create significant social cost since regulators have to exert a major effort to enforce the regulatory distinctions. Unless the rates and rate structures are nearly the same for each classification of access service, there is a strong incentive for interexchange carriers to arbitrage the differences in rates by configuring their networks to "look like" interstate or intrastate facilities depending on the relative price of interstate vs. intrastate access. Multipart, jurisdictional classification and pricing

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[30] The following discussion is based in substantial part on my paper entitled "Contemporary Issues in Telecommunications Pricing" presented at the *Ninth Annual Rate Symposium on Present and Future Pricing Issues in Electric, Gas, and Telecommunications Industries*, Kansas City, Missouri, February 7, 1983.

[31] See Elizabeth E. Bailey, "Contestability and the Design of Regulatory and Antitrust Policy," *American Economic Review* 71 (May 1981):178–183. More generally, see William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and The Theory of Industry Structure* (New York: Harcourt Brace Jovanovich, Inc., 1982).

of local exchange access is, in reality, a scheme of price discrimination where the costs of local exchange access are apportioned and recovered in access tariffs on the basis of the *identity* of the class of users, i.e., local service end users, intrastate interexchange carriers, or interstate interexchange carriers. The cost allocations among these user classes must be arbitrary, since these access service categories are regulatory fictions and not based on cost causation.

This regulatory morass with its discriminatory rate structures, tariffing complexity, incentives for arbitrage, and regulatory enforcement costs can be completely avoided by assertion of federal jurisdiction by the FCC over all NTS and TS costs of local exchange access. I recognize that this proposal represents a significant change from current regulation and is likely to draw legal fire. I submit that the Commission can legally adopt this proposal, however, for the following reasons.

The FCC's authority to assert jurisdiction over access costs and require unified access tariffs derives from the Communications Act mandate that the Commission "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. To fulfill this mandate, the Commission occasionally is required to reexamine and rethink existing regulatory policy to ensure that it is consistent with the statute's objectives. See generally, *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979). And, when it appears that changes in the industry warrant changes in the Commission's regulatory efforts, the Commission is empowered to make adjustments and thus "avoid the necessity of repetitive legislation." *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). See also *General Telephone Co. of California* v. *FCC*, 413 F.2d 390 (D.C. Cir.) *cert. denied* 396 U.S. 888 (1969). In fact, the Commission, with judicial approval, has radically altered much of its regulatory policy in recent years to accommodate the modern telecommunications environment. *E.g. Computer and Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, U.S.L.W.—(U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352) (*Computer II*).

Unified treatment of access costs is both desirable and necessary in today's telecommunications environment. It will facilitate open entry into the industry and thus produce the public benefits that competition fosters. It will eliminate the need for arbitrary cost allocations and subsidy schemes that encourage uneconomic bypass of the network. And, it will conform regulation of access charges to the reality of the post-divestiture telecommunications industry structure. These goals cannot be accomplished if the current system of split regulation of access costs continues. So long as there is a pretense that there is a difference between interstate access and intrastate access and an arbitrary allocation of costs to accommodate

that pretense, there will be an incentive for irrational regulation that is inimical to development of a rapid, efficient telecommunications system in which access charges are cost-based and non-discriminatory.

Challenges to the legality of my proposal are likely to center upon two main themes: first, that unification of access charges is contrary to the Supreme Court's decision in *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133 (1930); and second, that unification under the federal jurisdiction works an impermissible preemption of state authority to set local rates. Neither argument is insurmountable.

With regard to *Smith*, it seems entirely reasonable to conclude that the Supreme Court's analysis in that case cannot prevent the FCC from finding that an arbitrary allocation of access costs between the interstate and intrastate jurisdictions is no longer consistent with the goals of the Communications Act. *Smith* was decided in 1930. This was before Congress created the FCC and gave it the "comprehensive mandate" with "expansive powers" that the courts have recognized for many years. See *National Broadcasting Co.* v. *FCC*, 319 U.S. 190, 219 (1943). See also *General Telephone of the Southwest* v. *FCC*, 449 F.2d 846, 853 (5th Cir. 1971). It also was before technological development eroded the foundations of the monopoly market structure that existed in 1930, making competitive entry into the interexchange market possible and viable. Finally, and perhaps most importantly, it was well before the announcement of AT&T's divestiture of the Bell Operating Companies, an event that will make the technical and economic distinction between local service and long distance service even clearer.

I submit that *Smith* need not be read as a Supreme Court order that costs associated with plant used for both interstate and intrastate service always must be divided between the two jurisdictions. Rather, I advocate a more limited reading of the case as a statement that, in an environment where monopolized end-to-end communications service and rate base regulation were the norm, a state rate prescription that failed to recognize federal jurisdiction over commonly used plant was unlawful. Viewed in this light, it is apparent that *Smith* is not a bar to the adoption of my proposal.[32]

[32] The validity of this conclusion is not diminished by the fact that the FCC and the states have cited *Smith* as the basis for jurisdictional separations of access costs for many years. In situations such as this, where recently changed circumstances warrant rethinking of a regulatory approach, the Commission is not bound by its past practice so long as it recognizes that it is implementing a change and explains it. See *Greater Boston TV Corp.* v. *FCC*, 444 F. 2d 841, 852 (D.C. Cir. 1970). See also *Chisolm* v. *FCC*, 538 F. 2d 345 (D.C. Cir.) *cert. denied*, 429 U.S. 890 (1976). FCC is not precluded from changing its mind as to the limits of its statutory authority.

Nor is the validity of this conclusion diminished by the legislative history of Section 410(c) of the Communications Act. There, in the course of enacting legislation that

The second likely argument against adoption of my proposal is that it would work an unwarranted interference with state ratemaking authority in violation of Section 2(b) of the Communications Act.[33] In assessing this argument, it is important to recognize the very limited degree of preemption inherent in my proposal. In effect, my proposal would remove certain NTS and TS costs from the intrastate rate base and make recovery of those costs subject to federal oversight necessary to maintain the effectiveness of our federal open entry policies. I do not propose that the Commission set the actual rates for access; this would be left to state discretion within federal guidelines.

Recent preemption caselaw indicates that this type of limited intrusion upon state ratemaking powers is permissible under 2(b). In *NCUC II*, for example, the Fourth Circuit Court of Appeals rejected an argument that the FCC's terminal equipment registration program (which facilitated customer ownership of such equipment, thus removing some of the costs of that equipment from the intrastate ratebase) was impermissible under 2(b) because it would reduce state ratemaking options. 552 F.2d at 1048. The court concluded that the FCC's jurisdiction over jointly-used plant was primary, and thus, action intended to promote federal policy could impose limits upon state regulatory authority. *Id.*

Similarly, in its recent decision in *Computer II*, the D. C. Circuit rejected arguments that FCC ordered detariffing of all CPE (entirely removing those costs from the intrastate ratebase) violated 2(b). In that case, the Court indicated that so long as the Commission "has neither attempted to set rates for intrastate communications services or facilities nor asserted jurisdiction over matters of state concern because of intrastate discrimination against interstate business," its actions are not contrary to the purpose of 2(b).[34]

Rate Structure Rules for Network Access Tariffs. I propose that

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codified state participation in the jurisdictional separations process, Congress recognized *Smith* and its influence on telecommunications regulation. I submit that a fair reading of this history does not evidence a legislative intent to enshrine *Smith* or the jurisdictional separations process, but solely an intent to ensure state participation in the process so long as it existed.

[33] Section 2(b) was enacted in response to the Supreme Court's decision in the so called *Shreveport* case. *Houston, E. and W. Texas Ry.* v. *United States*, 234 U.S. 342 (1914). In that case, the Supreme Court held that the ICC could suspend rates set by a state regulatory agency in order to allow carriers to raise local rates to the level existing on similar federal routes. In enacting 2(b), Congress specifically indicated that it did not want the FCC to have such authority. See discussion *North Carolina Utilities Commission* v. *FCC*, (*NCUC I*), 537 F.2d 782, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, (*NCUC II*) 552 F. 2d 1036, 1047 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[34] 693 F.2d at 216. In fact, the FCC action that I propose is far less intrusive upon state ratemaking options than the decision to detariff CPE. In that situation, all CPE was removed from state rate regulation. Under my proposal, the states would retain significant ratemaking powers over access costs. See also *People of California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1976) *cert. denied*, 434 U.S. 1010 (1978).

the FCC prescribe general rate structure rules for recovering all NTS and TS costs involved in providing access to local exchange facilities. Such rules would grant state public utility commissions considerable discretion in setting rate *levels* for access tariff rate elements but impose general rules or "rate structure guidelines" for designing any network access tariffs. An example of such general rules would be the prohibition of inefficient price discrimination schemes based on arbitrary segmentations of customer groups. State PUCs would continue to review and approve a local carrier's revenue requirement and authorized rate of return on its rate base. The relevant rate base, however, would include all the costs associated with exchange access.

The FCC-prescribed rate structure rules would establish principles that local telephone companies must follow in designing "efficient rate structures," i.e., rate structures that track so far as possible the actual economic costs of exchange access and usage. Such guidelines might include self-selecting, two-part tariffs; nonlinear or "tapered" rate structures; premium flat rates; and other cost-based rate structures that would promote economically-efficient usage of local exchange facilities, facilitate nondiscriminatory access to local exchange plant by *all* users, and permit full recovery of all NTS and TS costs of local exchange access.[35] State PUCs would retain considerable discretion, however, in designing specific rate tapers or multi-part tariffs as prescribed by the FCC's general rate structure guidelines. Different *qualities* of local exchange access would be offered pursuant to tariffs which are separate but similar in structure to a generic, "line-side" access tariff.

Administratively, the access tariffs would be filed with the state PUCs, not the FCC. This procedure would not be burdensome, since a single tariff would replace many of the existing tariffs presently filed with state PUCs. The FCC would retain an oversight function and accept petitions that allege violations of the federal rate structure rules.

The assertion of federal jurisdiction over all costs of local exchange acces eliminates entirely the need to create artificial classifications of network access. All rate discrimination based solely

[35] Theoretical discussions of various rate structure options include Gerald R. Faulhaber and John C. Panzar, "Optimal Two-Part Tariffs With Self-Selection," Bell Laboratories *Economic Discussion Paper* #74, January 1977; K. W. S. Roberts, "Welfare Considerations of Nonlinear Pricing," *Economic Journal* 84 (March 1979):66–83, R. D. Willig, "Pareto-Superior Nonlinear Outlay Schedules," *Bell Journal of Economics* 9 (Spring 1978):56–69, and Bridger M. Mitchell, "Alternative Measured-Service Structures for Local Telephone Service" in *Issues in Public-Utility Pricing and Regulation*, ed. Michael A. Crew (Lexington, Massachusetts: Lexington Books, D. C. Heath, 1980), pp. 107–123. A non-technical summary of some of the recent theoretical literature on efficient rate structures is provided by Duvall, "Telephone Rates and Rate Structures: A Regulatory Perspective."

on the class or identity of the user would be eliminated, since classifications of local exchange access drawn along arbitrary regulatory boundaries would no longer exist. For example, any telecommunications user accessing local exchange plant through "line-side" terminations at the central office would take such service pursuant to a uniform tariff. Thus, the current tariff classifications of residential, business, and interexchange carrier (ENFIA) would cease to exist. If such users subscribe to identical line-side access, they will be subject to the same tariff.

While this concept may appear revolutionary as applied to the pricing of telephone service that has traditionally reflected discriminatory, "value-of-service" pricing principles, it is, nonetheless, a commonplace reality in most unregulated markets. By analogy, this principle would bar a supermarket from attempting to segment its customers by sex and charging female customers one price for bread and males another. Since there is no cost difference in selling bread to males in comparison to females, such a personal price discrimination scheme—if it could be enforced—would be injurious to the sex forced to pay the higher price and would encourage an inefficient allocation of resources, i.e., the price of bread charged to the discriminated sex would not approximate marginal cost. Such an example of inefficient price discrimination seems almost ludicrous within the context of an unregulated market. But the long tradition of a similar type of inefficient price discrimination in the pricing of local exchange access—business vs. residential local loop service—has not been seen for what it is, i.e., a system of inefficient (possibly "unreasonable") price discrimination insofar as the customer classifications do not reflect significant cost differences.

The rate structure rules that I would propose would *not* prohibit price discrimination per se; only inefficient price discrimination based on the *identity* of the user would not be permitted. A tapered rate structure, for example, could include a "volume discount" such that high-volume users would pay a unit price just equal to the marginal cost of usage. At intermediate levels of usage, the unit price could be designed to exceed slightly the marginal cost of an additional minute, message, or other measure of telecommunications output. To prevent "unreasonable" volume-based price discrimination, my rules would ban any tariff restriction prohibiting resale or shared use. Of course, in a world where the transactions costs of arbitrage are zero, a volume-based price discrimination plan may be unsustainable; low and intermediate users could simply pool their network access requirements to take advantage of the high-volume discount. But organizing and managing an arbitrage arrangement *is* costly, so there does exist some flexibility to incorporate some volume discounts in the rate structure.

"Universal Service" as a State Responsibility. Permitting local telephone companies and state PUCs to include volume-based price

discrimination in their local exchange access tariffs provides a source of revenue to finance below-cost network access for certain subscribers who might otherwise discontinue telephone subscribership if required to pay its full cost. This application of welfare-enhancing price discrimination could be combined with statewide pooling or rate averaging as appropriate to deal with the problem of "high cost" exchanges within a given state.[36] Subsidies *between* and *among* states, however, would be eliminated.

The state PUCs could, at their option, require that the uniform rate structure include subsidized access to the local exchange. The state PUCs would accept, however, the responsibility for establishing eligibility criteria for telephone subscribers who should receive subsidized access. Such criteria (if any) would mirror the economic conditions and political importance of subsidized access in each individual state. Some states may place great emphasis on widely-available telephone subscribership while others may not. If either statewide pooling or welfare-enhancing price discrimination is inadequate to assure a high level of statewide telephone subscribership, then state legislatures should be encouraged to subsidize telephone service to targeted user groups that satisfy state-determined eligibility requirements. Moreover, each state PUC should develop its own transition plan found necessary to ameliorate only undesired rate impacts on consumers as the FCC-prescribed rate structure rules become effective. Some states will find that no transition plan is necessary and could implement the FCC rules with minimal impact on subscribers. As a general rule, I believe that the issue of subsidized access to the telephone network is ultimately a *local* issue and federal telecommunications policy should reflect this view.

A state-specific view of "universal service" may seem both radical and antithetical to the purpose of the Communications Act of 1934 ". . . to make available, so far as possible, to all the people of the United State a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . .," but I do not believe it is. As I noted earlier, the concept of universal telephone service is not a well-defined social or economic objective mandated by the Communications Act of 1934. The Communications Act directs only that telephone service be provided at "reasonable charges." In my view, reasonable charges simply means "reasonable cost." Nowhere does the Act state that reasonable charges should be interpreted to require that local network

[36] Implementing jurisdictional subsidies through the separations mechanism typically focuses on subsidizing the *local exchange carrier* rather than the end user. However, the end user, *not* the carrier, is the proper target of public policy designed to maintain wide subscribership to telephone service. Neglecting this point may lead to protectionist policies toward local telephone companies rather than policies that will directly improve the economic welfare of end users.

access be provided *below* cost to some network subscribers. While a "network externalities" argument can be made that suggests that the private cost of network access may exceed its social cost and, therefore, an access subsidy may be good social policy for encouraging subscribership to a *new* or *developing* network, it does not follow that this economic argument mandates that one telecommunications service, say, interstate MTS, must subsidize another.[37] Indeed, a strict application of this economic argument would require the levy of a non-distorting tax and subsidy from the federal treasury, since the economic distortions introduced by inefficient pricing of telecommunications services used to finance the subsidy may lead to other economic distortions that *exceed* the social value of the access externalities.[38] Given the existing high level of nationwide telephone subscribership, I feel confident that this is precisely the case today, i.e., the social cost of the pricing distortions in the intercity transmission market probably exceeds the social value of the externalities of local exchange subscribership provided below cost.

While the Commission's ACP will begin to shift the source of local exchange subsidy from the price of interstate toll minutes to a carrier's-carrier charge, the concept of subsidized access to "high cost and rural areas" as a federal regulatory responsibility remains. I simply cannot accept the implicit logic of a regulatory policy that requires the ratepayers in New York state, for example, to subsidize telephone companies in Wyoming. Such federal regulatory policy is no different in my view from having the Federal Energy Regulatory Commission require electric power customers in Mississippi who enjoy relatively mild winters to subsidize the winter operating costs of electric power companies in Minnesota. If Congress, however, wants to provide *nationwide* subsidized access to the telephone network, it should do so explicitly and provide the necessary subsidy through general tax revenues. It should not simply impose a statutory requirement of subsidized network access to be funded by nationwide distortions in the pricing of telecommunications services.

Treating access to the telephone network as a state rather than federal regulatory responsibility would minimize and localize the distortions in network access pricing necessary to fund below-cost access. Both state regulators and the local telephone companies would be confronted with a binding constraint on the source of the

[37] A survey of some of the literature on the externalities of telephone service is provided by S. C. Littlechild, *Elements of Telecommunications Economics* (Stevenage, U. K.: Peter Peregrinus Ltd., 1979), Chapter 12.

[38] The National Telecommunications and Information Administration has estimated that telephone consumers in the aggregate would be better off economically by approximately $1.6 billion annually if local telephone rates fully recovered all NTS costs and MTS rates were permitted to fall following removal of local exchange NTS costs presently allocated to the interstate jurisdiction. See Comments of the National Telecommunications and Information Administration to the Federal-State Joint Board, CC Docket 80-286, Appendix D.

subsidy, viz., the difference between price and cost for intermediate volume users of network access. This constraint will force state regulators to take a hard—and perhaps uncomfortable—look at precisely *who* should receive subsidized local exchange access and on what terms. For example, should both telephone access *and* usage be subsidized? Should users with multiple access lines receive subsidized access for *each* access line or only the first? Should both the rich as well as the poor have the right to subscribe to subsidized "lifeline" service? So long as the subsidy continues to flow from the Universal Service Fund as prescribed by the FCC and funded by all connecting intercity carriers (or, more precisely, their customers), there will be no incentive at the local level for reducing dependence on this source of subsidy or reducing the cost of local exchange service in "high cost" areas. Moreover, there will be little incentive to target the receipt of subsidized access to users that each state PUC, legislature, or other local political body might find deserving of financial support.

It must be emphasized that major beneficiaries and proponents of the universal service shibboleth have been the regulated, local franchise monopoly telephone companies. As rate base regulated entities, local telephone companies have had a powerful incentive to invest in telephone plant when given favorable treatment by state and federal regulators. Moreover, the long-standing industry practice of flat rate pricing of local telephone service has encouraged uneconomic usage of local telephone service; has encouraged the growth of rate base by requiring the building of new plant to meet peak demand accentuated by flat-rate tariffs; and has provided inaccurate price signals regarding the cost of using local exchange facilities. The mandate of universal service has provided local telephone companies with a convenient and, for all practical purposes, a compelling political argument supporting the current status of jurisdictional separations and local monopoly supply of telephone service.

It is not clear to me that the concept of nationwide universal service that thrived in a monopoly telecommunications world will continue to be in the self-interest of local telephone companies as growing competition undermines the jurisdictional subsidy mechanism and technological changes make alternative local distribution networks increasingly cost-effective. If the local telephone companies cease to be a major constituency and beneficiaries of the universal service doctrine, then the political basis of universal service as a federal responsibility may narrow considerably in the future. Approaching universal service as a state rather than federal responsibility may, therefore, be an inevitable consequence of advancing technology and economic forces at work in the telephone industry rather than a discretionary shift in the direction of telecommunications policy.

Uneconomic Bypass of Local Exchange Facilities. A major consequence of non-cost based rates for intercity switched transmission services is the powerful economic incentive for large users to avoid payment of telecommunications rates that exceed cost. Both advancing technology and the FCC's open entry policies have made it possible for new intercity carriers and large private users to bypass both AT&T's long haul network and, more recently, local exchange facilities as well. Uneconomic bypass of telecommunications facilities is an inevitable consequence of non-cost based pricing and poses a serious threat to the economic viability of some local exchange carriers.

The threat of uneconomic local exchange bypass is by definition a local, regional, or statewide problem. Not all local telephone companies in the nation are or will be subject to the same bypass probability. Given the localized nature of the problem, the local exchange carriers and their state PUCs are uniquely qualified to assess the likelihood of bypass in their own service areas. Consequently, the local exchange carriers and the state PUCs should accept the responsibility for balancing the goals of statewide universal service and the potential for state-specific uneconomic bypass of local exchange facilities.

Approaching the pricing of network access from a unified, comprehensive perspective eliminates regulatory distinctions that cannot be sustained in a competitive environment, greatly simplifies the tariffing of network access, and recognizes the essential role of the states in resolving conflicting policy objectives. In short, my federalist approach recasts the problem of access charges as largely a state and local issue with the federal interest in interstate telecommunications competition protected by rate structure rules. Ultimately, both network subscribership and uneconomic bypass *are* a state and local concern, unlike the national defense which is clearly a federal responsibility. In my view, the federal interest can be maintained and protected by minimal federal intrusion in contrast to a complex web of rules that unnecessarily maintains a bifurcated jurisdictional responsibility for the pricing of network access.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON
re:
MTS AND WATS MARKET STRUCTURE

The Commission initiated this proceeding five years ago to determine whether the public interest requires that interstate toll telephone service (MTS/WATS) should be provided on a sole source basis, free from direct competition. 67 FCC 2d 757. Of course, the Commission realized that, should competition be permitted, it would have "to determine what reimbursement interstate services should make to local operating companies for the use of local plant, on a cost causational basis; what additional charges, if any, should be levied

on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services." *Id.* at 759. Having subsequently determined that unfettered competition will best serve the public interest,[1] the Commission must now decide these very difficult policy issues.

The cornerstone of any Commission action, and this one is no exception, is Section 1 of the Communications Act, 47 U.S.C. 151. Section 1 provides that the Commission shall "make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . ." Lest there be any confusion arising from the Order that elimination of discrimination between services is the overriding objective of this decision, it is not. The objective of this proceeding is to promote efficient communications service with adequate facilities at reasonable charges.

Nonetheless, the Commission has met conflicting objectives in this proceeding because promoting efficient communication service through cost-based rates could jeopardize the availability of adequate facilities to many households. The Commission has approached this apparent conflict by asserting, for the first time, that promoting "universal service" is one of the purposes of the Act. The Commission reaches this finding because it believes a dimunition of universal telephone service would impede the Commission in meeting its Section 1 mandate to make communication service available to all people of the United States and to ensure that safety of life and property is promoted through such service.

I am troubled by this finding. At the outset, I wish to make it clear that promoting universal service may be a laudable goal in Docket No. 78–72. However, the Commission has based its statutory finding, which appears to be a novel interpretation of an Act that is almost fifty years old, upon an insufficient analysis of the Communications Act and its legislative history, and prior Commission and judicial pronouncements in this area.[2] I am therefore not prepared to find, based on the present record, that promoting universal service is an

[1] Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980), and Second Report and Order in CC Docket No. 78–72, FCC No. 82–515, released November 30, 1982.

[2] See, *e.g.*, Specialized Common Carrier Services, 31 FCC 2d 1106. I am also not persuaded by the record in this proceeding that safety of life and property would be jeopardized absent universal service. Nor is it immediately obvious from my own experience that this would be the case. For example, at a recent Regional Hearing in Portland which I chaired, my staff asked the Secretary-Treasurer of the Southern Montana Telephone Company what she felt the effect of disconnects would be on the safety of life and property. She responded, "Probably would be none." Transcript from May 6, 1982, Portland Hearing (Docket No. 80–286) at 139. She explained that while large ranchers in Montana may choose to disconnect some of the main stations which they currently utilize on their property if rates increase, their telephone service would only be reduced thereby, not terminated.

absolute goal of the Act. The Commission has also failed, in my estimation, to demonstrate any reason to establish universal service as a statutorily mandated goal which the Commission is obliged to meet. The purposes of Docket No. 78–72 could be achieved just as effectively, and without compromising other important goals, were the Commission simply to exercise its Section 1 authority.

This brings me to the source of my greatest concern over the universal service finding. It threatens to restrict, in this proceeding and in others, the flexibility the Commission retains and requires under its broad Section 1 mandate to achieve its overriding policy objective: the promotion of efficient service with adequate facilities at reasonable charges. I need only point out in this regard the conflict that may exist between a goal of universal service and efforts to encourage efficient service through increased competition. In pursuit of the latter policy, the Commission is now considering deregulating carriers which are non-dominant (*i.e.*, those which are constrained by the market from pricing their services above cost).[3] However, in high cost areas the cost-based rates of these carriers, that might otherwise be found to be non-dominant, could nonetheless be considered unaffordable to some customers. The universal service mandate could be interpreted in these circumstances as necessitating the continued regulation of these competitive carriers in order to avoid disconnects.[4] In sum, I believe that it is fully within the Commission's jurisdiction, and a valid communications policy, to promote universal service, provided it does not unduly infringe upon promoting efficient communication service at reasonable charges.

Having said this, the question becomes what access charge structure will promote efficient communications service at reasonable charges. To begin that analysis, it is essential to realize that the Commission is dealing with the problem of deciding the appropriate price of access to local bottleneck facilities. Control of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants.[5] The Commission previously has determined that all exchange telephone operators control bottleneck facilities.[6]

Given this setting, economic and legal precedent teaches us that

[3] See Further Notice of Proposed Rulemaking (Competitive Carrier Rulemaking), 84 FCC 2d 445 (1981).

[4] It is also unclear whether the statutory interpretation adopted in this order would impose on the Commission an obligation to ensure the development of universal service among new services, such as cellular radio and Digital Termination System (DTS).

[5] See e.g., A.D. Neale, the Antitrust Laws of the United States of America: A Study of Competition Enforced by Law (1968).

[6] First Report and Order in Competitive Carrier Rulemaking, 85 FCC 2d 1 (1980).

cost-based rates would best serve to promote efficient service and thereby maximize consumer welfare.[7] Moreover, costs should be assigned to the cost causer in order for society to best utilize its resources.[8] Finally, cost-based access charges will serve to promote the optimal market structure for competition in both the interstate and international toll telecommunications markets.

In the telephone business, the revenue requirements for local exchange plant are divided between interstate and intrastate jurisdictions pursuant to the Commission's Separations Manual. Of course, this proceeding does not address the question of the appropriate jurisdictional separation of exchange plant. However, we at the Commission are extremely aware of the potential problems that may arise from disparate regulatory treatment of exchange access charges.[9] I personally am looking forward to reviewing the recommendations of the Joint Board, and the comments upon those recommendations, in the Commission's jurisdictional separations proceeding in Docket 80-286.

The present proceeding, however, looks only to the allocation of costs which are attributed to the interstate jurisdiction. These costs include both traffic sensitive (i.e., variable) and non-traffic sensitive (i.e., fixed) costs. The fundamental finding of this Report and Order is that non-traffic sensitive (NTS) costs ultimately must be recovered on a flat basis and that traffic sensitive cost must be recovered on a usage basis—with virtually all costs being recovered from the cost causers.[10] This approach promotes efficient communications services at reasonable prices.[11]

Unfortunately, the present pricing structure does not follow this

[7] See e.g., Alfred E. Kahn, The Economics of Regulation: Principles and Institutions (1970); and Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[8] See e.g., J. Bonbright, Principles of Public Utilities Rates, 311-2 (1961).

[9] One immediate problem resulting from disparate interstate and intrastate access charges is the reporting and identification of toll minutes as either interstate or intrastate. However, perhaps even more disturbing than disparate regulatory policies is the potential for exchange carriers to discriminate between intra-LATA transport charges to toll carriers and direct charges to its subscribers for completion of intra-LATA toll calls. Such a scenario will be possible unless a uniform, coordinated regulatory approach is adopted for allocating exchange telecommunications revenue requirements. One guiding rule that state and federal regulators must keep in mind is that the carrier's rate structure should be transparent to the identity of the traffic that is being transported.

[10] One relatively minor exception in the Commission's plan in this regard is that NTS central office equipment will be recovered on a usage basis. The Commission concludes that, because NTS central office equipment is not dedicated to particular subscribers, it should be collected on the basis of usage. This particular conclusion and its rationale, in my opinion, is inapposite.

[11] For a discussion of the appropriate pricing methodology for recovering fixed and variable costs, see, for example, J. Hirshleifer, Price Theory and Applications, p. 355 (1980).

framework. Virtually all interstate costs, both traffic sensitive and non-traffic sensitive, are recovered on the basis of usage.[12] As such, the NTS costs are recovered inefficiently. I need not repeat here how such inefficiency can spur uneconomic bypass and hamper this economy's entry into the Information Age. However, in devising a plan to correct the current pricing anomalies, it is important to understand the magnitude of the problem we are dealing with. For example, in 1981, the annual interstate NTS revenue requirement was eight billion dollars, which is roughly equal to an average of $7 per access line per month.

In devising a plan to recover NTS costs on a flat basis, it is important to recognize that the Commission previously had addressed the regulatory treatment of both CPE and inside wiring in other proceedings. The interstate costs for CPE are smoothly being phased out over a five year transition pursuant to the Poponoe Plan. Therefore, it would be unnecessarily disruptive to impose these costs upon consumers in the form of flat subscriber charges because these flat charges would decrease as the costs were phased out. Similarly, in 1981 the Commission adopted a 10 year program for amortizing the capital costs associated with inside wiring. These costs essentially represent a one time expense as they are amortized, and therefore also will not be placed in a flat charge. With respect to the current expense attributable to inside wiring, the Commission must decide in Docket 79–105 whether to recoup these expenses on the basis of usage, switch to flat charges or deregulate entirely.

By excluding CPE and inside wiring from flat charge recovery, an average of only $4 per line per month in 1981 dollars must be recovered through flat charges. However, as depicted in Figure I, the distribution of costs on a study area basis is widely dispersed.[13] The numbers for some companies are so high as to suggest either a large number of disconnects if flat charges are imposed to recover NTS costs, or, in the extreme, the telephone operations will cease to exist.

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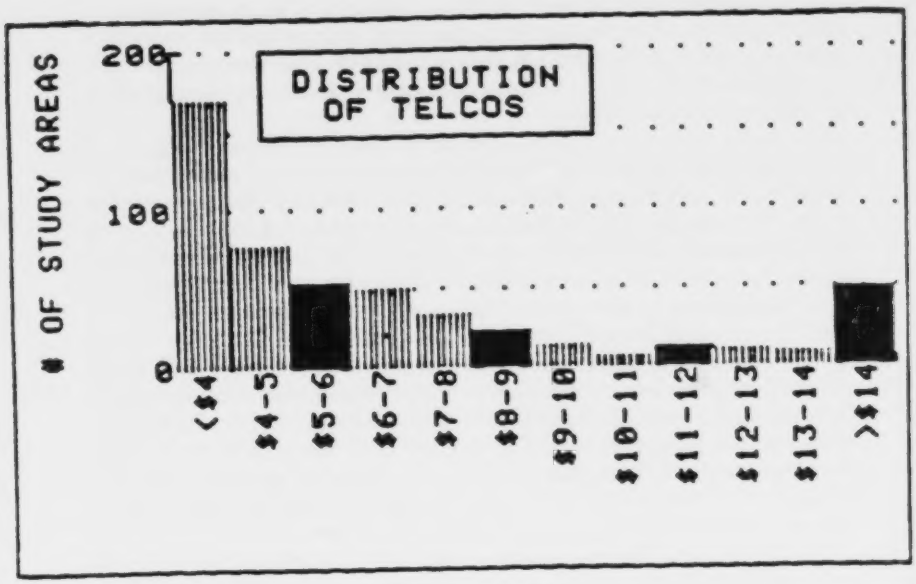
[12] The rate structure for interstate private line services does not follow the industry norm, but rather currently appears to follow generally accepted economic principles.

[13] Study areas generally coincide with state boundaries, with each individual company's costs being averaged or aggregated within the state. The estimates have been derived from data submitted in Docket No. 80–286. Observations have been reported for 506 study areas. In addition to these observations, there are roughly 800 average schedule companies that provide telephone service throughout the nation. However, the revenue requirements for these companies tend to be lower than average, and therefore the companies generally would not qualify for any subsidies.

Figure I.
DISTRIBUTION OF FLAT CHARGES BY STUDY AREA
(Excludes CPE and inside wiring but includes pay telephones and central office equipment)



The Commission has addressed this problem by adopting a Universal Service Fund to provide support to high cost areas. The magnitude of this fund will be determined by the Commission in Docket 80–286. However, this decision finds that the Universal Service Fund should be supported by access charges that are assessed upon interexchange carriers.

One approach to the problem of ensuring that adequate facilities are available, so far as possible, is to provide a subsidy to offset the costs which are deemed too high to be recovered through flat charges. Figure II specifies an estimate of the annual surcharge required to subsidize consumers at various rate levels. For example, if all households were to receive a subsidy for any costs above $6, the annual cost to society would be only $250 million.

Figure II.
STATISTICS REGARDING SUBSIDIES FOR HIGH COST AREAS
(assumes subsidy of all costs above specified dollar amount)
(access lines costs are computed for each company with the data used in Figure I)

MAXIMUM ACCESS CHARGE	ANNUAL SUBSIDY REQUIREMENT	ESTIMATE OF MONTHLY SURCHARGE PER LINE
$10.00	$ 63,500,000	$.06
9.00	70,000,000	.07
8.00	96,700,000	.08
7.00	152,000,000	.13
6.00	250,000,000	.22
5.00	410,000,000	.36
4.00	688,000,000	.60

As mentioned, the Commission has decided to recover the Universal Service Fund through usage sensitive charges assessed upon long distance communications carriers. However, these funds could be allocated directly from subscribers through flat charges as shown in Column 3. This approach may promote the public interest because the elasticity of demand is much less for "dial-tone" than for toll service. Therefore, there will be less of an output distortion if the surcharge is placed in the flat charge.[14] Another rationale for a flat surcharge may be that it will be clearly visible to all subscribers, carriers and regulators. Hence, it will not be subject to any large unforeseen growth, which has been the case with SPF. Because the Commission, to my knowledge, has not received any comment on which approach would better serve the public interest, I would hope it would maintain an open mind on this subject in Docket 80–286.

The remainder of the Commission's access charge plan is exceedingly complex. Additionally, the particular transition plan adopted by the Commission to implement its cost-based policies has not received public comment. Therefore, I would like to highlight what might be a few problems with the plan so that the carriers and the general public can carefully examine whether it is both workable and equitable.

First, the plan reallocates on January 1, 1984, $4 per line per month from the existing charges to interstate carriers for MTS/WATS services to direct charges to telephone subscribers by exchange carriers. Of this $4 per line, minimum flat charges of $2 to residences and $4 to businesses are mandated. The exchange carriers are given flexibility for recovering the $2 shortfall attributable to

[14] See, *e.g.*, R.A. Musgrave and P.B. Musgrave, Public Finance in Theory and Practice (1973).

residential households (i.e., $4 - $2). However, the business minimum charge cannot exceed 200% of the residential minimum charge, and no customer can be billed more than what the exchange carrier charges for dedicated facilities.

The major reason for this aspect of the plan is to give each carrier flexibility in recovering its NTS costs. Because economic circumstances vary throughout the country, the Commission believes that a standard nationwide plan would be appropriate. However, the flexibility afforded by the plan may turn out to be a double-edged sword. For example, the antitrust implications of an exchange carrier changing its pricing structure in the face of bypass are unclear. Similarly, it is unclear whether the $2 per line shortfall attributable to residential households can be accurately recovered in the first year due to unexpected shifts in demand caused by rate structure changes. For the most part, the Commission expects these costs to be recovered either on a price per call or a price per minute basis. However, the prices to large volume users will be capped at roughly $28 per line on average thereby requiring that revenues that are currently collected above the cap be recovered from another source. Since low volume users will make virtually no contribution, the bulk of the revenues will have to be derived from moderate users.

Another problem which highlights the difficulty the Commission will have in implementing its plan is that exchange carriers simply do not have the capability to determine which OCC customers have reached their maximum charge per line. Any attempt to rectify this problem will necessarily engender administrative and economic burdens. The Commission's discussion of having the exchange carriers either coordinate billing or establish surrogate charges for the OCCs only highlight the problems, but does not solve them.

The second major aspect of the plan is the method by which NTS costs are recovered from interstate services and carriers during the transition period. Currently, NTS costs are recovered from MTS/WATS services on a usage sensitive basis. AT&T pays about 7.2 cents per minute for premium interconnection and the OCCs pay about 3.3 cents per minute (at 4474 minutes per line) for standard line side interconnection. Private line services do not presently contribute to any common line NTS costs.

The Commission's access charge plan radically alters the relative NTS costs burden that these services share. Private line services that access the local exchange will, for the first time, contribute to NTS costs through a usage charge that is equivalent to that charged to MTS/WATS services. Additionally, the OCCs' contribution will be somewhat less than AT&T's because of the $1.4 billion premium access charge that is assessed to AT&T.

My greatest concern with this aspect of the Commission's access charge plan is that it leaps into the unknown. For example, we do not have any information on the effect that changing the cost

allocation for private lines will have on individual subscribers' overall telephone bills. Placing a surcharge above costs upon private line users may prove to be highly inequitable to some consumers, especially in light of the fact that this surcharge will be phased out by the end of the transition. Moreover, any additional revenues that are generated may produce only very small decreases in MTS/WATS bills.

Perhaps even more troubling is the lack of analytical vigor employed by the Commission in developing the $1.4 billion premium access charge. Of course we are all aware that the correct answer to the problem of access for toll service providers is equivalent interconnection at equivalent cost-based prices. We also know that, as long as one carrier receives a premium interconnection, estimating the value or opportunity cost for that interconnection for purposes of allocating NTS costs among carriers will be highly speculative. Nevertheless, given that this proceeding was initiated to determine the appropriate "MTS and WATS Market Structure," it is crucial for the Commission to maintain a competitive environment that is suitable for new entry until equal interconnection is afforded to all.

Unfortunately, I cannot be certain that this is the case under the Commission's access charge plan. While the Commission believes that the $1.4 billion premium access charge is substantial, this charge in reality is only about $56 million because AT&T would pay about 96 percent of these costs if there were no price differential between AT&T and the OCCs. There are several ways to view the economic effect of the Commission's premium access charge plan. For example, the OCCs currently contribute roughly 60 percent less per minute than AT&T to NTS plant. Under the new access charge plan, when including an accurately billed usage charge in the end user common line rate structure, OCC customers (except for the larger customers who are "capped") will pay about 25 percent less per minute (35 percent for "capped" customers) than AT&T's MTS/WATS customers for NTS plant. Stated another way, the Commission's access charge plan will have the effect of more than doubling the OCCs' current ENFIA charges, while at the same time reducing the cost of access to AT&T.

What effect these changes will have on the market structure for MTS and WATS is unclear at this time. However, I am certain the Commission will carefully review any evidence which suggests that this part of the access charge plan will impede the development of competition in the interstate and international public switched voice markets.

In conclusion, the Commission has taken the extremely important step of bringing its costing methodologies in line with a competitive market structure. The access charge plan will promote efficient communications by adopting a cost-based approach for ratemaking,

while at the same time provide subsidies to high cost areas that otherwise would be threatened with the loss of adequate facilities to many households. As such, the plan is fully in accord with the Communications Act. However, as described herein, there may be unknown problems with certain aspects of the transition plan. Because of the critical importance of this decision and its extraordinary complexity, the Commission, no doubt, will be asked to review several aspects of its decision. I will pay particular attention to those petitions that attempt to demonstrate that the transition plan is either unworkable or produces unnecessary transitional dislocations.

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

In re: MTS and WATS Market Structure, CC Docket No. 78–72, Phase I (Access Charge)

I write separately to emphasize my concern that any access charge plan assure that universal service is maintained. Being from a state with a low population density, I am especially mindful of how necessary telephone communications are to the health and well-being of rural America. I am delighted that the Commission apparently shares my concerns.[1]

[1] The Commission has adopted a plan that recognizes that the national interest is best served if universal service is maintained. This plan accomplishes this objective by:

- the contemplated *monitoring* program and commitment to take corrective action and to undertake a formal "*revisitation*" of this proceeding to ensure immediate, appropriate modifications should any unanticipated disruptive or deteriorating effects upon the nationwide telecommunications system or upon the continued maintenance of universal service develop (paras. 124, 195–196, 366–367);
- the establishment of the *Universal Service Fund*, enabling high cost companies to maintain affordable local exchange rates that do not substantially exceed rates charged by other companies, and selective mandatory *pooling* requirements (and voluntary participation in common tariff and revenue pool arrangements) to assure continuation of universal service in rural America and other high cost areas (paras. 134–135, 308–338);
- the provision for waivers to allow "*life line*" service (paras. 136–137);
- our recognition of possible justified *local deviations* from a single national plan requiring all dedicated end user costs be recovered through flat and equal charges on all customers (para. 367);
- a *transition* with a smooth and gradual, yet flexible, pace to allow a more "comfortable" adjustment to the new economic realities (para. 172);
- the allowed rate structure *flexibility* for the exchange carrier to implement the transition in a manner, within reason, to fit its individual situation and requirements (paras. 132, 175, 182, 185); and
- the careful balancing of conflicting objectives including the elimination of unlawful discrimination and preferences, and the promotion of competition, network economic and engineering efficiencies and, importantly, universal

No doubt should exist that the immediate, overriding policy concerns of the Commission for assurance of universal service and network preservation will set the future development and evolution of this plan.

SEPARATE STATEMENT OF COMMISSIONER STEPHEN A. SHARP

In the past, local telephone companies have been compensated in different ways when their plant has been used for the origination or termination of interstate or foreign communications. In general, local telephone companies receive the highest compensation when their plant is used in the provision of interstate MTS/WATS. The lowest rate of compensation is the so-called B-1 rate, which is the monthly rate, usually flat, that local telephone companies charge business customers for local exchange telephone service. Vast interstate private line networks have been created by connecting private lines to B-1 service in each area where the customer wishes to communicate; in some cases these networks rival the public switched telephone network in their coverage. Yet these networks pay only the B-1 rate for "access";[1] in part because the B-1 rate is in most instances considerably cheaper than the rate for access that is bundled into the cost of a MTS/WATS call,[2] the same telephone call often costs the customer less on a private line network than it does under MTS/WATS.

With the rise of competition, the other common carriers (OCCs) sought to utilize B-1 service for access. The established telephone industry naturally opposed this and sought to obtain compensation at the higher MTS/WATS rate. The result of this dispute was a compromise: the OCCs were charged the ENFIA rate for access,[3] which was higher than the B-1 rate but lower than that received by local telephone companies under MTS/WATS.[4]

The Commission seeks to resolve these rate disparities with a single federal access charge. While this is a laudable goal, I wish to point out that there are many services tariffed with the various states which can be and are being used for purposes of access. Some examples of these services are intrastate WATS and intrastate private line service. It is not always obvious or simple to determine

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service as mandated by Section 1 of the Communications Act (". . . to make available, so far as possible, to all the people of the United States a rapid efficient. Nation-wide. . .communications service with adequate

[1] The term "access" is used henceforth to denote the use of a local telephone company's plant for the origination and termination of interstate and foreign communication.

[2] AT&T has estimated that the rate for access in an MTS/WATS call is approximately 7¢ per minute in each local exchange.

[3] As the Commission has recognized, ENFIA service is local exchange (i.e., B-1) service at a rate different from that on file with local jurisdictions for that service. *See* AT&T, 89 FCC 2d 1000, 1001 n. 4 (1982).

[4] *See* ENFIA, 71 FCC 2d 440 (1979).

whether these services, tariffed with the states, are in fact being used for interstate and foreign communications. And to the extent that these services are priced lower than the federal access charge, users will attempt to substitute the former for the latter.[5]

If *all* rates including those tariffed with the states, were based upon the cost of providing the respective service, it would not be necessary to establish a federal access charge since users would be free to use *any* service, whether tariffed with this Commission or the states, for interstate or intrastate communications as they saw fit. Carriers would remain financially whole regardless of differences in the way the same service is *used*. There would be no incentives on the part of customers to substitute one service for another because of non-cost based rate disparities, and no need for either the Commission or the telephone companies to police the use to which various services were put in order to make the federal access charge workable.[6]

We know that local exchange service can be employed practically to interconnect any two points within that local calling area, including points at which access to interstate and intrastate toll can be obtained. In the long run, it appears neither reasonable nor practical to maintain differences in rates for the same service depending on the use to which local exchange service is put i.e., for interstate and foreign communication, intrastate toll communication, or local exchange communication.

It is true that different jurisdictions, in seeking to implement their own policies, may see fit to use different ratemaking approaches which can result in different charges for similar or identical products. From a practical point of view, however, as distinctions between jurisdictionally interstate and jurisdictionally intrastate communications become increasingly blurred and resale becomes more widespread, the desirability of cost-based local exchange rates for each local area will become increasingly apparent. In this way, users of telephone service will pay the same rates regardless of how they use their local service, thereby discouraging uneconomic bypass and eliminating opportunities for arbitrage based upon differing rates for the same service or services.

I hope that the Commission will keep this long term solution in

[5] In page 20 of Appendix F of the order, for example, the Commission notes that in its 1981 Annual Report, Aeronautical Radio, Inc., a large user of communications services, stated that it had replaced federally tariffed private lines in its private line intercity network with cheaper private lines obtained under state tariffs.

[6] If users were free to substitute other, cheaper services for the federal access charge, they would have no incentive to obtain service under federal access tariffs. Under these circumstances, either the Commission or the telephone companies would have to police how substitutable services were being used in order to prevent avoidance of the federal access charge.

mind when it revisits and reviews the progress in implementing access charges.

Administrative Finality
CATV Carriage, Mandatory Signals
CATV, Violation Commission Orders
Forfeiture Mitigation, Request for Denied
Reconsideration, Petition for Denial of

Petition for reconsideration and request for forfeiture mitigation denied. Commission's rules and Communications Act did not operate to toll carriage requirements beyond time originally found.
–*Quincy Cable TV, Inc.*

FCC 83–60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
QUINCY CABLE TV, INC.	CSR-1678 WA0295
Quincy, Washington	
Petition for Reconsideration	

MEMORANDUM OPINION AND ORDER

(Adopted: February 9, 1983 Released: February 17, 1983)

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT.

Introduction

1. On April 28, 1980, the Chief of the Cable Television Bureau, pursuant to delegated authority, denied a petition for waiver of the cable television mandatory broadcast signal carriage rules (Section 76.57 of the Commission's Rules) filed by Quincy Cable TV, Inc. (hereinafter "Quincy"), of Quincy, Washington.[1] Quincy thereafter did not comply with the rules but filed petitions for stay and for reconsideration,[2] and subsequently for review by the full Commission. The Commission affirmed the decisions of the Bureau Chief and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating

[1] *In re Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter "*Quincy I*"].

[2] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter "*Quincy II*"]; *In re Quincy Cable TV, Inc.* (Quincy, Washington) (adopted September 2, 1981) [hereinafter "*Quincy III*"].

that the filing of stay, reconsideration, and waiver petitions does not automatically stay the effect of a decision taken under delegated authority.[3]

2. Now pending are a series of pleadings relating to this, including: (1) letters dated May 14, 1982, and May 25, 1982, to Chairman Fowler;[4] (2) Quincy's "Petition for Reconsideration"; and (3) oppositions from KHQ, Incorporated (hereinafter "KHQ-TV"); from King Broadcasting Company (hereinafter "KREM-TV"); and from Spokane Television, Inc. (hereinafter "KXLY-TV"), who are, respectively, the licensees of Stations KHQ-TV (NBC, Channel 6), KREM-TV (CBS, Channel 2), and KXLY-TV (ABC, Channel 4), all Spokane, Washington; and (4) Quincy's reply thereto.

3. Although Quincy reiterates and continues certain arguments concerning the validity of the mandatory signal carriage rules themselves,[5] and relating to the denial of its waiver petition, Quincy is now essentially seeking reconsideration of that part of the decision relating to its apparent liability for failure to carry the signals in question after initial denial of its petition. Although the Notice of Apparent Liability referred to KHQ-TV and KREM-TV, it and the *Quincy II* decision should have referred to KHQ-TV and KXLY-TV, both of which Quincy admitted to not carrying. Although it might be inferred that KREM-TV was also not carried, this is not in evidence. Quincy has not argued that this provides any ground for change in the forfeiture proposed, and we do not believe any change is in order since the forfeiture was not based on the particular identity of the signals involved. The essential question here is whether the effectiveness of the Bureau Chief's decision was stayed by the filing of various subsequent pleadings so that no violation could be said to have occurred.

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[3] *Quincy Cable TV, Inc.* (Quincy, Washington), FCC 82-193, 89 FCC 2d 1128 (1982) [hereinafter "*Quincy IV*"].

[4] KREM-TV and KXLY-TV each filed a "Motion to Strike" Quincy's May 14, 1982, letter on, respectively, May 17 and May 18, 1982. These motions will be denied. While arguably irregular, we cannot say that the filing of Quincy's May 1982 letters has prejudiced any party to this proceeding.

[5] In a "Motion for Expedited Determination" filed July 8, 1982, Quincy raises an additional constitutional challenge to the mandatory signal carriage rules, claiming that they constitute an unlawful taking of private property in contravention of the fifth amendment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). We note, however, that the Court continues to distinguish between permanent physical occupations of property, which constitute takings, and ". . . appropriate restrictions upon an owner's *use* of his property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. at 3179, which do not. *See also Black Hills Video Corporation v. FCC*, 399 F.2d 65 (8th Cir. 1968).

Summary of Pleadings

4. Prior to filing of the instant reconsideration petition, Quincy filed a letter to the Chairman of the Commission on May 14, 1982.[6] In this letter, Quincy contends that the language of Section 76.7(g) of the Rules, which allows a timely filing of, *inter alia*, a petition for waiver of Section 76.57(a) of the Rules to toll the requirements of that rule "... pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings," clearly demonstrates that Quincy's progressive filings for stay pending further review have continuously tolled Quincy's obligations to carry the Spokane signals. Quincy asserts that any finding that it has been in violation of Section 76.57(a) of the Rules as early as May 2, 1980, renders Section 76.7(g) of the Rules a nullity. Quincy reiterates its contention that Section 408 of the Communications Act prohibited the Bureau Chief from imposing a ten-day compliance requirement on Quincy in *Quincy II*. Quincy claims that the questions it has raised in these proceedings have been novel, and should not have been decided on delegated authority. Quincy argues that it should not be subject to forfeiture liability in the face of Bureau and Commission silence on Quincy's stay requests. Citing Section 1.108 of the Rules, Quincy suggests that the Commission might on its own motion set aside *Quincy IV*.[7]

5. On May 25, 1982, Quincy filed another letter to the Chairman. In this letter, Quincy contends that its argument that it is not obligated to carry the Spokane signals is supported by the Administrative Procedure Act (hereinafter "APA"), particularly Sections 551(8), 551(9), and 558(c) of the APA, referring to agency licensing procedures, which Quincy asserts include the Commission's signal

[6] The letter was served on all Commissioners; the General Counsel; the Chief of the Cable Television Bureau; and counsels for KHQ-TV, KREM-TV, and KXLY-TV.

[7] Quincy commented on KREM-TV's and KXLY-TV's motions to strike its letter on May 20, 1982, contending that its letter was procedurally proper. Quincy claims that its letter only addressed the question of the $5,000 forfeiture, which Quincy characterizes as inequitable and unwarranted. Quincy argues that while former Section 74.1109(h) of the Rules referred to "interlocutory" questions of temporary relief pending further "procedures," the fact that its successor Section 76.7(g) of the Rules did not use the term "interlocutory" and uses the term "proceedings" means that Section 76.7(g) of the Rules allows for stays of signal carriage obligations at least until a final decision subject to judicial review is handed down by the Commission. KREM-TV and KXLY-TV each replied to Quincy's comments on, respectively, May 21, and May 25, 1982. Both KREM-TV and KXLY-TV state that the proper procedure for requesting mitigation or remission of a forfeiture is set forth in Section 1.80(f)(3) of the Rules. On June 11, 1982, Quincy responded to the notice of apparent liability, requesting that action on the notice be held in abeyance pending Commission action on the instant "Petition for Reconsideration." However, upon examination of the thrust of Quincy's arguments on reconsideration, we will herein address the question of Quincy's forfeiture liability, rather than postpone consideration thereof as Quincy requests. *See* Section 1.80(f)(3) of the Rules.

registration and carriage rules for cable television systems. Quincy claims that, pursuant to Section 558(c) of the APA, the automatic stay provisions of Section 76.7(g) of the Rules, triggered by Quincy on November 27, 1979, may not be terminated until the Commission issues its final determination in this proceeding.

6. In support of its "Petition for Reconsideration," filed June 4, 1982, Quincy reiterates its prior arguments concerning the automatic stay provisions of Section 76.7(g) of the Rules, Section 408 of the Communications Act, and Sections 551 and 558 of the APA.[8] Quincy further argues that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as a final or an effective order. In addition, Quincy now contends that none of the Spokane stations can assert mandatory carriage rights on Quincy's system. Section 76.57 of the Rules permits such rights to be asserted by a " . . . relevant licensee . . . . " According to Quincy, this does not include the Spokane licensees, whose signals, Quincy claims, neither serve nor reach Quincy, Washington. Quincy asserts that the only over-the-air service available to its community is from the translators which rebroadcast the Spokane signals. These translators are licensed to Quincy Valley TV Inc. (hereinafter "Quincy Valley"), which has never requested carriage of its signals. Quincy further argues that Section 312 of the Communications Act requires certain procedures before the Commission may find violation of a rule or regulation, which were not afforded prior to the issuance of *Quincy II* or *Quincy IV*. Quincy challenges the summary disposition of its argument concerning Section 408 of the Communications Act in *Quincy IV* at n. 11, and maintains that the ten-day compliance order of *Quincy II* " . . . is illegal and of no effect."

7. KHQ-TV filed its opposition on June 17, 1982. Initially, KHQ-TV argues that Quincy's petition is procedurally defective, as it alleges no new facts or changed circumstances concerning the signal carriage at issue, and is more properly directed to the notice of apparent liability insofar as it challenges the forfeiture authorized in *Quincy IV*. KHQ-TV contends that Sections 1.102(b)(1), 1.102(b)(3), and 1.115(h)(2) of the Rules clearly indicate that issuance of a stay of an action taken by delegated authority is discretionary on the part of the Commission, and that the Commission in its discretion herein decided not to issue a stay. Accordingly, maintains KHQ-TV, Quincy was obligated to comply with the order of *Quincy II*. KHQ-TV further contends that at this date, Quincy's argument based on Section 408 of the Communications Act has become moot by the passage of time.[9] With regard to Quincy's argument concerning the automatic stay,

[8] Quincy also argues that the automatic stay represents an "exemption" within the meaning of Section 551(8) of the APA.

[9] KHQ-TV notes that Quincy apparently resumed carriage of KHQ-TV on June 3, 1982. *See also* note 10, *infra*.

KHQ-TV argues that were this argument to be accepted, "it would jeopardize the Commission's entire temporary authorization and waiver granting process." In any event, asserts KHQ-TV, *Quincy II* denied any continuance of temporary relief, terminating the automatic stay. KHQ-TV maintains that its status as a significantly viewed signal in Grant County makes it a relevant licensee to assert carriage rights, pursuant to Section 76.57(a)(4) of the Rules, as the Commission noted in *Quincy IV* at 1128–1129 n. 1.

8. KREM-TV opposed Quincy's petition on June 17, 1982. KREM-TV notes that it is entitled to be carried on Quincy's system, pursuant to Section 76.57(a)(4) of the Rules. In addition, citing *Friendly Broadcasting Co.* (Cleveland Heights, Ohio), FCC 62–670, 23 RR 2d 893, 897 (1962), KREM-TV contends that the Commission's forfeiture sanctions are separate and distinct from those authorized by Section 312 of the Communications Act. KREM-TV argues that the Commission's forfeiture sanctions are authorized by Sections 501 and 503 of the Communications Act and Section 558(b) of the APA, and characterizes the automatic stay provisions of Section 76.7(g) of the Rules not as a "license" but as "relief" within the meaning of Section 551(11)(c) of the APA. Finally, KREM-TV notes that Quincy was not assessed a forfeiture until after it had been given a chance to comply with *Quincy II* and failed to do so.

9. KXLY-TV opposed Quincy's petition on June 17, 1982. KXLY-TV again argues that Quincy's May 14, 1982 letter should be stricken, as should Quincy's May 25, 1982 letter. KXLY-TV characterizes Quincy's "Petition for Reconsideration" as repetitive, and ". . . limited to . . . strained legalistic contentions. . . ." KXLY-TV asserts that Quincy has misrepresented facts concerning its signal complement from the inception of this proceeding, in the face of which the $5,000 forfeiture imposed is justified. KXLY-TV states that it is the relevant licensee and party-in-interest to request carriage as the Quincy Valley translators rebroadcast the Spokane signals only with their consent. Finally, KXLY-TV contends that Section 312 of the Communications Act is not applicable to Quincy because it is not a broadcast licensee.

10. Quincy filed its "Reply to Oppositions" on June 23, 1982. Quincy claims that neither Commission nor Bureau orders are self-effectuating, even on thirty days' notice, and reiterates its first amendment arguments. In addition, Quincy asserts that, pursuant to Section 704 of the APA, *Quincy II* was inoperative pending review by the Commission, or was subject immediately to judicial review. Absent these safeguards, Quincy maintains, first amendment rights and freedoms would be intolerably deferred. Quincy reiterates its prior arguments challenging the Commission's application of Section 1.102 of the Rules, by which the Commission in *Quincy IV* found *Quincy II* to have been final and effective on release, and contends

that Section 1.102 of the Rules is in conflict with Section 408 of the Communications Act.[10]

Discussion

11. To avoid controversy, and to expedite and narrow the issues in this proceeding, the Notice of Apparent Liability was issued only for rule violations commencing on or after May 18, 1981. In the Bureau Chief's *Quincy II* decision, Quincy was ordered to resume carriage of the signals in question within ten days; *i.e.*, by August 28, 1981. Quincy now argues that this order should not have been issued without the type of hearing described in Section 312(c) of the Communications Act[11] first having been held, and also that, pursuant to Section 408 of the Communications Act,[12] no order should have specified an effective date less than 30 days from service of it on Quincy. Since the forfeiture notice issued was for violation of the rules and not an *Order* of the Commission and since it was for violations continuing more than 30 days after service of the *Memorandum Opinion and Order* denying Quincy's waiver request (*Quincy II*), a resolution of both of these arguments in favor of Quincy would not result in any change in the outcome of this proceeding. We need not therefore address in detail Quincy's arguments. We would note, however, that Congress recently amended Section 408 to provide explicit authority for the Commission to make orders effective on less than 30 days' public notice. *See* H. R. Rep. No. 97–765, 97th Cong., 2d Sess. 58 (1982).[13]

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[10] On July 8, 1982, Quincy filed a "Motion for Expedited Determination." Quincy initially states that it has complied with *Quincy IV*, having ". . . commenced carriage of those Spokane, Washington broadcast station signals, via translators, to the preclusion of other programming of its choice, on June 3, 1982." Quincy again contends that *Quincy II* was not a final nor effective decision, citing, *inter alia*, S. Rep. No. 576, 87th Cong., 1st Sess. 7 (1961), and Sections 5(d)(3) and 5(d)(4) of the Communications Act.

[11] Section 312(c) of the Communications Act states, in pertinent part:

> Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein.

[12] Section 408 of the Communications Act states, *in pertinent part*: "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect with such reasonable time, not less than thirty days after service of the order. . . ."

[13] We note, with respect to Quincy's arguments concerning Section 312 of the Communications Act, that this section is manifestly not meant to

12. The second argument raised relates to compliance with the requirements of the APA. Section 558(c) of the APA specifies that if a proper application for a new license or for renewal of a license is on file, the existing license "does not expire until the application has finally been determined by the agency." This provision is urged to be relevant in the present context because "license" is a defined term in Section 551(8) of the APA, which includes "statutory exemption or other form of permission." If the exemption from the mandatory signal carriage rules provided Quincy during the pendency of its waiver application is an APA "license" then arguably that license continues in force past the time of the Bureau Chief's decision until the matter is finally determined by the agency. If this were the case, no rule violation could be said to have occurred. However, Section 551(8) of the APA, in defining the term "license," does not refer to exemptions in general, but only to "statutory exemption[s]" as well as other traditionally understood forms of "permission" or "registration." A request such as Quincy's *not* to carry signals required by law is not included in this definition. It is Section 551(11) of the APA which refers to "exemption[s]," as well as other actions beneficial to persons upon application therefor, defining such actions and exemptions as "relief," apart from the APA's concept of licenses and licensing procedures.[14]

13. A third argument made is that specific provisions of the Commission's Rules provide Quincy with protection from having to comply with the mandatory carriage rules until such time as the administrative processes relating to its waiver petition are complete. Seection 76.7(g) of the Rules provides that if a waiver petition is timely filed, a cable system "need not carry the signal of the requesting station pending the Commission's Ruling on the petition or on the question of temporary relief pending further proceedings." Quincy interprets this to mean that, so long as a request for stay or a petition of some type remains pending, compliance is automatically excused.

14. This is a misinterpretation of the import of Section 76.7(g) of the Rules. This rule had its genesis in former Section 74.1109(h) of the Rules, which allowed the timely filing of an appropriate petition for waiver to stay a carriage requirement ". . . pending the Commission's ruling on the petition or on the interlocutory question

circumscribe forfeiture proceedings instituted pursuant to Section 503 of the Communications Act, which are of a separate and distinct nature. *American Cable Television, Inc.* (Fountain Hills, Arizona), FCC 81-555, 88 FCC 2d 593, 604 (1981); *Star Stations of Indiana, Inc., et al.*, FCC 71-365, 28 FCC 2d 691, 692 (1971); *Friendly Broadcasting Co.*, 23 RR 2d at 897. *Cf. Midwest Television, Inc. (KFMB-TV), et al.*, FCC 66-683, 4 FCC 2d 612, 622-623 (1966) (Section 312 does not circumscribe temporary relief provisions of waiver rules).

[14] Moreover, we note that Section 558(c) of the APA specifically refers to ". . . a license required by law," which does not contemplate a request *not* to carry signals otherwise required by rule or law.

of temporary relief pending further procedures." The further procedures referred to, however, were only those supplementary to the standard written submissions at the inception of a waiver proceeding, in those few cases in which written submissions alone were insufficient to resolve the pending matter. *Second Report and Order in Docket Nos. 14895, 15233, and 15971*, FCC 66–220, 2 FCC 2d 725, 764–766 (1966). *See also Memorandum Opinion and Order in Docket No. 15971*, FCC 66–354, 3 FCC 2d 400, 401–402 (1966). This is echoed in the current rules, in Section 76.7(f) of the Rules, which states in pertinent part: "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party *pending the hearing* and the nature of any such temporary relief." (emphasis added). In proceedings involving questions of television broadcast signal carriage, however, the evidentiary hearings required by the 1966 cable television rules were found to be unnecessarily burdensome, and were eliminated in 1968. *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 148 (1972); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, FCC 68–1176, 15 FCC 2d 417, 432–434 (1968). Nevertheless, the Commission stated that it had ". . . retained special relief rules." *Cable Television Report and Order*, 36 FCC 2d at 186, in this instance Section 76.7(g) of the Rules, allowing for an automatic stay of carriage requirements ". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings." The actual change in language was, apart from conforming editorial changes to new rule numbers, to delete the word "interlocutory" from the rule, and to substitute the word "proceedings" for "procedures." However, we do not agree that successive filings of requests for stay will prolong indefinitely the automatic stay of Section 76.7(g) of the Rules. Such an effect was not contemplated nor intended by former Sections 74.1109(f) and 74.1109(h) of the Rules. Indeed, in view of the Commission's desire to avoid burdensome special relief proceedings, we do not read Section 76.7(g) as allowing an automatic stay beyond the time that the Commission (or its designated authority) acts on an initial petition for relief. Accordingly, while Quincy's timely filed petition for waiver in 1979 stayed Quincy's carriage obligations vis-a-vis the affected stations, this automatic stay expired upon the resolution of *Quincy I*.

15. While Quincy argues that Section 704 of the APA either rendered the Bureau Chief's decisions in *Quincy I* and *Quincy II* inoperative pending review by the full Commission, or subjected them immediately to judicial review, we disagree. Section 704 of the APA states, in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final *for the purposes of this section* whether or

> not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule *and* provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §704 (1977) (emphasis added). While Section 5(d)(7) of the Communications Act and Section 1.115(k) of the Rules make the filing of an application for review a condition precedent to judicial review of delegated actions, neither Sections 5(d)(3) nor 5(d)(4) of the Communications Act grants an automatic stay on such a filing. In fact, Section 1.102(b) of the Rules states that stays of delegated actions are discretionary.[15] Nor do we feel that our existing procedures for rehearing constitute either a prior restraint or an intolerable deferral of access to review in contravention of the first amendment, which would be impermissible under, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[16] Finally, nothing in Quincy's numerous arguments gives us any justification for a mitigation of the $5,000 dollar forfeiture.[17]

In view of the foregoing, we find that grant of Quincy's petition is not in the public interest.

Accordingly, IT IS ORDERED, That the "Motion to Strike" filed May 17, 1982, by King Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Strike" filed May 18, 1982, by Spokane Television, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed June 4, 1982, by Quincy Cable TV, Inc. IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, That Quincy Cable TV, Inc. FORFEIT to the United States the sum of five thousand dollars ($5,000) for willful or repeated violation of Section 76.57(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal

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[15] *See also* Section 705 of the APA, Section 405 of the Communications Act, and Section 1.106(n) of the Rules, setting forth *the* discretionary nature of stays on the part of an agency.

[16] With regard to Quincy's contention that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as an effective or final order, we do not read the APA so rigidly, nor have the courts. *See, e.g., FTC v. Standard Oil Co. of California*, 101 S.Ct. 488, 493 (1980). *Cf. Bucks County Cable TV, Inc. U.S.*, 299 F.Supp. 1325, 1334 (E.D. Pa. 1969), *rev'd on other grounds*, 427 F.2d 438 (3d. Cir. 1970), *cert. denied*, 400 U.S. 831 (1970) (automatic stay constitutes final action).

[17] We also note an erroneous reference to an obligation on Quincy's part to carry the signal of Station KALB-TV (NBC, Channel 5), Alexandria, Louisiana, in *Quincy II* at 66. This was an editorial error, and is rescinded.

Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of this Memorandum Opinion and Order, the case will be referred to the Department of Justice for collection, pursuant to Section 504(a) of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order shall be sent by Certified Mail — Return Receipt Requested to Quincy Cable TV, Inc.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Dissenting Statement
of
Commissioner Anne P. Jones

In Re: Petition for Reconsideration filed June 4, 1982, by Quincy Cable TV, Inc.

When this case first came before the Commission on April 22, 1982, I reluctantly concurred in affirmance of the Bureau Chief's denial of the relief requested by Quincy Cable. On reconsideration, I have concluded that Quincy should be granted that relief.

In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps must as a matter of law, rest with Quincy Cable.

Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest that any of the stations target any of their programming to Quincy.

Quincy Cable insists that it is constitutionally entitled to use its limited channels to provide its customers with programming of its and their choice brought in from Seattle and elsewhere. I believe it may be correct.

In its April 22, 1982, Memorandum Opinion and Order, the Commission answered Quincy Cable's constitutional arguments in part by asserting that in footnote 16 to its decision in *Midwest Video II* the U.S. Supreme Court "distinguished the mandatory signal carriage rule [from the access rules in question in that case] and reconfirmed their validity." 89 F.C.C. 2d 1135. It seems to me,

though, that read in context, that footnote does nothing more than distinguish these rules.

If we are to infer law from footnotes, I believe that for purposes of the present case footnote 19, in *Midwest Video II* is more significant than footnote 16. In footnote 19, the Supreme Court noted the opinion by Chief Judge Markey for the U.S. Court of Appeals for the Eighth Circuit in that case and said:

> "The Court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forego comment on these issues as well." 440 U.S. 709

Footnote 19 seems a virtual invitation by the court for a proper case in which to consider the constitutional arguments pressed so insistently by Quincy Cable in this one. Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

I therefore respectfully dissent.

Political Broadcasting, Reasonable Access Rule
Political Candidate, Federal Candidate, Reasonable Access

Petitions to issue Notice of Inquiry for overall renewal/revocation approach to implement Section 312(a)(7) denied. Section 312(a)(7) of Communications Act (reasonable access) requires affirmative right of access to use of broadcast facilities by candidates for federal office.
–Renewal/Revocation Approach

FCC 83–47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Adoption of an overall renewal/revocation approach to implementation of 47 USC §312(a)(7)	RM-3821

MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1983; Released: February 8, 1983)

BY THE COMMISSION:

1. The Commission has before it petitions filed by the National Telecommunications and Information Administration (NTIA) and Henry Geller which seek the issuance of a Notice of Inquiry concerning the Commission's implementation of Section 312(a)(7) of the Communications Act of 1934, as amended.[1] Comments were submitted by the National Citizens Committee for Broadcasting (NCCB), and the American Broadcasting Companies, Inc. (ABC).[2]

2. NTIA's petition urges the Commission to abandon its case-by-

[1] Section 312(a)(7) provides:

(a) The Commission may revoke any station license or construction permit—

(7) for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

On September 17, 1981, the Commission recommended to Congress that it repeal Section 312(a)(7), as well as Section 315 and the Fairness Doctrine. In this connection, we will continue to enforce these laws as long as they remain in effect.

[2] NTIA's petition was filed by its then director, Mr. Henry Geller, on December 11, 1980. NCCB's comments were filed February 13, 1981. ABC's comments were filed February 26, 1981. Mr. Geller filed his "Petition to Issue Notice of Inquiry" on September 8, 1981. It was filed subsequent to the U.S. Supreme Court's decision in

case approach to reasonable access determinations because such a procedure is inconsistent with the language of the statute, its legislative history and sound administrative policy. In this regard, NTIA suggests that the Commission adopt an approach of determining whether a station or network failed to afford reasonable access on an "overall" basis at either renewal time or upon institution of a revocation proceeding for willful or repeated violations.

3. With respect to the language of Section 312(a)(7), NTIA believes that the Commission has inappropriately proceeded on the basis that a licensee shall grant each federal candidate's request for use of a station's facilities unless such requests are deemed unreasonable, and that the Commission has the authority to review any specific denials to determine whether a licensee acted in an arbitrary fashion and, in effect, failed to afford reasonable access. NTIA argues that Congress chose its language (i.e., willful or repeated failure to allow reasonable access) because "it recognized the clear inappropriateness of proceeding case-by-case." NTIA contends that Congress imposed a reasonable access requirement, desiring the licensee to be held "broadly accountable" to avoid "interference with day-to-day editorial decisions." NTIA asserts that if Congress wanted the Commission to review each request on a case-by-case basis, it would have drafted a statute reflecting this intention. In this connection, NTIA maintains the absence of such language indicates that Congress deliberately avoided such scrutiny by the Commission.

4. NTIA urges that this overall approach reflects the congressional goal for the Commission, consistent with its oversight of the public interest standard, to "judge whether a licensee's overall performance indicates a sustained, good faith effort to meet the public interest in being reasonably informed concerning federal races."

5. NTIA contends that the legislative history of Section 312(a)(7) further supports its interpretation. In this regard, NTIA states that, although there is no extensive discussion of the specific language of the reasonable access provision, the overall approach is appropriate in light of congressionally stated goals to give candidates for public office greater access to the media to inform the voters more fully and completely. NTIA states that of equal importance is the fact that nothing in the legislative history indicates congressional intention for the Commission not to give the language and scheme its plain meaning; that is, that "the licensee is to afford *reasonable* access to use and the Commission is to enforce this obligation by revoking (or denying renewal) for willful or repeated failure to meet this obligation."[3] NTIA concludes that "Congress thus imposed a new

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the *Carter/Mondale* case (see note 4, *infra*). At the time of the latter filing, Mr. Geller was director of the Washington Center for Public Policy, but he has indicated that the views expressed are his own.

[3] In this regard, NTIA cites the following passage in the Senate Reports:

obligation for [f]ederal offices *but explicitly charged the Commission to continue with its existing enforcement policy of examining the obligation at renewal.*" (Emphasis added by NTIA.)

6. NTIA states that in addition to the plain language of the statute and its legislative history, sound policy compels the overall approach. In this respect, NTIA contrasts administration of the equal opportunities provision under Section 315(a) and the reasonable access provision. It states that in applying equal opportunities obligations, "the Commission can simply determine whether a candidate has been allowed to use the station; if so, equal opportunity follows in a rather mechanical objective fashion." Accordingly, NTIA states, "Clearly, individual case-by-case rulings are called for and are perfectly feasible." However, NTIA states that in "'reasonable access' situations, if the Commission proceeds to determine in each case whether the licensee's action in refusing a request is 'reasonable,' it is in a deep quagmire." In this context, NTIA believes that "[c]oncern with the individual action involves a deep intrusion into the day-to-day broadcast editorial decisions and the highly subjective process of review of a candidate's needs versus the station's judgment of those needs and its own needs."

7. NTIA suggests that by reviewing reasonable access performance on an overall basis, the Commission need not fear that the statutory purpose will be thwarted. In this connection, NTIA states

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Section 101(c) was added in Committee. It amends Section 312(a) of the Communications Act to provide that willful or repeated failure by a broadcast licensee to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of his station's facilities by a legally qualified candidate for [f]ederal elective office on behalf of his candidacy shall be grounds for adverse action by the FCC.

The duty of broadcast licensees *generally* to permit the use of their facilities by legally qualified candidates *for these public offices* is inherent in the requirement that licensees serve the needs and interests of the committees [sic] of license. The Federal Communications Commission has recognized this obligation in its *Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).* [S. Rep. No. 382, 92nd Cong., 1st Sess. 34 (1971); emphasis added by NTIA.]

Furthermore, NTIA states that "all doubt is settled by the discussion at page 28 of the [Senate] Report. After describing the 'lowest unit charge' provisions of Section 315, the Report states . . . ":

The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC *should continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license.* Certainly no diminution in the extent of such programming should result from the enactment of this legislation.

In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by the spending limitation in the legislation [candidates for federal office], S. 382 contains an express provision [Section 101(c)] to this effect. [Emphasis added by NTIA.]

that since "[l]icensees remain under a clear obligation to afford reasonable access, at the risk of losing their franchises, . . . [they] are most unlikely to act in derogation of that obligation." In the "unusual or rare case" that either complaints or its own investigation indicates "willful or repeated violations, the Commission can act promptly by instituting revocation proceedings, and, before the end of the campaign, can also proceed to obtain immediate relief." Further, NTIA states the Commission can utilize a reporting procedure for determining after any particular election whether "reasonable compliance has been achieved." Additionally, NTIA believes the Commission can continue to provide guidance to both licensees and candidates, and, if necessary, issue policy statements. NTIA contends that these procedures are sufficient to satisfy the goals intended by Congress and do not bring into possible jeopardy a broadcaster's license because so long as "it has acted reasonably on an overall basis, its renewal is assured."

8. NTIA indicates its approach is more in line with the First Amendment. In this respect, it cites *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973), in which the Court stated that "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty." NTIA adds that the Commission itself has acknowledged in previous rulings that it is engaged in precisely such balancing.

Comments

9. The NCCB has filed an opposition to NTIA's petition. NCCB states the Commission has previously considered and rejected the same "'overall' approach" regarding the Fairness Doctrine based in large part on its belief that the public would otherwise be deprived of timely debate on controversial public issues. NCCB contends that because questions concerning reasonable access are in the political arena, the need for timely review is of critical significance since it "could mean the difference between victory and defeat for a particular candidate." Furthermore, rather than implementing congressional intent, NCCB believes that, contrary to NTIA's assertions, the plain language and legislative history of Section 312(a)(7) mandates the complaint procedures implemented by the Commission. NCCB contends that by deferring review until license renewal time or, as NTIA has stated, upon instituting revocation proceedings, the congressional goal of affording candidates greater media access would be severely undermined by the inability to act expeditiously. Further, NCCB asserts that "[a]lthough Congress authorized license revocation for Section 312(a)(7) violations, lesser included penalties have not been ruled out."

10. NCCB asserts that the consistent case-by-case approach implemented by the Commission should be deferred to because "[t]he

construction of a statute by those charged with its administration 'should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.'" (Citations omitted.) *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *CBS v. Democratic National Committee*, 412 U.S. at 121. NCCB adds that nothing in the present scheme eliminates the potential for implementing the most severe penalty of denying renewal or revoking a license. The Commission's approach merely allows for timely determinations when necessary to prevent the thwarting of Congress' goals in enacting Section 312(a)(7).

11. NCCB asserts that in addition to being inconsistent with the plain language of Section 312(a)(7) and its legislative history, NTIA's overall approach is inconsistent with the First Amendment. In this regard, NCCB cites *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976), in which the Court stated:

> [I]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

NCCB believes that this clearly illustrates that under the First Amendment people are entitled to hear discussion of political issues "before election day" and clearly candidates are entitled to communicate their positions "before the votes have been tallied." Without the case-by-case implementation, argues NCCB, the immediate consideration of specific situations needed to guarantee what Congress and the Courts intend would not be possible.

12. NCCB agrees that the overall approach suggested would "have the advantage of escaping the 'heated political climate' during an election campaign," but it asserts that it is this very climate which makes immediate consideration so critical. NCCB states that "only during the campaigns, not afterwards, can the Commission insure that the outcome of the election is an accurate reflection of the collective decisions of an informed public." In addition, NCCB notes that Section 315(a), the equal opportunities provision, creates a right of reply in favor of a candidate's opponents, and thereby mitigates any effect of "non-neutrality." In sum, NCCB believes that "NTIA has failed to advance any compelling reasons for altering [the Commission's present] practice" of considering Section 312(a)(7) matters on a case-by-case basis.

13. ABC's filing contains no substantive comment due to its involvement as a party to the *Carter/Mondale* [4] litigation which was pending before the Supreme Court at the time of its submission. ABC

[4] *Carter/Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979), *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub nom. CBS v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

suggests that interested parties be afforded an opportunity to participate after the Supreme Court rules.

14. As noted above, Mr. Geller's petition was submitted subsequent to the Supreme Court's decision in *Carter/Mondale*. *See supra* note 2. With respect to the Court's decision which, *inter alia*, upheld the Commission's case-by-case approach, Geller states that: "Significantly, the Court's holding does not rule on the main point of the NTIA petition — that as a matter of sound policy, the Commission should implement [S]ection 312(a)(7) on an overall basis—either at renewal or by revocation." Thus, he argues, the Commission still has the discretion to adopt the overall implementation policy suggested by NTIA, "if it finds that it would better serve the public interest."

15. Geller urges the Commission to adopt a procedure whereby it would intervene when it appears a "licensee is acting willfully (i.e., in bad faith) . . . or repeatedly to violate the reasonable access provision." Geller suggests that, additionally, the Commission should continue to afford guidance through general inquiry or rulemaking as it has in the past, "and by issuing declaratory rulings *at the request of the broadcaster, but not the candidate*." (Emphasis added by Geller.) Geller contends that this approach reflects two prior Supreme Court decisions: *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *CBS v. Democratic National Committee*, 412 U.S. 94 (1973), because each requires "breathing space" for the licensee's day-to-day editorial judgment.

16. Geller also asserts that consistent with the Commission's present goal of creating and fostering broadcast diversity, "there should obviously be a 'letting go' process as to the existing system. . . ." In this context, Geller asserts that our case-by-case policy "constitutes the old Commission attitude of 'business as usual,' with a government agency deeply involved in individual judgments best left to licensee editorial decisions."

Discussion

17. Having fully considered the petitions and the comments, we remain convinced that our case-by-case implementation of reasonable access under Section 312(a)(7) is contemplated by the statute and is consistent with congressional legislative intent and sound Commission policy. Moreover, we believe that the Supreme Court's recent decision in review of *Carter/Mondale* clearly supports this determination.

18. In accordance with the statute and congressional intent to foster the communication of ideas in the federal political arena, we adopted a case-by-case approach to implement Section 312(a)(7) in order to insure that the candidate, and ultimately the electorate, would benefit in a timely fashion from the intent of the reasonable access provision. Unless we maintain a posture of acting upon individual complaints, even where a licensee's actions may not be

willful, the timely resolution of disputes would be impossible. Furthermore, there is no indication in the legislative history that Congress intended to limit Commission action to overall review at renewal or upon revocation proceedings. The language which NTIA excerpts from Section 312(a)(7)'s legislative history, *see supra* note 3, and which it claims settles "all doubt," refers only to a licensee's obligations "in connection with the renewal of . . . [its] broadcast license." If Congress intended only the "overall" review at renewal time suggested by NTIA and Mr. Geller, it would not have placed the statute in the revocation section of the Act, since revocation is a procedure used *during* a license term. By prescribing revocation Congress demonstrated its intention for timely Commission enforcement of the reasonable access provision. In addition, it seems plain that the language in the legislative history concerning renewal and revocation merely refers to ultimate sanctions that might be imposed by the Commission and does not suggest that Congress intended these to be the exclusive administrative remedies. Finally, our administrative approach to the political arena has consistently been predicated upon the desirability of timely Commission review. In this connection, we cannot perceive how the public interest would be served if candidates for public office were denied access and the Commission took action only months or years after the election.

19. Congress has indicated that the purpose of the Federal Election Campaign Act (FECA), of which Section 312(a)(7) was a part, is:

> . . . to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters. [117 Cong. Rec. 28792 (1971).] We believe that these stated goals would be frustrated if individual complaints concerning denial of reasonable access could not be reviewed by the Commission to determine if, in fact, a broadcaster is in compliance. By deferring consideration as suggested by NTIA it would be impossible to protect both the candidate and the people to whom each candidate needs to communicate.

20. We also emphasize that the Commission, in an effort to clarify its regulatory role with respect to reasonable access, issued in 1978 a Notice of Inquiry concerning its policy in enforcing Section 312(a)(7) and afforded interested parties an opportunity to comment on the full range of our administration of the statute.[5] No commenting party recommended that the Commission stop its practice of reviewing reasonable access complaints on a case-by-case basis. Further, nothing contained in the comments led the Commission to conclude that its policy of reviewing reasonable access matters

[5] *In re Commission Policy in Enforcing Section 312(a)(7)*, 68 FCC 2d 1079 (1978).

through the individual complaint process should be modified or changed.

21. Since the enactment of Section 312(a)(7) the Commission has implemented a policy of reviewing reasonable access complaints to determine if a broadcaster has complied in a specific situation. In every instance, the Commission's policy, with respect to the broadcaster, has been and continues to be deference to the good faith determinations of its licensees. In this way we believe the day-to-day editorial judgments of licensees are protected insofar as possible. Nothing in the language of this provision or in its legislative history suggests that any other course is required. Furthermore, in light of the Commission's recent "deregulation" rule changes, specifically with respect to renewal periods, the case-by-case policy is even more appropriate. If, as NTIA and Geller suggest, the Commission were to adopt an overall approach to reasonable access, the new seven-year renewal period for radio and the five-year renewal period for television could further damage the purpose behind the reasonable access provision. For instance, four general elections involving federal candidates could be held before the Commission might consider the access afforded by a radio station, and as many as three such elections with respect to television. It is not likely that Congress intended this potential result.

22. Both NTIA and Geller express concern with "intrusion" into the day-to-day judgments of licensees. However, the reasonable access provision requires timely oversight by the Commission, which in certain cases cannot be satisfactorially implemented by delaying consideration until renewal time. It should be noted with respect to petitioner's concern with potential intrusion that we become involved in individual controversies as little as possible by encouraging negotiation between complainants and individual broadcasters. Most complaints are resolved by such negotiation. Thus, the "intrusion" which NTIA and Mr. Geller are most concerned with is not characteristic of the Commission's implementation. In addition, without the benefit of Commission input on an individualized basis, the broadcaster might be inhibited in its reasonable access judgments because of a lack of guidance from the Commission during particular campaign situations. Mr. Geller's suggestion that this problem could be remedied by permitting the broadcaster but not the candidate to seek guidance is inconsistent with the clear intent of Congress that reasonable access be afforded on an individual basis to federal candidates.

23. NCCB, in its opposition to NTIA's petition cited *Red Lion* and *CBS v. Democratic National Committee* for the proposition that the Commission's construction of the statute ""should be followed unless there are compelling indications that it is wrong, [and] especially when Congress has refused to alter the administrative construction."" (citations omitted.) Further weight is given this

principle in *United States v. Rutherford*, 442 U.S. 544, 554 (1979), in which the Court, in referring to *Red Lion*, 395 U.S. at 381, stated that "[s]uch deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."

24. The recent decision by the Supreme Court in *Carter/Mondale* which affirmed the Commission's ruling adds specific judicial acceptance of the Commission's implementation of Section 312(a)(7). *See supra* note 4. *Carter/Mondale* began with an October 1979 complaint from the Carter/Mondale Presidential Committee stating that the three major television networks had denied reasonable access to President Carter in violation of Section 312(a)(7). The Carter/Mondale Committee indicated that it had attempted to purchase one prime time 30-minute program slot for early December 1979, and was unreasonably refused.

25. On November 20, 1979, the Commission found each network had acted unreasonably and directed them to advise the Commission by November 26, 1979, of their intentions regarding compliance with Section 312(a)(7). In reaching this decision, the Commission evaluated whether the campaign had begun for purposes of Section 312(a)(7) by considering the positions of both the candidate and the broadcaster as well as an abundance of objective indicia. Based on its evaluation, the Commission found that the only reasonable conclusion was that the campaign was in full swing and that the networks' policies amounted to the type of arbitrary blanket ban that had been previously deemed to be unreasonable.

26. The networks sought Commission reconsideration of this ruling which was denied. The Court of Appeals affirmed the Commission's decision describing the access created by 312(a)(7) as an affirmative right of access for candidates seeking federal elective office. The Court rejected the networks' assertion that Section 312(a)(7) was merely intended to codify prior Commission practice[6] and found that it was intended to create a new right of access for *individual* candidates for federal office. The Court of Appeals also expressed approval of the procedures and standards that the Commission had designed to implement the statute and concluded that, as so implemented, Section 312(a)(7) does not unconstitutionally intrude upon broadcasters' editorial discretion.

27. In affirming, the Supreme Court made a number of statements which are relevant to the instant petition. The Court stated:

[6] Prior to 1972, the Commission, under the public interest standard, had required that some time be made available for political broadcasts. However, no individual candidate had a right to buy time. Instead, the broadcaster was left with considerable discretion to determine what political programming to present based on its reasonable, good faith judgment about the importance and interest in particular races.

The Federal Communications Commission is the experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and the Commission is responsible for implementing and enforcing §312(a)(7) of the Communications Act. Accordingly, its construction of the statute is entitled to judicial deference "unless there are compelling indications that it is wrong . . .." *Red Lion Broadcasting Co. v. FCC, supra*, at 381. As we held in *CBS v. Democratic National Committee, supra*, at 120, the Commission must be allowed to "remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." Like the Court of Appeals, we cannot say that the Commission's standards are arbitrary and capricious or at odds with the language and purposes of §312(a)(7). See 5 U.S.C. §706(2)(A). *Indeed, we are satisfied that the Commission's action represents a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith.* [*Id.* at 390, (emphasis added.)]

28. Furthermore, there is no question that the Court considered the Commission's case-by case policy for implementing reasonable access. In this connection, the Court stated:

As it did here, the Commission, with the approval of broadcasters, engages in case-by-case adjudication of Section 312(a)(7) complaints rather than awaiting license renewal proceedings. See Tr. of Oral Arg. 11–16. Although the penalty provided by Section 312(a)(7) is license revocation, petitioners simply were directed to inform the Commission of how they intended to meet their statutory obligations . . .. In essence, the Commission entered a declaratory order that petitioners' responses to the Carter-Mondate Presidential Committee constituted a denial of "reasonable access." Such a ruling *favors broadcasters by allowing an opportunity for curative action before their conduct is found to be "willful or repeated"* and subject to the imposition of sanctions. [*Id.* at 394 n. 15; (emphasis added).]

29. With respect to NTIA and Mr. Geller's contention that overall review is consistent with the public interest standard, the following statement by the Court is pertinent.

It is clear on the face of the statute that Congress did not prescribe merely a general duty to afford some measure of political programming, which the public interest obligation of broadcasters already provided for. *Rather, §312(a)(7) focuses on the individual "legally qualified candidate" seeking air time to advocate "his candidacy," and guarantees him "reasonable access" enforceable by specific governmental sanction.* [*Id.* at 377–78; (emphasis added).]

It is quite apparent from the above passages that, contrary to Mr.

Geller's arguments, the Court did consider our case-by-case approach and concluded that the Commission's implementation has been consistent with the intent of Congress.

Conclusion

30. The Commission's case-by-case implementation of Section 312(a)(7) follows the statute and Congressional intent. In the ten years since Section 312(a)(7) became law, Congress and the Courts have approved our method of enforcement and have not seen fit to alter the administrative scheme. We believe that the case-by-case approach is consistent with the public interest because, unlike the "overall" approach, it helps to assure that the electorate is adequately informed prior to individual elections. Case-by-case review does not in any way diminish our ability to review a licensee's compliance on an overall basis at renewal or to initiate revocation for willful violations. Furthermore, in 1978 we offered interested parties an opportunity to comment on our reasonable access enforcement. The difference between 1978 and today is the fact that the Supreme Court has now recognized the appropriateness of our policies.

31. Accordingly, the petitions of NTIA and Henry Geller to issue a Notice of Inquiry urging an overall renewal/revocation approach to the implementation of Section 312(a)(7) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Application, for Review, See Also Review
Review by Commission

Section 1.115(e)(3) of the Rules revised to state that applications for review of hearing designation orders issued under delegated authority shall be deferred until applications for review of final Review Board Decision in case are filed, unless the ALJ certifies the matter to the Commission.
–Revision of Sec. 1.115(e)(3)

FCC 83-90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revision of

Section 1.115 (e) (3) of the Commission's Rules and Regulations, Applications for Review of Hearing Designation Orders Issued under Delegated Authority

ORDER

(Adopted: March 3, 1983; Released: March 14, 1983)

BY THE COMMISSION:

1. The Commission has determined that the prompt and orderly conduct of its adjudicatory proceedings necessitates a change in Section 1.115(e)(3) of our Rules and Regulations to provide that applications for review of hearing designation orders issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. The revised rule permits the presiding Administrative Law Judge to certify an application for review of a designation order to the Commission if the Judge determines that the application for review involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. In addition, the revised rule provides that the Commission may refuse to entertain an application for review so certified and direct that objections to the hearing designation order should be deferred and raised when applications for review of the final Review Board Decisions are filed.[1]

[1] *Cf.* 28 U.S.C. 1292(b), which provides United States Courts of Appeals with

2. Authority for this revision of our Rules and Regulations is contained in Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended.[2] Because this revision relates to a matter of procedure, the procedural and effective date provisions of Section 4 of the Administrative Procedure Act[3] are not applicable.

3. ACCORDINGLY, IT IS ORDERED, That on the date that this Order is published in the Federal Register, Section 1.115(e)(3) of the Commission's Rules and Regulations IS REVISED as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

In Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations, Section 1.115(e)(3) is revised to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * * * *

(e)(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when applications for review of the final Review Board Decision are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

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authority to entertain appeals of certain interlocutory orders when the district judge states that an order, not otherwise appealable, involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

[2] 47 U.S.C. 154 (i) and (j) and 303 (r).

[3] 5 U.S.C. 553.

Suburban Community 307(b) Issue
Suburban Community-FM Station

Report and Order adopted eliminating the suburban community policy, used in licensing AM stations, and its FM corollary, the *Berwick* doctrine. Henceforth, the Commission will presume that compliance with rules pertaining to service to community of license will indicate an applicant's intent to serve that community and not a nearby central city.
–*Suburban Community Policy*
BC Docket No. 82–320

FCC 83–81

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of The Suburban Community Policy, the *Berwick* Doctrine, and the *De Facto* Reallocation Policy	BC Docket 82–320

REPORT AND ORDER

(Adopted: February 17, 1983 Released: March 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP DISSENTING IN PART AND ISSUING A STATEMENT.

Introduction

1. Before the Commission is the *Notice of Proposed Rulemaking*, 47 Fed. Reg. 29282, published July 1, 1982 and the comments filed in response to that *Notice*. In the *Notice*, the Commission sought comment on whether the public interest requires the continuation of three policies used in the licensing of radio and television stations. The policies, adopted to aid the Commission in fulfilling its responsibilities under § 307(b) of the Communications Act, 47 U.S.C. § 307(b), are the suburban community policy, used in authorizing AM radio, and the *Berwick* doctrine and the *de facto* reallocation policy, used in authorizing FM radio and television stations. We have reviewed carefully the comments filed in this proceeding. The comments indicate that the policies frequently are used for anticompetitive purposes. Commenting parties also contend that the policies have frustrated rather than furthered the goals of § 307(b) by inhibiting

the establishment of stations in small communities located nearby larger ones. Consequently, based on our analysis of the comments and for the reasons that follow, we believe that the mandate of § 307(b) can be fulfilled without reliance on these policies which, we conclude, no longer serve the public interest and should be eliminated. We emphasize, however, that elimination of these policies will not eliminate or modify § 307(b) of the Communications Act. Our obligation to implement that statutory responsibility continues and will be faithfully carried out.

Background

2. The *Notice* set out Commission responsibilities under § 307(b) of the Communications Act. Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Prior to the Radio Act of 1927, radio licensees generally were free to locate their radio stations in any preferred location subject to the then-existing minimal limitations against electrical interference. The result was "an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago, 40 stations; of New York, 38; of Philadelphia, 22; and of San Francisco, 22." 67 Cong. Rec. 5479 (1926) (remarks of Representative White). To dilute this concentration of radio stations in and around large cities, Congress enacted Section 9 of the Radio Act of 1927, which provided, *inter alia*, that

> the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operations, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

Pub. L. No. 69–632, ch. 169, § 9, 44 Stat. 1166. By this statutory provision, Congress authorized the newly created Federal Radio Commission "in passing upon a license to consider its proposed location and the area to be served" and directed the Commission to "effect an equitable geographical distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926).

3. Unsuccessful efforts were made to include in Section 9 language requiring the Commission to consider "the right of each state to have allocated to it" a certain quota of frequencies. 68 Cong. Rec. 2557 (1927). However, the following year, a compromise amendment to Section 9 was enacted which directed the Commission to allocate frequencies among five zones, each composed of several states. The frequencies were to be allocated in accordance with a formula based on population. Pub. L. No. 70–195, 45 Stat. 373. In 1934, Congress reenacted Section 9, as amended, into the Communications Act, as Section 307(b). Two years later, in 1936, Congress deleted the five-zone scheme, which had proved to be mechanistic

and unsatisfactory. This restored the original language of Section 9 of the Radio Act of 1927. Pub. L. No. 74–652, 49 Stat. 1475, 47 U.S.C. § 307(b). Thus, the legislative intent behind the original Section 9 of the Radio Act is still controlling today; namely, to effect an equitable geographical distribution of stations across the entire nation.

4. The Commission implemented § 307(b) in commercial FM radio and TV by establishing and incorporating in its rules a Table of Assignments for each service.[1] These tables provide for a distribution of channels to specific communities throughout the United States based, in part, on fixed mileage separations. The Commission determined that

> effectuation of the distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307(b)) . . . can best be achieved by the adoption of a Table of Assignments. . . .

Sixth Report and Order on Television Allocations, 41 FCC 148, 151 (1952). The licensing procedure for FM and television is a two-step process. Step one fulfills the § 307(b) obligation by making available for licensing only a frequency which has been assigned to a specific community on the Table of Assignments. If the applicant is desirous of utilizing the frequency in another community, he or she must petition for a rulemaking to amend the Table of Assignments. In step two of the licensing procedure, applications are processed in order to ascertain that the applicants have the requisite qualifications to be licensees of the Commission. If there is more than one applicant for a frequency, a comparative hearing takes place in order to determine the party most worthy of the grant. The *Notice* explained that Commission rules permit a station to be located within 15 miles (TV or Class B/C FM) or 10 miles (Class A FM)[2] of the community listed in the Tables.[3] If multiple applicants apply for a single frequency within the 15-mile or 10-mile limit, and these applications propose different communities of license, then a second § 307(b) determination is made during the comparative hearing.

5. In contrast, AM radio frequencies are allocated on a demand

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[1] *See, Sixth Report and Order on Television Allocations*, 41 FCC 148, 151–153 (1952). *Revision of FM Broadcast Rules*, 40 FCC 747, 757 (1963). 47 C.F.R. § 73.202 contains the FM Radio Table of Assignments and 47 C.F.R. § 73.606 contains the Television Table of Assignments.

[2] A Class A FM station is designed to render service to a relatively small community, city, or town, and the surrounding rural area. A Class B FM station is designed to render service to a sizeable community, city, or town, or to the principal city or cities of an urbanized area, and to the surrounding area. A Class C FM station is designed to render service to a community, city, or town, and large surrounding area.

[3] The 10- and 15-mile rule for FM is found at 47 C.F.R. §§ 73.203(b) of the rules. The 15-mile rule for TV is found at 47 C.F.R. § 73.607(b).

basis, with an applicant requesting the desired community and providing engineering exhibits to show the absence of harmful interference to existing stations. Section 307(b) considerations are made during the one-step proceeding to process the construction permit application. A hearing can result if petitions to deny are filed raising substantial and material questions of fact or if there are mutually exclusive applications.

6. Objectives and priorities guide the Commission's § 307(b) determinations. These set up preferences for applicants proposing to establish a station in an underserved community or in a community lacking broadcast service. Because the preferences are based on § 307(b) considerations, they can be conclusive in a mutually exclusive licensing contest.[4] The Commission feared that preferences could create incentives for applicants to try to prevail on the § 307(b) issue by designating as the community of license an underserved community proximate to a larger, more lucrative community, which was the intended recipient of the service. Thus, in an attempt to determine which community an applicant actually *intended* to serve, the Commission created the policies that are under study in this proceeding.

7. The suburban community-central city setting presented the Commission with its first occasion to test intent. Designation of a suburban community without a local transmission service could garner an applicant a § 307(b) preference while, at the same time, permitting coverage of the larger metropolitan community, not favored under § 307(b). Out of this situation, the suburban community policy was promulgated. The *Notice* stated that the suburban community policy, adopted in 1965 and modified in 1975 to apply principally in hearings involving mutually exclusive license applicants, is applicable where

> the applicant's proposed 5 mV/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community . . . a presumption will arise that the applicant realistically proposed to serve that larger community rather than its specified community.

Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 193 (1965) ("*Suburban Community*"). Related to this is the *Berwick* Doctrine, which applies the public interest considerations underlying the AM suburban community policy to FM radio and television, but without benefit of the presumption. *Berwick Broadcasting Corp.*, 12 FCC 2d (Rev. Bd. 1968); 20 FCC 2d 393 (1969); *sub. nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (Rev. Bd. 1973). *De facto* reallocation is

[4] *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 348 (1955).

> [a]n attempt to utilize a channel assigned to one community in order to establish a broadcast service in another community, thereby depriving the assigned community of service from that channel.

Hall Broadcasting Co., Inc., 71 FCC 2d 235, 237 (1979).

8. The *Notice* explained that the instant rulemaking proceeding was prompted, in part, by a remand of *Communications Investment Corporation* v. *FCC*, 641 F.2d 954 (1981) ("CIC"), by the United States Court of Appeals for the District of Columbia. In that case, the Court reviewed two actions of the Commission granting construction permits for two FM[5] radio stations in Utah. The *CIC* court said that the Commission had failed to follow its own and court precedent in authorizing, without a hearing, a transmitter location that objectors claimed constituted *de facto* reallocation of two class C FM stations from their city of license to a larger community. The court derived from the precedents nine factors[6] for determining when an evidentiary hearing is required on *de facto* reallocation and *Berwick* doctrine issues before a transmitter location can be approved. The court, however, invited our review of the policies. Based on that invitation and on our continuing evaluation of the relevancy of all our rules and policies in furthering the public interest, we undertook this rulemaking proceeding.

9. The *Notice* sought comment on whether the policies under review herein continue to be necessary in implementing §307(b) in light of the extensive dispersion of radio and television services throughout the United States. The *Notice* also expressed concern that the policies may impose unwarranted costs on the public and the parties involved in licensing new or improved service. This occurs, according to the *Notice*, when allegations that a proposed facility will not serve its designated community are made, not in furtherance of a fair, efficient, and equitable distribution of service, but in order to delay or to impede the authorization of new service and new competition, most often in smaller communities. We asked

[5] *D & B Broadcasting Co., Inc.*, 67 FCC 2d 570, *reconsid. denied*, 67 FCC 2d 1116 (1978); *Ben Lomond Broadcasting Co.*, 68 FCC 2d 1331 (1978).

[6] The nine factors are: the ratio of the population of the city of license to that of the larger city; the ratio of the distance between the proposed site and the city of license to the distance between the site and the larger community; the ratio of the signal strength in the city of license to the signal strength in the larger city; a loss area in the city of license or surrounding areas; whether the proposed site is already in use by larger city stations; whether the station is commonly owned with an AM station in the larger city and plans to share programming, staff or facilities with it; whether the station has evinced a prior intent to locate in the larger city; whether the station proposes to move its studio to the larger city; and whether there is a unique advantage to the site proposed.

comment on whether the benefits to be derived from the policies warrant the costs involved.

10. The *Notice* also sought comment on whether the term "community" should be redefined for §307(b) purposes in application processing to mean, not the specified community, but the metropolitan area effectively covered by the signal of the proposed station. Utilization of such a definition, said the *Notice*, would remove the comparative preference for designating as the community of license an underserved suburb while proposing power sufficient to cover a metropolitan area. The final item on which we sought comment was an implementation scheme in the event that the policies were deleted.

Comments

11. Comments were filed by parties representing two main interests: those generally concerned about the policies in question and those with matters pending before the Commission involving the policies.[7] One theme enunciated by commenting parties favoring retention of the policies centered on the Commission's responsibility to challenge, as stated by Seven Parties,[8] "disingenuous" applications. These were defined as construction permit applications specifying, as the community of license, a small community that is nearby a large or metropolitan community the applicant actually intends to serve. In a similar vein, Dempsey and Koplovitz said that, if the policies were removed, the Commission "will be plagued with questions of good faith, (and) undisclosed motivation for service to the larger more lucrative market," as long as an advantage can be earned under §307(b). Chatterbox, Inc. and Commanche Broadcasting, Inc. warn that "the evils sought to be averted by the policies still exist."

[7] *See* Appendix A for a list of the commenting parties. On August 6, 1982, Southern Minnesota Broadcasting Co., Antares Broadcasting Co., and four FM applicants commenting jointly, Beaufort County Broadcasting Co., Dutchess Communications Corp., Carson Valley Broadcasting Company, and Jack A. Carpenter ("Beaufort"), requested the Commission to accept late filed comments. Because the filings were only one day late and in the interest of developing a full record in this proceeding, the comments have been accepted and considered. In similar fashion, "Beaufort" filed reply comments one day late, which, for the same reasons, will be accepted. On September 9, 1982, Channel 287, Inc., requested leave to respond to the reply comments of Mid-States Broadcasting, Inc. Because this unauthorized filing refers to a specific application pending before the Commission and otherwise raises no new or significant issues relevant in this rulemaking, it is denied. Denton Channel Two Foundation, Inc. filed a Motion to Strike portions of the reply comments of Public Communications Foundation for North Texas who, on October 6, 1982, filed an opposition. Because the Motion to Strike refers to matters pending in a restricted adjudicative proceeding, the Motion to Strike is granted.

[8] Joint comments filed by: Alegria I, Inc., Alegria, II, Inc., Alegria III, Inc., Big Time Radio, Inc., the Orange County Broadcasting Corporation, Santa Maria Radio, Inc., and Sonrisa, Inc. ("Seven Parties").

12. Parties favoring deletion of the policies generally agreed with Ben Lomond[9] who stated that the policies "are relics of an earlier age when there was a paucity of local transmission services." Atlantic Broadcasting Corporation expressed a similar conviction: "[A]lthough the policies may have served legitimate public policy concerns years ago, they have outlived their usefulness and, in fact, may actually undermine the policies underlying §307(b)." Gordon & Healy Chartered, declaring that the policies have denied local facilities to suburban American communities, submitted that, "It makes no sense in 1982 to view such current proposals [for new service] in light of American social structure of 1965 when the Suburban Community Policy was first adopted."

13. The comments presented divergent views on the benefits smaller communities, the intended beneficiaries under §307(b), have reaped from these policies. Buena Vista Telecasters of Texas, Inc., Chatterbox and Edward O. Fritts stated that elimination of the policies will hurt smaller communities because stations licensed to those communities will direct service to nearby larger areas and ignore the needs of the smaller communities. Ward & Mendelsohn, P.C., believes that the suburban community policy, or a suitable replacement, is necessary to "prevent abuse, but that significant communities which merit their own local outlet (due to a reasonable population benchmark) should not lose their valid §307(b) interests merely because they are located near a still larger community." Atlantic states that tastes and interests of persons living in large and small communities proximate to each other are not so divergent that service to one precludes service to another. Buena Vista, although urging retention of the policies, notes that "the frequencies for which applications are pending, or for which no applications have yet been filed, tend to be those available for suburban or outlying communities." Arch Communications commented that "hindrance of competition, hearing costs and delays, the realization of §307(b) objectives through past allocation decisions and the existence of other rules and policies to assure that licensees will direct their service to their specified communities of license" are persuasive reasons for abolishing the policies.

14. Eight different parties[10] focused on the 10- and 15-mile rules as a solution to the *Berwick* doctrine. Because the Tables of

[9] Joint comments of Ben Lomond Broadcasting Company, KDAB, Inc., and Wasatch Broadcasting Partnership ("Ben Lomond").

[10] The parties are: ABC, Inc.; Joint Comments of Beaufort County Broadcasting Co., Dutchess Communications Corp., Copper Valley Broadcasting Co., Jack A. Carpenter ("Beaufort"); Dempsey and Koplovitz; Gordon & Healy; Joint Reply Comments of Arcatel, Inc., Lockhart Omni Communications, Inc., Cen-tex Broadcasting Corporation, Texas Professional Communications, Inc., and Lockhart Radio, Inc. ("Lockhart"); Ward and Mendelsohn; McKenna, Wilkinson and Kittner ("McKenna"). Joint Comments of Forward Communications Corp., Group One Broadcasting Co., Guaranty Broadcasting Corp., Lake Huron Broadcasting

Assignment constitute the Commission's decision as to the "fair, efficient and equitable" distribution of FM radio and TV stations mandated by §307(b), these parties contended that the rulemaking proceeding to amend the Tables should satisfy and conclude the §307(b) question for those services. In other words, step one of the licensing process should resolve all §307(b) determinations. As stated by Ward & Mendelsohn

> [A]ny party wishing to apply for a channel in a community other than that specified in the Table of Assignments or in a Petition for Rulemaking (to specify a new channel assignment) shall do so in the course of the Commission's initial allocation procedures rather than via an application.

15. The *Notice's* request for comments on a redefinition of community elicited varied responses. Arch Communications stated that without such a redefinition, unwarranted preferences could become acute. Buena Vista, Ward & Mendelsohn, National Radio Broadcasters Association (NRBA), and Gordon & Healy warned about the impossibility in many instances, due to geographic configurations, of covering a specified community with the requisite signal and avoiding penetration of larger nearby communities with the same signal. Dempsey and Koplovitz suggested that the proposal be treated as one for the largest community to which "significant"[11] principal-city service is provided, regardless of the community specified. Southwest Radio Enterprises disagrees with a redefinition of community. It states, however, that if such a definition is adopted, it not be applied to Class A FM facilities, which are designed to serve small local communities. Buena Vista and NRBA warn that applicants receiving conclusive §307(b) preferences by proposing power sufficient to serve underserved communities could later amend to increase power and/or move their transmitter, thereby providing service to a larger more lucrative community. Ogden Broadcasting Service, Inc. cautions that such a redefinition "would defeat the important policy goals of §307(b) by virtually insuring that smaller communities situated near larger communities will never acquire their own local broadcast transmission services."

16. In commenting on the *de facto* reallocation policy, the Denton Channel Two Foundation and Communications Investment Corporation said that as long as the Tables of Assignment are retained, so must the *de facto* reallocation policy in order to insure that applicants do not subvert the Table. McKenna, recognizing that "inconsistent application of the *de facto* reallocation doctrine has

Corp., Shamrock Broadcasting Co.; Inc., Ralph C. Wilson Industries, Inc., Summit Radio Corp., Wilson Communications, Inc., WKRG-TV, Inc. ("Licensees").

[11] Significant could mean, according to Dempsey and Koplovitz, "provision to the larger community of at least 50% of the service that would satisfy any of the applicable principal community criteria."

generated considerable confusion, which has only been heightened by the *CIC* decision," suggests a *de facto* reallocation test based on the nine-factor *CIC* test. The National Association of Broadcasters (NAB) suggested a similar test. Taft Broadcasting Co. believes that the nine-factor analysis in the *CIC* case constitutes a reasonable approach to *de facto* reallocation, which the Commission should reaffirm. Gordon & Healy suggested that enforcement of Commission rule §73.315(b) which states that the FM transmitter should be located as near the center of the proposed service area as possible, would solve the *de facto* reallocation problem for FM. On the other hand, Ben Lomond finds that the distinctions some commenters draw about the importance to §307(b) of the *de facto* reallocation policy as opposed to the importance to §307(b) of the suburban community policy and the *Berwick* doctrine are not persuasive.

17. Putbrese and Hunsaker suggests an alternative if the policies are eliminated. The Commission should adopt a policy holding that in cases "where there are mutually exclusive applicants for broadcast licenses in which there is overlap of 50% or greater of the proposed primary service contours of the proposals, then no § 307(b) preference would be awarded."

18. The *Notice's* request for comment on the implementation process should any or all of the policies be abandoned, elicited the full range of options. Seven Parties and Southwest Radio Enterprises said that the current policies should be applied to all applications that have been "cut-off." Arch states that, should the three policies be eliminated and community redefined, those decisions should be applied in all pending cases. Ben Lomond states that the retroactive effectiveness of the abolition of the policies could be so disruptive to cases far into the hearing process that it may be prudent to have various implementation programs dependent on the category of case. Denton believes that *de facto* reallocation issues already designated for hearing should not be deleted.

Discussion

19. Before discussing our decision on the policies under consideration in this item, we believe it important to focus attention on one view expressed by some of the commenting parties. These parties warn of the misrepresentation that is rife when an applicant applies for a facility in a community proximate to a community larger or more lucrative than the designated one. These parties state that the instant policies must be continued so that the Commission can look behind the declarations about community of license made in the application and/or related documents in order to ascertain the real intent of the applicant with regard to the primary community to be served. We acknowledge that such misrepresentations may occur. Nevertheless, policies which attempt to guard against the eventuality of such behavior should be discarded if they are ineffectual or

disserve the overall public interest, as long as other means are available to deter misrepresentations. In this case, statutory and regulatory provisions concerning candor and veracity required on applications, amendments and related statements of fact filed with the Commission adequately respond to the concerns of the parties. Section 312(a)(1) of the Communications Act, 47 U.S.C. 312(a)(1),[12] empowers us to revoke a station license for false statements knowingly made in applications. Section 73.3513(d) of our rules, 47 C.F.R. § 73.3513(d), states that willful false statements made in applications, amendments and related statements of fact are punishable by fine and imprisonment.[13] Stating one community of license, while intending to render primary service to another community fails the candor and veracity test. The requirements for candor and veracity in all dealings with the Commission are mandated by the Communications Act and by our rules. *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981). We remind all applicants that those requirements pertain whether or not the instant policies are maintained.

20. On the basis of the record adduced, we have determined that the policies in question, which attempt to ascertain an applicant's intent with respect to the community to be served, should be abolished. Due to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities. Thus, we no longer see a substantial likelihood that, merely because of proximity to larger urban areas, licensees will provide inadequate service to their communities. Moreover, these policies inhibit entry into unserved communities because they increase costs to suburban applicants and cause delays in processing. In addition, the policies provide incumbent stations a means to delay competition from new suburban stations and thereby retard competition in metropolitan markets. Consistent with this analysis is the indication, gleaned from a review of the cases, that the test for determining intent under the suburban community policy and *Berwick* doctrine may be invalid for that purpose. For these reasons the policies in question undermine the goal of Section 307(b), to

[12] Sections 312(a)(1) reads as follows:

> The Commission may revoke any station license or construction permit—
>
> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308.

[13] Section 73.3513(d) reads as follows:

> Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein, however, are punishable by fine and imprisonment, U.S. Code, Title 18, Section 1001, and by appropriate administrative sanctions, including revocation of station license pursuant to Section 312(a)(1) of the Communications Act.

distribute broadcast services fairly, efficiently, and equitably, and should therefore be abolished.

21. *Suburban Community Policy and the Berwick Doctrine.* We begin the rationale for our decisions with the suburban community policy and its FM corollary, the *Berwick* doctrine.[14] Because the *de facto* reallocation policy is so closely related, much of our reasoning applies with equal validity to that policy. The oldest of the policies, the suburban community policy, was adopted in 1965. At that time, the Commission was faced with the problem of processing "rising numbers of applications for suburban communities, which would be entitled to a first transmission service preference in a comparative hearing." *Suburban Community Policy*, 2 FCC 2d at 191. The Commission also had been instructed by the U.S. Court of Appeals for the District of Columbia to establish or clarify the standards used to distinguish between suburban applicants for the same frequency. *Miners Broadcasting Service, Inc.*v. *Federal Communications Commission*, 349 F.2d 199 (1965). The suburban community policy was the Commission's response to those events.

22. The suburban community policy was designed to further § 307(b)'s mandate for a fair, efficient, and equitable distribution of service by "testing" the AM radio applicant's intent to serve the suburban community designated rather than a metropolitan center located nearby. The test consists of the applicant's evidence that:

1. The suburban community has programming needs, separate and distinct from the central city;
2. Those needs are unmet currently;
3. The applicant's programming proposal will meet the specific, unsatisfied programming needs of the suburb; and
4. Advertising revenues generated within the specified community are adequate to support the programming proposal.

This is a rugged test. An applicant subject to the presumption can attempt to rebut it without a hearing through submission with the application of information on the four issues. An applicant has to demonstrate that its community has separate and distinct programming needs which are currently unmet by existing stations. Establishing with competent and probative evidence that existing stations are not serving the community's programming needs is a difficult task. Normally, program logs and/or portions of an existing station's renewal application are not detailed enough to satisfy the required showing. Moreover, there is little incentive for existing stations, whose personnel are the most knowledgable and thus most competent witnesses, to provide assistance. Consequently, reliance is often placed on costly programming surveys. This evidentiary problem is

[14] The *Berwick* doctrine is rarely invoked in licensing proceedings for television stations because, by virtue of their technical specifications, television stations are designed to serve regional areas.

exacerbated by the fact that the nearby larger community normally has a number of aural facilities whose programming has to be surveyed. In addition, it is not unusual for these nearby stations to direct at least some programming to the smaller suburban community. With regard to demonstrating the source and adequacy of projected revenues, again an applicant is faced with a difficult burden. While the suburban community policy specifically stated that dependence on revenues from other communities would not necessarily be determinative, applicants still have to make an effort to demonstrate the source of their revenues. The only reliable means of obtaining this information involves surveying potential advertisers. Thus, not only are the standards somewhat confused, but even when understood, the evidentiary burdens are time consuming and costly to meet. The burdens of proof required to rebut the presumption were criticized by the United States Court of Appeals for the District of Columbia in 1972. In the Court's view, applicants were left "devoid of any guidelines as to the type and degree of evidence required to rebut the commission's Policy Statement." *Northern Indiana Broadcasters, Inc.*v. *F.C.C.*, 459 F.2d 1351 (1972). Although the Court thought it incumbent upon the Commission to clarify the standards used to grant or deny licenses in suburban communities, the Commission itself has not since 1972 had occasion to resolve a suburban community proceeding after hearing.[15]

23. We have analyzed the reported cases involving the suburban community issue and find what we believe is a disturbing variance in success on rebutting the presumption. When there is only one applicant for a frequency, the suburban applicant has been more successful in rebutting the presumption than when there are competing applicants. This is true in cases in which the presumption was rebutted without a hearing[16] as well as in cases in which the presumption was rebutted in a hearing.[17] When the suburban applicant was not successful in rebutting the presumption in a

[15] *Radio Wheeling*, 85 FCC 2d 486, 490 (Rev. Bd. 1981).

[16] *Pettit Broadcasting Co.*, 21 RR 2d 317 (1971); *David Ortiz Radio Corp.*, 16 FCC 2d 798 (1969); *Wood & Watkins*, 12 RR 2d 97 (1968); *KACY, Inc.*, 15 FCC 2d 33 (1968); *WTOW, Inc.*, 11 FCC 2d 277 (1968); *Burlington Broadcasting Co.*, 9 RR 2d 1119 (1967); *Virginia Broadcasters*, 9 FCC 2d 205 (1967); *Major Market Stations, Inc.*, 8 FCC 2d 13 (1967); *Donnelly C. Reeves*, 6 FCC 2d 531 (1967); *Du Page County Broadcasting Inc.*, 5 FCC 2d 557 (1966); *Clay Broadcasters, Inc.*, 4 FCC 2d 932 (1966). *Wood & Watkins, Burlington, DuPage County* and *Virginia Broadcasters* involved two or more applicants.

[17] *Progressive Broadcasting Co.*, 54 FCC 2d 638 (1975); *Hymen Lake*, 46 FCC 2d 560 (1974); *Great Southern Broadcasting Co.*, 14 FCC 2d 176 (1968); *Jupiter Associates, Inc.*, 12 RR 2d 889 (1968); *Mount-Ed-Lynn, Inc.*, 9 FCC 2d 986 (1967); *Jersey Cape Broadcasting Corp.*, 2 FCC 2d 942 (1966); *Southington Broadcasters*, 2 FCC 2d 936 (1966). *Progressive Broadcasting Co.*was the only mutually exclusive licensing contest case.

hearing, he typically was competing with another for the frequency.[18] These results seem to indicate that, prior to 1975 when the policy was relaxed to exclude most singleton applicants, an applicant who was not vying with another applicant for one frequency had a good chance of convincing the Commission that the designated community truly would be the community served. However, that outcome was not so certain when another applicant joined the contest for a single outlet. We are concerned that the test can be manipulated by the competing applicant so that it becomes not a measurement of intent but a tool useful in defeating a suburban community applicant.

24. Settlements of mutually exclusive licensing contests frequently result in the demise of the suburban community applicant.[19] This result leads us to question whether the burden of rebutting the presumption creates an incentive seemingly at odds with the goals of § 307(b). For example, as a result of the settlement in *H-B-K Enterprises*, the application designating the suburban community of Grandview, Missouri, vying for its first local service, dropped out, and Kansas City, Missouri, was awarded its sixth local service.

25. The Commission acknowledged that the suburban community policy presented a significant obstacle to the authorization and improvement of AM radio service in 1974. In that year, the Commission initiated a rulemaking proceeding designed to liberalize AM radio allocations policies. In the *Notice of Proposed Rulemaking*, 39 Fed. Reg. 42920, published on November 27, 1974, we sought comment on whether or not the rule changes proposed would be effective in encouraging more AM applications if the suburban community policy remained unaltered. The *Report and Order* concluding the proceeding found that, unchanged, the suburban community policy would obstruct the goals sought to be achieved by liberalizing § 73.37 of the rules in order to encourage AM applicants. Therefore, the Commission relaxed the suburban community presumption to apply primarily in mutually exclusive licensing contests

[18] *Centreville Broadcasting Co.*, 50 FCC 2d 261 (1974); *James E. Reese*, 45 FCC 2d 315 (1974); *Broadcasters 7, Inc.*, 46 FCC 2d 282 (1974); *What the Bible Says, Inc.*, 28 FCC 2d 551 (1971); *Harry D. and Robert E. Stephenson*, 33 FCC 2d 763 (1969); *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011 (1969); *Augustus L. Cavallaro, Jr.*, 15 FCC 2d 4863 (1969); *Tri-State Broadcasting Co., Inc.*, 19 FCC 2d 1042 (1969); *Tidewater Broadcasting Co., Inc.*, 12 FCC 2d 471 (1968); *Northern Indiana Broadcasters, Inc.*, 13 FCC 2d 546 (1968); *KWEN Broadcasting Co.*, 10 FCC 2d 753 (1967); *Boardman Broadcasting Co., Inc.*, 10 FCC 2d 422 (1967); *Goodman Broadcasting Co.*, 10 FCC 2d 141 (1967); *Lebanon Valley Radio*, 2 FCC 2d 683 (1966). *Centreville, Cavallaro, Tri-State, Northern Indiana* and *Goodman* were singleton applicants.

[19] *Ditmer Broadcasting Co., Inc.*, 23 FCC 2d 283 (Rev. Bd. 1970); *Sundial Broadcasting Co., Inc.*, 17 FCC 2d 614 (Rev. Bd. 1969); *Howard M. McBee*, 19 FCC 2d 800 (1969); *H-B-K Enterprises*, 15 FCC 2d 683 (Rev. Bd. 1968); *Logan Broadcasting Co.*, 10 FCC 2d 166 (1967).

in which a hearing was required irrespective of the suburban community issue. We said

> By amending the rules . . . while continuing to impose the significant burden of the § 307(b) presumption, particularly on applications for improvements to existing facilities, we would merely be removing one so-called artificial barrier while leaving another in its place.

54 FCC 2d at 21.

26. In 1969, the Review Board applied the public interest considerations underlying the suburban community policy in an FM licensing case and the *Berwick* doctrine was born. In its decision on the merits in the *Berwick* proceeding, decided *sub nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546 (1973), the Review Board made clear that the suburban applicants for an FM facility had the burden of proving the same four sub-issues that the Commission had adopted for AM suburban applicants. *See*, paragraph 22, *supra*. However, in two recent cases that we affirmed, the Review Board has criticized those standards as "unworkable, unduly burdensome, and not reasonably related to the Commission's concern" about an applicant's intent to serve the designated community rather than a nearby larger one. *Radio Wheeling, Inc.*, 85 FCC 2d 486, 489 (Rev. Bd., 1981). In *Bie Broadcasting Co.*, 81 FCC 2d 1 (Rev. Bd., 1980), the Review Board rejected outright use of the standards. Thus, the *Berwick* doctrine, as traditionally applied, has been found to be infirm as a test for determining an FM applicant's intent. This result parallels our determination with respect to the suburban community policy, as outlined above. It is appropriate, therefore, that these tests be abolished.

27. We are mindful that the policies were promulgated in order to protect underserved, small, and suburban communities, favored under § 307(b), by assuring they actually receive the service promised. As we said when promulgating the suburban community policy, "developing deserving suburban communities" should be protected in situations where the

> propagation of a competitive signal over a heavily populated area of substantial size, . . . (has) led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

2 FCC 2d at 193. The suburban community policy and the *Berwick* doctrine responded to what apparently was considered the inevitable intent of a small market licensee: to *abandon* the needs of its designated market in those situations in which its signal was able to reach a more populous community. Although that assumption may have been valid in 1965, changes in the broadcasting industry since that time, especially in radio, make the assumption invalid today.

28. The major change of relevance to the present proceeding is the growth since 1965 in the number of broadcasting facilities. At

the end of fiscal year 1965, there was a total of 5,630 AM and FM radio stations in operation and 681 commercial and educational television stations.[20] By the end of fiscal year 1981, that number had grown to 9,087 for radio and 1,035 for television.[21] Growth in the number of stations has increased competition in the industry and created the incentive for broadcasters to discover discrete markets within which to provide an economically viable service. For example, it is possible that a station could earn more revenues as the single station in a 40,000 person community rather than the 11th station in a nearby community of 400,000 persons. Identification with and service of a small community becomes economically feasible after an increase in the number of players in an industry fractionalizes a market.[22]

29. Another change in the broadcasting industry of relevance to this proceeding is the role of demographics, creating an economic incentive for a broadcaster to establish a station in a small community to serve a particular type of audience, instead of in a larger, more heterogenerous nearby community. For example, there are 122 radio stations utilizing Spanish language programming for twenty or more hours per week.[23] Not all these stations are licensed to large metropolitan communities. Among the communities in this category are: *tab546,1

The *Broadcasting/Cablecasting Yearbook, 1982* also lists 151 all news radio stations. This kind of programming appeals to a specialized audience usually described by broadcasting entrepreneurs as well educated and middle income. Among the communities receiving service from all-news stations are the following:[24] *tab546,2

Thus, it is plausible that a broadcaster can fashion a service targeted for a specific community characteristic, such as ethnicity, educational level or cultural preference and find the service economically remunerative enough to be disinclined to abandon the smaller community for the larger.

30. We believe the policies may be used to stem the establishment of competing stations. In practice, the policies are frequently invoked by stations in large communities against the establishment of new or improved service in smaller communities.[25] Moreover, a

[20] *FCC Annual Report*, 1965.

[21] *FCC Annual Report*, 1981.

[22] *See generally, Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57636, published October 5, 1977, for an analysis of competition in radio markets.

[23] *Broadcasting/Cablecasting Yearbook, 1982*, at D-94.

[24] *Id.*, at D-91.

[25] *Communications Investment Corp. v. FCC*, 641 F.2d 954 (1981); *Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

Berwick issue is not limited to mutually exclusive licensing contests as is generally true in AM radio since 1975.[26] It can be contained in Petitions to Deny new applications and applications for improved facilities. If the small community applicant is unsuccessful in passing the stringent test created by these policies, new or improved service will be denied to the small community. This is a result at odds with Commission policy fostering competition in the broadcasting industry and with the objectives of § 307(b). If the suburban community policy and the *Berwick* doctrine have worked against the purposes of § 307(b), the statutory provision they were formulated to implement, then their continuation is mere folly. The test for overcoming these policies is a rugged one involving high expenditures for lawyers and engineers who participate in hearings with a resulting delay in the authorization of new service in the smaller community.[27] This tends, ironically, to benefit stations in the larger, metropolitan markets by delaying or frustrating the establishment or improvement of competing stations in nearby smaller markets.

31. After considerable reflection, we fail to see the deleterious effect on the public living in small communities from our authorization of a station that designates the small community as its community of license, locates its main studio in that community, places the requisite signal over the community, fashions a programming proposal to meet the needs and interests of the smaller community, and then also competes in the larger metropolitan area that includes the community of license. The station failing to live up to its obligations to the community of license risks a renewal challenge. In the *Notice of Proposed Inquiry and Proposed Rulemaking* in BC Docket 80–130, 45 Fed. Reg. 26390, published April 18, 1980, we said about the *Berwick* doctrine: "Even if it's true that the station intends to compete in the metropolitan market, this does not mean that it would not be able to offer programming responsive to the needs of this smaller locality." We continue to believe that statement to be true.

32. Many commenting parties in this proceeding discussed the so-called 10- and 15-mile rules, 47 C.F.R. §§73.203(b) (FM) and 73.607(b) (TV). These rules permit an FM or TV station to be licensed to an unlisted community within ten miles (Class A FM) or 15 miles (Class B/C FM and TV) of a community contained in the Tables of

[26] In the *Report and Order* relaxing the applicability of the suburban community policy to mutually-exclusive licensing contests primarily, the Commission affirmed its continuing concern about the intent of applicants with regard to their community of license and stated that it would entertain suburban community issues where warranted even outside a mutually-exclusive contest. 54 FCC 2d at 22. *See e.g., Home Service Broadcasting Corp.*, 68 FCC 2d 1135 (1978).

[27] The *CIC* court quoted from one party's pleadings that a hearing in that case would have meant a delay of up to two years and an estimated cost of $50,000 for attorney's fees.

Assignments without petitioning for a rule making to add the community to the Table. These rules were adopted at the time the Tables were adopted.[28] Their purpose was "to preserve flexibility and to permit adjustments . . . upon demand and need in communities other than those listed in the table without going through the rule making procedure." *Notice of Proposed Rulemaking*, FCC 68–54, 33 Fed. Reg. 917, published January 25, 1968. The Commission was well aware of the fact that in adopting a Table of Assignments it was impossible to predict population trends or pinpoint community development. However, "a Table coupled with the flexibility present in a 'twenty-five mile rule,' [now the 10-and 15-mile rule] provides the best means to insure an efficient *present* distribution of channels." 40 FCC at 758. (emphasis added) We also noted, that, "the question of future flexibility becomes increasingly academic as the available FM channels are put to use by present day applicants." *Id.* The decision to provide for flexibility within the limited geographical area surrounding each listed community was appropriate for the early days in which the new services were being established. That condition does not exist today. Television and FM radio are mature, thriving services, well dispersed throughout the United States.[29] We no longer have to foster and facilitate their development as we did when the Tables of Assignments were adopted. In addition, the rules create an unnecessary burden on applicants and the Commission alike. The issues raised under the rules are issues that can be resolved more efficiently and at lower cost to both the applicant and the Commission in a rulemaking proceeding than in a hearing.[30] Therefore, we have decided to eliminate the 10- and 15-mile rules. This, of course, does not mean that applicants are foreclosed from applying for communities 10 or 15 miles from listed communities.

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[28] *Sixth Report and Order on Television Allocations*, 41 FCC 148, 209 (1952); *Revision of FM Broadcast Rules, Third Report, Memorandum Opinion and Order*, 40 FCC 747, 763 (1963). In FM, §73.203(b) originally permitted a station to locate within 25 miles of a listed community without amending the Table of Assignments. This rule was changed in 1968 to 10 miles for Class A stations and 15 miles for Class B and C stations. *Amendment of Section 73.203(b) Concerning the Availability of FM Channels to Unlisted Communities*, 12 FCC 2d 660 (1968).

[29] The Commission has found that "there is no part of the contiguous 48 states which lacks at least some aural broadcast service, and almost no place . . . where multiple skywave services are not available." *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345, 1356 (1980). Similarly, in the television service, the Commission has stated that the "Table of Assignments . . . was designed to provide service to as large a part of the population as was possible and at the same time to provide local outlets for as many communities as possible . . . the goals of the Table have been largely achieved . . ." *Inquiry Into the Future Role of Low-Power Television Broadcasting*, FCC 80–503, 45 Fed. Reg. 69178, 69179 (Oct. 17, 1980).

[30] §307(b) determinations are based on, *inter alia*, the number of transmission services in competing communities, the number of reception services in each, and the size of the communities involved.

Our decision only means that the applicant must petition for a rulemaking in order to add the community to the Table. Henceforth, all §307(b) issues will be concluded in the rulemaking proceeding, which is step one of the licensing process. Step two will be concerned solely with establishing the qualifications of the applicants and, when there are competing applicants, deciding which applicant should prevail.

33. *De Facto Reallocation.* The *de facto* reallocation policy is closely related to the *Berwick* doctrine.[31] It is applicable only in the FM and TV services and does not require a central city-suburban community setting. The Commission has made clear that two essential elements must be present in order for a proponent to prevail on an allegation of *de facto* reallocation: (1) redirection of the service of an FM or TV station from its community of license in such a manner as to constitute its removal from that community, and (2) its effective use to provide service to another community. *Central Alabama Broadcasters, Inc.*, 68 FCC 2d 1339, 1340 (1978); *Hall Broadcasting Co., Inc., supra.* The policy is most often invoked in proceedings to modify existing facilities, for example, to change a transmitter site or to increase power. If, as a result of such a proposal, the station's signal either reaches another community, typically a larger one, or penetrates more of it, the stage is set for a *de facto* reallocation allegation.

34. Some commenting parties have urged that the *de facto* reallocation policy is essential in safeguarding the integrity of the Tables of Assignments and, through the Tables, §307(b). Others have contended that our requirements for, *inter alia*, the requisite signal over the community of license,[32] and the location in that community of the station's main studio,[33] are adequate safeguards. As we will outline below, we find that the policy has many of the same infirmities we found to be present in the suburban community/*Berwick* policies. Therefore, based principally upon those same reasons, and upon the fact that in many instances the *de facto* reallocation policy is indistinguishable from the *Berwick* doctrine, we have determined that the *de facto* reallocation policy no longer serves the public interest and should be abolished.

35. Our major concern with the policy is that rather than furthering the purposes of §307(b), the *de facto* reallocation policy, as applied, has frustrated that end. It is most often invoked against small market stations. The frequent proponents of the policy are

[31] *See, CIC*, 641 F.2d at 967, n. 82.

[32] 47 C.F.R. §§73.188 (AM); 73.315 (FM); 73.685 (TV).

[33] 47 C.F.R. §73.1125. "The Commission has frequently ruled that a station is identified by the place where its studios are kept, not the location of its transmitter or antenna." *Community Telecasting Co. v. FCC*, 255 F.2d 891, 893 (1958).

licensees located in larger communities who will face increased competition as the result of an application to modify or improve facilities filed by licensees in nearby smaller communities.[34] The arguments proponents make in support of *de facto* reallocation are strikingly similar to those made by proponents of the suburban community/*Berwick* policies: that a station in the smaller community will, as the result of the modification, direct its service to the larger community thereby abandoning its community of license, undermining the Tables, and subverting the goals of §307(b). Changes in the industry, as we described above, no longer pre-ordain such results. Moreover, the policy places a burden on the establishment and improvement of service in small communities that is not in keeping with the objectives of §307(b). We are also convinced that the policy too frequently is invoked to preclude additional competition. Such a result is an abuse of the policy.

36. Because the *de facto* reallocation policy does not require a central city-suburban community relationship, its applicability is broader than that of the suburban community policy and the *Berwick* doctrine. More than ten years ago, in a case in which a Chicago station filed a petition to deny raising *de facto* reallocation against a Gary, Indiana station filing to relocate its transmitter, we said:

> [W]e did not intend to prohibit a Gary station from serving large portions of the city of Chicago as it is simultaneously providing primary service to Gary. . . . A *de facto* reallocation issue does not arise merely because a licensee proposes an extension of a station's service area, and in some circumstances, the retention of the station's main studio in its community of license may itself constitute sufficient contact with the community to rebut any presumption of reallocation. *Rhode Island Television Corp.* v. *FCC*, 320 F.2d 762 (1963); *Community Telecasting Co. (WXTV)* v. *FCC*, 255 F.2d 891 (1958).

General Media TV, Inc., 27 FCC 2d 861, 863 (1971). The policy can be invoked without regard to the size of the communities involved. Even though the smaller of two communities is an independent, non-suburban, and thriving city, worthy and capable of supporting its own stations, an application to modify the license of a station in that community will likely prompt an allegation of *de facto* reallocation from a licensee in the larger community.[35] The policy also can be

[34] *Son Broadcasting, Inc.*, 79 FCC 2d 598 (1980); *Hall Broadcasting Co.*, 71 FCC 2d 235 (1979); *D and B Broadcasting Co. (KDAB)*, 67 FCC 2d 243 (1978); *Central Alabama Broadcasters*, 68 FCC 2d 1339 (1978); *Magic Box Media*, 65 FCC 2d 45 (1977); *Kaiser Broadcasting Corp.*, 62 FCC 2d 246 (1977); *Great Trails*, 59 FCC 2d 916 (1976); *Robert P. Adams*, 36 FCC 2d 479 (1972); *General Media TV, Inc.*, 27 FCC 2d 861 (1971); *WSTE-TV*, 11 FCC 2d 1013 (1968).

[35] In the *CIC* case, Salt Lake City stations raised the issue of *de facto* reallocation against Ogden, Utah stations that located their transmitters in an antenna farm

invoked without regard to the type of station involved. For example, a Class C FM station is a wide area station designed to serve a community, city or town *and* a large surrounding area. Similarly, television stations are capable of serving wide areas. However, if such a station applies to modify its signal strength to the highest permitted, an allegation of *de facto* reallocation would undoubtedly be forthcoming from a licensee in a community receiving a new or strengthened signal.[36] The fact that Class C FM and television stations are supposed to serve wide areas is not enough to deflect an allegation of *de facto* reallocation or even to avoid a hearing on the allegation.[37]

37. The *CIC* majority constructed its nine-factor test for determining when a hearing must be held on a *Berwick* or *de facto* reallocation issue from precedents found in four cases decided between 1963 and 1969.[38] The record of Commission action in this area, however, includes other cases whose holdings are at variance with the outcomes cited by the *CIC* majority. Several of these cases pre-date the 1978 Commission action in the cases consolidated in *CIC*,[39] while others are more recent. In three cases decided before Commission action in *CIC*, *Grindstone Broadcasting Corp.*, 41 RR 2d 1107 (1977); *Magic Box Media, Inc.*, 65 FCC 2d 45 (1977); and *Public Service Broadcasters, Inc.*, *supra*, we found that the mere fact that a station proposes to put a city-grade signal over a larger nearby community, in addition to its designated community, is not sufficient to lead to the conclusion that the station intends to serve the larger community.[40] Since Commission action in the *CIC* case, we have continued to move away from designating *Berwick* and *de facto* reallocation issues. In *Hall Broadcasting Co., Inc.*, *supra*, the Commission could not find that a *de facto* reallocation would occur when the transmitter of a Class C FM station was moved to a point

located near Salt Lake City. This location apparently cured a multipath interference problem, caused by terrain, that impaired reception of the Ogden stations in Ogden. Judge Wald, in dissent, noted, that the Salt Lake City stations were received in Ogden more clearly than was Ogden station *KDAB* before its move.

[36] *WSET-TV*, 80 FCC 2d 233 (1980); *Sarasota-Bradenton*, 70 FCC 2d 699 (1979); *Hall Broadcasting*, 71 FCC 2d 235 (1979).

[37] *Radio Wheeling*, 85 FCC 2d 486 (1981).

[38] *Wometco Enterprises, Inc.* v. *FCC*, 314 F.2d 266 (D.C. Cir. 1963) (per curiam), *rev'g Scripps-Howard Radio, Inc.*, 22 RR 1054 (1962); *Louisiana Television Broadcasting Corp.* v. *FCC*, 347 F.2d 808 (D.C. Cir. 1965) (per curiam), *rev'g St. Anthony Television Corp.*, 2 RR 2d 348 (1964); *Santa Fe Television, Inc.*, 18 FCC 2d 741 (1969); *Berwick Broadcasting Corp.*, 20 FCC 2d 393 (1969).

[39] *See CIC*, 641 F.2d at 977, where majority seems to believe that only one case with a contrary holding pre-dated Commission action in *CIC*.

[40] *See also, General Media Television, Inc.*, 27 FCC 2d 861, 863 (1971); *Almardon, Inc.*, 16 FCC 2d 395, 399 (Rev. Bd. 1969); *David Ortiz Radio Corp.*, 46 FCC 2d 341, 342 (Rev. Bd. 1974); *Congaree Broadcasters, Inc.*, 40 FCC 2d 297, 300 (Rev. Bd. 1973).

midway between the community of license and a larger community and the antenna height was increased, permitting greater coverage of the larger community. Nor would we designate a *de facto* issue in *Bie Broadcasting Co.*, 81 FCC 2d 1 (1980) and *Radio Wheeling, Inc.*, 85 FCC 2d 486 (1981). Many years ago, a similar decision withstood judicial scrutiny. In *Rhode Island Television Corp.* v. *FCC*, 320 F.2d 762, 766 (1963), the Court approvingly quoted the Commission's conclusion:

> The mere fact that as a result of the proposed modification, WTEV will improve its signal to the Providence area from Grade B to Grade A does not warrant [the conclusion that there has been a channel reassignment]. In fact, WTEV will continue to be a New Bedford station, will maintain its main studio in New Bedford, will place a principal city signal over that community and will be primarily responsible for providing for the needs of that community under the Rules. Accordingly, grant of the proposal will not change the channel assignment.

The court's unequivocal statement twenty years ago has not resulted in a disciplined use of the policy. Rather, the policy has been invoked to frustrate more competition despite our consistent rejection of such a course. The trend we have documented now must be concluded by abolition of the policy. Anything less would permit future use in a manner we find inconsistent with the public interest.

38. In the future, we will examine applications to detrmine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the rules will result in the requisite signal to the community of license, location of the main studio in that community and a programming proposal that will serve the needs of the community of license. Abolition of this policy does not mean that we will countenance subversion of our rules or the Tables. However, we believe the risk of a renewal challenge for failure *actually* to serve the designated community constitutes a more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent. Abolition of the *de facto* reallocation policy also means that it will not be available for anti-competitive purposes. Ten years ago, in approving an assignment of license application in which *de facto* reallocation was raised by a petitioner to deny, we said:

> [P]etitioner is in effect asking us to hold a hearing to determine whether the assignee will do what it has affirmatively represented it would do. In effect, we are being asked to determine, in advance, whether the assignee will operate KUTE as it has proposed it would. In view of the assignee's explicit representations regarding its proposed operation of KUTE, a hearing on this question is clearly unnecessary. Moreover, such a hearing would deprive the

assignee of the opportunity to demonstrate its good faith. *Brandywine-Main Line Radio, Inc.*, 4 RR 2d 697, 702 (1965). *Robert Adams*, 38 FCC 2d 1, 4 (1972). By abolishing the policy, we will return to that position.

Redefinition of Community

39. The *Notice* asked for comment on whether the term "community" should be redefined for §307(b) purposes to mean, not necessarily the community specified on the application, but the community actually receiving service as a result of the power proposed. We have reviewed carefully the record in this proceeding to determine if it supports such an action. We have determined that it does not. The current definition of community has guided our §307(b) determinations through the years. To change from that concept to one based on a larger geographical or urbanized metropolitan area standard, for example, requires that our action be supported by an adequate record and a rational basis for making the change. We do not believe that we have that record before us in this proceeding. Consequently, we decline to adopt the proposed redefinition.

40. Our refusal to change the concept of community for §307(b) purposes at this time does not foreclose the possibility of doing so in the future. A rulemaking in which comments are elicited on such questions as the benefits to the public interest of a new definition, the costs that may be involved in making a change, the different geographical standards that could be substituted, and the standard that would be preferable could well provide the adequate basis to support a decision to change the concept in the future.

41. *Implementation*. We believe that the public interest requires the implementation of these decisions with respect to the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy upon adoption of this *Report and Order*. Permitting the policies abolished herein to be used, even in pending application contests, would simply continue what we have found to be adverse to the public interest. Therefore, effective with the adoption of this *Report and Order* we will:

1. Process AM radio applications without application of the suburban community policy;
2. Process petitions to amend the TV Table of Assignments without application of the *Berwick* doctrine;[41]
3. Process FM and TV applications for new service or for modification to existing service without application of the *Berwick* doctrine and the *de facto* reallocation policy; and
4. Delete from all hearings, in progress and scheduled to

[41] The *Berwick* doctrine is not entertained in petitions to amend the FM Table of Assignments. *FM Assignment Policy and Procedures*, 90 FCC 2d 88 (1982).

start after adoption of this *Report and Order*, all issues based on the suburban community policy, the *Berwick* doctrine and the *de facto* reallocation policy.

42. Deletion of §§73.203(b) and 73.607(b) of our rules, the 10- and 15-mile rules, will be phased in. Applications already on file as of the date of the adoption of this *Report and Order* that utilize these rules, will be processed under the rules. Applications filed after the date of adoption of this *Report and Order* utilizing the 10- and 15-mile rule will be accepted only if such an application is tendered as a valid competing application to one the staff has already found acceptable for filing under the 10- or 15-mile rule.

43. *Regulatory Flexibility Act Final Analysis.* The rule and policy changes effected herein are appropriate in light of the changes that have taken place in the broadcasting industry. These revisions will also facilitate the establishment of additional radio and television facilities by abolishing issues that give rise to costly hearings with resultant delays in new service.

44. We received no public comments which specifically addressed the initial regulatory flexibility analysis contained in the Notice of Proposed Rulemaking. Since the decisions we are making in this proceeding relieve an economic burden, especially for licensees in small communities, our action is consistent with the purposes of the Regulatory Flexibility Act. Other alternatives that we might have adopted would have achieved more limited benefits.

45. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) and 303, of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 303, that effective as stated herein, Part 74 of the Commission's Rules is amended by the deletion of §§73.203(b) and 73.607(b). IT IS FURTHER ORDERED, that, effective *April 20, 1983*, the suburban community policy, the *Berwick* Doctrine, and the *de facto* reallocation policy are abolished. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Comments submitted:

Alegria I, Inc., *et al.*

Algeria II, Inc.

Alegria III, Inc.

Big Time Radio, Inc.

Orange County Broadcasting Corp.

Santa Maria Radio, Inc.

Sonrisa, Inc.

Association of Maximum Service Telecasters

Arch Communications Corp.

Atlantic Broadcasting Corp.

Beaufort County Broadcasting Company, *et al.*:

Dutchess Communications Corp.

Copper Valley Broadcasting Company

Jack A. Carpenter

Ben Lomond Broadcasting Co., *et al.*:

KDAB., Inc.

Wasatch Broadcasting Partnership

Buena Vista Telecasters of Texas, Inc.

Chatterbox, Inc.

Communications Investment Corp.

Commanche Broadcasting, Inc.

Carl Como, Ronette Communications Corp.

Dempsey and Koplovitz

Denton Channel Two Foundation, Inc.

Edward O. Fritts

Gordon & Healy, Chartered

Historic Hudson Valley Radio, Inc.

Kaldor Communications, Inc.

The Honorable Thomas N. Kindness, Member of Congress from Ohio

McKenna, Wilkinson & Kittner

National Radio Broadcasters Association

National Association of Broadcasters

Mark Pierce

Puerto Rico Broadcasting, Inc.

Putbrese & Hunsaker

Southern Minnesota Broadcasting Co. and Antares Broadcasting Co.

Southwest Radio Enterprises, Inc.

Taft Broadcasting Co.

Town and Country Broadcasting, Inc.

Ward & Mendelsohn, P.C.

Reply Comments Submitted:

American Broadcasting Companies, Inc.

Arcatel, Inc., *et al.*:

Lockhart Omni Communications, Inc.

Cen-Tex Broadcasting Corp.

Texas Professional Communications, Inc.

Lockhart Radio, Inc.

Atlantic Broadcasting Corp.

Beaufort County Broadcasting Co., *et al.*:

KDAB, Inc.

Wasatch Broadcasting Partnership

Buena Vista Telecasters Of Texas, Inc.

Community Television of Connecticut, Inc.

Forward Communications Corporation, *et al.*:

Group One Broadcasting Company

Guaranty Broadcasting Corp.

Lake Huron Broadcasting Corp.

Shamrock Broadcasting Co., Inc.

Ralph C. Wilson Industries, Inc.

Summit Radio Corp.

Wilson Communications, Inc.

WKRG-TV, Inc.

Mid-States Broadcasting, Inc.

National Association of Broadcasters

Ogden Broadcasting Service, Inc.

Public Communications Foundation for North Texas

Sanger Telecasters, Inc.

South Florida Broadcasting Company, Inc.

United Church of Christ, Office of Communication

WDOD of Chattanooga, Inc.

Ward & Mendelsohn, P.C.

February 17, 1983

Statement of

FCC Commissioner James H. Quello

Dissenting in Part

In re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I support these new policies, but I dissent from the Commission's refusal to consider broadening the definition of community in this proceeding.

DISSENTING STATEMENT OF COMMISSIONER STEPHEN A. SHARP

Re: The Suburban Community Policy, the *Berwick* Doctrine and the *De Facto* Reallocation Policy

I dissent from the Commission's action because, under the guise of administrative convenience, it returns us to the pre-*Berwick* era without a new answer to the problems as to which the *Berwick* doctrine and its brethren have proven to be an inadequate solution. In so doing, the *Report and Order* exhibits a basic misunderstanding of the nature of major market radio broadcasting. This flaw stems, I believe, from an attempt to justify the original result in the Ogden-Salt Lake City dispute (while avoiding a second reversal and remand) rather than solving the underlying problem. As a result, this proceeding skews the rational, market-based decisions of broadcasters in a manner not mandated by statute and is thus fundamentally inconsistent with the deregulatory principles to which we have sought to adhere.

Problems in the Report and Order

This ad hoc approach to policy-making leads to muddled facts and questionable logic weakening the credibility of the *Report and Order's* entire analysis. For example, paragraph 20 states that "[d]ue to the growth in broadcast services, suburban locations are oftentimes as attractive to licensee applicants as nearby cities." The decision offers no factual support for this conclusory statement and fails to show how, to the extent suburban locations *are* attractive, such attractiveness is not due to the Section 307(b) preference accorded applicants for such communities.

The discussion in paragraphs 27 through 29 provide the clearest example of the frailty of this decision. The *Report and Order* confuses "small market licensees" with suburban applicants and confuses a "market" with a community of license. It labels as an "assumption" the economic necessity of today's major market radio stations: service to an area beyond the borders of a particular suburb. It states that "small, and suburban communities" are "favored under Section 307(b)" without any basis in the record, the statute or the legislative history and in the face of contrary indications in paragraphs 2 and 3. While the decision catalogues the growth of broadcasting and increased competition, it fails to show the relevance of national totals to the suburban community issues at hand.

From the general, the *Report and Order* leads to the specific, arguing that "it is possible that a station could earn more revenues as a single station in a 40,000 person community rather than the 11th station in a neighboring community of 400,000 persons." While

a station with no competition in a community some distance from a metropolitan area could earn substantial revenue, the unsupported suggestion that this is as true for the single licensee in a suburban community blinks at reality.

While a station may be the only licensee in a particular suburb, it is compared with and competes for revenues against all of the other stations in that metropolitan radio market. In nearly every case, a close "identification with service of a small community" in a metropolitan market will ensure that the station will be the 11th rated station if, indeed, it is rated at all. The "fractionalization" of larger markets is both the result of and the reason for distinctive formats based on content designed to appeal to a specific category of listeners generally spread over a geographic area larger than the specific community of license. The two lists in paragraph 29 further demonstrate the unstated and unsupported assumptions which underlie the decision. Even to the extent all news radio usually appeals to a "well educated and middle income" audience, the fact that over ninety percent of such stations are within metropolitan areas does not lend much credence to the implication that serving audiences in more than the community of license is not important for a station's viability. Indeed, without an analysis of the service area demographics for the listed stations, the relevance of paragraph 29 is questionable at best.[1]

An Alternative Analysis

I agree that the *Berwick*, suburban community and de facto reallocation doctrines and the 10- and 15-mile rules, have failed to provide the Commission with an effective means to determine whether broadcast applicants intend to serve suburban municipalities rather than the heart of the market, the center city. Instead, they may have been devices of delay and great cost to both parties and the Commission, often animated by anti-competitive motives.

However, their elimination merely uncovers the deeper issue. The Commission's administrative embellishment of Section 307(b) of the Act has provided an incentive for applicants to seek a suburban community of license in the form of a dispositive preference vis-a-vis those who openly seek to serve a center city. To the extent this regulatory gloss has deterred applicants from serving the market of their choice, it has given rise to *Berwick* et al. as a means of testing their true intent.

To my mind, it is this governmental incentive which is crucial. By

[1] There are factual problems with the lists as well. For example, many people in Henderson, Nevada would be surprised to learn they were not part of the Las Vegas metropolitan area.

removing it, as I proposed, *Berwick* issues would, perforce, disappear as well.[2] My proposal would eliminate any Section 307(b) preference available for an applicant as compared with a mutually-exclusive applicant who seeks a community of license within the same metropolitan statistical area ("MSA"). Thus, in the AM band, the city of license sought would mean the MSA in which that city lies. In the FM and TV bands, the city identified in the Tables would be interpreted to mean the MSA in which that city is located. Thus, an applicant could, if consistent with our technical requirements, apply for any city within the MSA, without a rulemaking and without affecting its Section 307(b) status relative to others in the same MSA. Other technical, coverage, service and studio requirements remain in force. Section 307(b) preferences would continue to be available in situations where a competing applicant seeks a city of license outside of the MSA.

Four objections have been raised in opposition to my proposal. First, it is alleged to be inconsistent with the Commission's reliance on each applicant forthrightly to state its intent to serve its proposed city of license. My proposal purportedly denies that such reliance is feasible and therefore would obviate the intent issue entirely (at least within MSAs). Such an analysis misperceives my approach and, indeed, stands it on its head. No reason has been given as to why the Commission should be concerned with the applicant's stated intent to serve a particular intra-MSA city for Section 307(b) purposes. Until this is answered, there is no harm in eliminating the issue, regardless of whether intent is stated honestly. Our misrepresentation jurisprudence exists to ensure compliance with our substantive rules; we do not and should not establish rules merely in order to test compliance with them.

Second, it is stated that my recognition of the need for waivers in MSAs of unusual size or configuration would be overused or abused. But it is not clear why waivers in this context would be different than in any other. We are legally required to provide for waivers. The cause of legal certainty can only be promoted by stating the parameters for grant at the outset.

Third, my proposal is thought to be internally inconsistent because it does not modify certain localism-based standards, such as city coverage, studio location, ascertainment and programming requirements, while limiting the impact of the Commission's gloss on Section 307(b) itself (within MSAs). However, to the extent there is an inconsistency, it is an argument for a close review of those remaining Commission-imposed requirements, not for the retention of an otherwise erroneous policy. If they have a policy basis different

[2] The non-resolution of this problem here is compounded by immediately eliminating *Berwick*-type issues in pending cases, thus prejudicing the rights of competing applicants who have already applied for a license for a center city rather than a convenient suburb.

from that of the application selection preference, there may be a basis for keeping them. If not, they should be revisited.

Last, my suggestion to use the MSA designed by the Census Bureau and OMB is challenged as not being an "appropriate" delineation of a metropolitan area community for "our purposes". It is difficult to refute these arguments because they advance no standards of their own. Our reliance on city boundaries is indeed longstanding, but continuing past approaches for their own sake is not sound policy-making. Similarly, I recognize that MSAs are not a perfect device in this context; nonetheless, they are the best available geographic definition of the common socio-economic interests and patterns by which we define community. Whatever weaknesses do inhere in the use of MSAs, they are no different than those of municipal borders.

I am also concerned that no cogent arguments have been made to refute my approach to this issue. Neither the existence, nor the market-distorting impact, of the problem have been denied; no pro-suburban incentive legal requirement has been cited and my proposal is more consistent with the general policy of this Commission.

The present Commission has sought to rely on market forces rather than government regulation, whenever feasible. However, by encouraging applicants to seek suburban locations on the basis of the number of stations currently licensed to a particular municipality, the Commission not only ignores the basic fact that radio waves do not stop at political boundaries, but also inhibits the applicant's otherwise market-based decision to serve a perceived market need.

Congress has indicated that, in certain situations, other policies concerns are paramount; and with that decision I have no quarrel here. Nonetheless, the elimination of preferences within a metropolitan area is fully consistent with the language, legislative history and Commission and judicial interpretation of Section 307(b). Significantly, the statutory language itself does not define "community"; the Commission's distribution of broadcast facilities "among the several States and communities" must be "fair, efficient and equitable to each of the same." The complex legislative history of this provision indicates that Congress was concerned primarily with preserving the ability of less populated areas of the country, particularly in the west, but also rural areas in general, to obtain broadcast service. *See Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977). To the extent there was any concern with intra-metropolitan area distribution of facilities, it was not clearly expressed.

Section 307(b), in its present form, was added to the Communications Act in 1936. It was designed to restore the provisions originally enacted in the Radio Act of 1927 which had been significantly revised in 1934. *See* 80 Cong. Rec. 6032 (1936) (remarks of Sen. Wheeler). The 1927 provision was animated by congressional con-

cerns that an excessive percentage of both the total and preferred radio frequencies were used by stations based in the nation's largest cities, particularly those in the east. As Rep. Davis noted, of the approximately 700 stations then licensed, "[a]bout 600 of those are held in 21 States, chiefly in a few large cities." 68 Cong. Rec. 2575 (1927). Similarly, he stated "in the entire South and Southwest . . . there were 79 broadcasting stations, and there was not one first-class license in the whole lot, and is not to-day, south of the Ohio River." *Id.* He had previously cited the fact that there were *"within 50 miles* of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22" as the basis for enjoining the Secretary of Commerce "to effect an equitable distribution of stations over the entire country." 67 Cong. Rec. 5479 (1926) (emphasis added). There is no indication in the legislative history that, in enacting Section 307(b) or its 1927 predecessor, Congress intended that the Commission be concerned with the relative status of a center city versus a suburb, much less grant dispositive preferences on that basis.

As far back as the *Sixth Report and Order on Television Allocations*, 1 R.R. 601, 621 (1952), we have recognized that metropolitan centers and their central cities have "broad areas of common interest" which we must consider in allocating broadcast channels under Section 307(b). As a result, very few suburbs received allocations, even after the center city received several. Indeed, even prior to that point, not only we, but the Court of Appeals as well, have recognized that smaller municipalities in metropolitan areas are properly treated as identical to the center city for Section 307(b) purposes. *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

Similarly, in *St. Louis Telecast, Inc.*, 22 FCC 625 (1957), the Commission refused to find Section 307(b) applicable in selecting among mutually exclusive applicants for a television station in the St. Louis as its proposed city of license. We noted there that both St. Louis and East St. Louis were in the St. Louis Standard Metropolitan Area and that "there exists a single economically and culturally integrated community . . . ." 22 FCC at 713. *See also Rossmoyne Corp.*, 7 R.R. 117 (1951). I would expand that finding, by rule, to all MSAs.

Finally, I would note that, while this issue may appear to be a minor one; it does, in fact, have long-term significance. We are currently considering a proposal to drop-in a substantial number of FM stations. Later this decade, an entire new segment of the spectrum may be made available for AM stations in the 1600 KHz band. Thus, the Commission's action is important and will affect many licensing decisions in the years ahead.

In conclusion, I acknowledge the Commission's willingness to consider a new proceeding, on an accelerated schedule, to provide a more copious record on this issue. While late is better than never,

given the many major policy issues in the mass media area which are to be resolved in the near future, I am not optimistic of an early resolution. Sound deregulation is not accomplished by utilizing two rulemaking proceedings when one will do.

Comparative Criteria
Diversification, of Control of Mass Media, See Also Control
Ownership and Management, Integration of

In comparative FM proceeding, applicant with substantial preference for diversification and slight preference for integration is clear comparative winner.
–Thomas C. and Essie L. Collins
BC Docket No. 81–298

FCC 83R–11

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THOMAS C. AND ESSIE L. COLLINS, Tenants in Common Burney, California	BC Docket NO. 81–298 File No. BPH– 790604AB
MERIT BROADCASTING CORPORATION Burney, California	BC Docket NO. 81–299 File No. BPH– 791108AD
For Construction Permit for a New FM Station	

Appearances

Robert A. Marmet and *Harold K. McCombs*, for Thomas C. and Essie L. Collins, Tenants in Common; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, for Merit Broadcasting Corporation; and *Arthur I. Steinberg*, for Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: February 14, 1983; Released: February 17, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. Thomas and Essie Collins, husband and wife, presently own and operate AM broadcast station KAVA, Burney, California. They have applied for an FM channel which is also assigned to Burney. To win in this case the Collinses must show that they are the best comparative applicant. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). After a trial-type hearing, Administrative Law Judge Chachkin granted the competing applica-

tion of Merit Broadcasting because the Collinses already operate another station in Burney. Initial Decision, FCC 82D–56, released August 3, 1982. In their brief and exceptions filed September 2, 1982, the Collinses argue that they are the best comparative applicant, and that another station, some 40 miles from Burney, owned by the parents of the principal of Merit Broadcasting should have been attributed to Merit. After reviewing these arguments in light of the record and the reply briefs filed October 12, 1982, the Review Board will affirm the ALJ's selection. Merit is entitled not only to a substantial and decisive preference for diversification of mass media, but also to a very slight preference for participation of ownership in management, see para. 12 below.

2. *Diversification of Control.* The Collinses, husband and wife, filed their application as tenants in common. They also own, as tenants in common, AM station KAVA, the only broadcast station licensed to Burney. If their application is granted, they intend to assign portions of their respective interests to each other so that the new FM station would be owned ninety percent by Mr. Collins and ten percent by Mrs. Collins and KAVA would be owned ninety percent by Mrs. Collins and ten percent by Mr. Collins. *I.D.*, paras. 4–6. This curious 90–10 and 10–90 division for comparative purposes adds up to 100% ownership by the wife and husband. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425–427 (1981); *Absolutely Great Radio, Inc.*, FCC 83R–9, released February 4, 1983, paras. 7–10.

3. Merit is a corporation formed by Jeffrey and Jane Martin, husband and wife, and by Jeffrey's brother, Michael Martin. Mr. and Mrs. Martin have subscribed to one-half of the shares and Michael Martin has subscribed to the other half. Mr. and Mrs. Martin also own ten percent of the issued and outstanding voting stock of NorCal Broadcasting Corporation, licensee of AM station KSXO, Redding, California. The other ninety percent of NorCal's stock is owned by Jeffrey Martin's parents. Jeffrey and Jane Martin have pledged to divest this interest by selling their shares back to NorCal if Merit's application is granted. *I.D.*, paras. 8–14. Thus, the ALJ correctly attributed no media ownership to Merit and awarded it a substantial preference because the Collinses own the only broadcast station in Burney. We affirm his ruling.

4. No ownership interest in NorCal will be attributed to Merit since it made an unequivocal predesignation commitment to divest that interest upon grant of its application. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813–14 (Rev. Bd. 1982) and *Las Misiones De Bejar Television Co.*, FCC 83R–10, released February 11, 1983, note 1. Merit may be charged with Jeffrey Martin's interest as sales manager at KSXO because the Commission will consider significant managerial positions held by owners of an applicant under diversification, see *Policy Statement*, *supra*, 1 FCC 2d at 394 n.5, and Merit did not timely announce Jeffrey Martin's plan to resign his position

at KSXO until after designation. *See Las Missiones, supra*, at para. 12.

5. Far more significant here is the fact that the Collinses own the only broadcast station in the community of license whereas Merit owns no other broadcast interest and that a grant to Merit thus would create a new broadcast voice in Burney and avoid the creation of a two station monopoly in that community. *See Hassayampa Broadcasting*, FCC 82R–70, 52 RR 2d 1059 (Rev. Bd. 1982). That there is a multiplicity of media voices in the proposed service area does not reduce Merit's preference to less than substantial since the fact remains that Merit will provide a second station to Burney and a competing voice whereas the Collinses will not. *See Communications Properties, Inc.*, FCC 82R–64, 52 RR 2d 981 (Rev. Bd. 1982). Finally, the Collinses' argument that Jeffrey Martin's parents are real parties in interest in the Merit application and that their ownership of KSXO must be counted against Merit is rejected for the reasons set forth below in para. 9. But even if we assumed that the parents' station in Redding should be attributed to the children it would not change the outcome of the case because that station is located some forty miles from Burney. Collins Brief, pp. 3–4. The Collinses' station is located in Burney and under the *Policy Statement, supra*, 1 FCC 2d at 394, they receive a more significant diversification demerit for their ownership of another station in the proposed community.

6. *Full-time Participation of Ownership in Management*. The Collinses were awarded 90% full-time integration credit with some qualitative enhancement based on Mr. Collins' proposal to work full time as general manager and because of his local residence and limited civic involvement. Merit was credited with 75% full-time integration and 25% part-time integration because Jeffrey and Michael Martin intend to work full time as general manager and sales manager, respectively, and Jane Martin will work at least twenty hours a week as business manager. Merit also received credit for its principals' residence in the service area and broadcast experience. Although Merit earned greater qualitative enhancement, the ALJ concluded it could not overcome the Collinses' clear quantitative advantage, *see Van Buren Community Service*, 87 FCC 2d 1010 (Rev. Bd. 1981), and they were awarded a slight integration preference. I.D., para. 22.

7. In *Absolutely Great Radio, Inc., supra*, the Board found that evolving Commission policy did not differentiate for integration purposes between common spousal ownership interests but reasonably assumed that the integrated spouse is acting on behalf of the marital entity. Therefore, because of the unique partnership, one spouse's ownership interest would be combined with that of the other co-owner spouse. *Id.* at para. 10. Thus the Merit applicant will be credited with 100% full-time integration by awarding 50% credit for Michael Martin's proposed full-time role and a combined 50% credit

for Jeffrey Martin's proposal. In so doing, we do not attempt to distinguish, as the ALJ did, between the common interests of Jeffrey and Jane Martin in their combined 50% stock ownership but instead attribute Jane Martin's interest to her husband and award him 50% credit based on his full-time proposal. By the same token, with respect to the Collinses, we will attribute Mrs. Collins' ten percent interest to Mr. Collins and assume that he as the integrated owner will act on behalf of both, thus also earning the Collinses 100% full-time integration credit. With both applicants thus entitled to maximum quantitative integration credit, the only differences are qualitative. In their exceptions, the Collinses argue, and we agree, that the ALJ incorrectly denied Mr. Collins credit for his broadcast experience at KAVA because it was not on a day-to-day basis. *See North Carolina Radio Service, Inc.*, FCC 82R-67, 52 RR 2d 993 (Rev. Bd. 1982), where credit for part-time experience was awarded. Nevertheless, Merit's Michael and Jeffrey Martin also have broadcast experience and are better enhanced as local residents because they reside in the service area. Mr. Collins only visits Burney on weekends. Thus, while the ALJ awarded a slight integration preference to the Collinses, we conclude that if any slight integration preference exists, it is in Merit's favor, and accordingly the Initial Decision will be modified in this respect.

8. *Other Matters.* The Collinses point out that on various occasions they attempted unsuccessfully to raise the purported relationship that Jeffrey Martin's parents and NorCal will have to the Merit application. Specifically, they object to the ALJ's refusal to add an issue as to whether NorCal or the Martin parents are real-parties-in-interest in the Merit application (FCC 81M-2356, released July 30, 1981); they except to the refusal to compel Merit to answer interrogatories identifying those persons who assisted in the preparation of their application (FCC 81M-3068, released September 25, 1981); they except to the grant of summary decision to Merit under the financial issue (FCC 81M-3607, released November 13, 1981); and they except to the ALJ's failure to enlarge issues based on Merit's nonreporting of the filing of an application for a new FM station at Eureka, California by the Martin parents. (FCC 81M-3905, released December 10, 1981).

9. These exceptions are made in general terms only without "issue-oriented" explanation and could thus be rejected procedurally for failure to comply with the particularity requirement of Section 1.277(a) of the Rules. *See also Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 875 (1976). Nevertheless, the Collinses' concerns, to the extent they can be perceived are discussed below. The real party in interest issue request was based on the family and ownership interrelationship between the applicant and NorCal and the fact that Merit is being financed in large part by Jeffrey Martin's plan to sell his ten percent interest in NorCal to his parents for $85,000

which he in turn will lend to Merit. FCC 81M-2356, *supra*, at para. 2. Relying on applicable Commission precedent, the ALJ correctly ruled that the test for determining real party in interest status is whether a third party has an ownership interest or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc.*, 49 FCC 2d 962 (Rev. Bd. 1975); *cf. Redwood Television Ministries, Inc.*, FCC 82-482, released December 14, 1982. Family relationship alone is not sufficient to warrant an issue, and even a parental advance of funds without retention of control is not enough. *See, e.g., Michael S. Rice*, 9 FCC 2d 217 (Rev. Bd. 1967). Here, after the Merit application is granted, all ties between it and NorCal will be terminated; thus, as the ALJ concluded, there is no evidence that the parents will exercise any ownership or control over the proposed station. The motion to compel answers to interrogatories was correctly denied since the Collinses did not show the relevance of the proposed inquiry to the only issues in the proceeding, and the request for a real party in interest issue, of course, had been previously denied.

10. As for the ALJ's award of summary decision to Merit under the financial issue, he correctly concluded that Merit had demonstrated a financial cushion considerably in excess of its estimated costs and that therefore it was financially qualified. See FCC 81M-3607, *supra*, at page 2. While the Collinses make reference to the role of NorCal in Merit's financial plan, they have not shown how this allegation in any way impairs the ALJ's conclusion that there was no genuine issue of material fact regarding Merit's financial qualifications. With regard to the request for a Section 1.65 issue, we agree with the ALJ that no issue was warranted because this rule does not require the reporting of all changes, but only those which are substantial and may be of potential decisional significance. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 168 (D.C. Cir. 1969); *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, 52 RR 1210, 1220 (Rev. Bd. 1982). As indicated previously, the Martin parents are not real-parties-in-interest in the Merit application; moreover, their filing for the Eureka channel has not been shown to have any bearing on Merit's financial or other qualifications. Thus, the filing does not have any significance in this proceeding.

11. Finally, we affirm the ALJ's denial of an inquiry into the past broadcast record of Station KAVA. FCC 81M-3323, released October 20, 1981. The Collinses failed to make a threshold showing that the station's record is unusually good. *Gilbert Group, Inc.*, 49 RR 2d 1081 (1981). While they were able to show that their performance exceeded promises made in their 1977 renewal application for KAVA in the categories of news and all other programs, exclusive of entertainment and sports, it is also true that KAVA carried significantly less public affairs programming than promised and also fewer public service announcements. In addition, their showing was

limited to KAVA and thus did not permit a comparison with other stations in the same service area. Accordingly, the ALJ correctly concluded on the information before him that KAVA's record was well within the bounds of average performance and was not relevant for comparative purposes. *See Policy Statement, supra*, 1 FCC 2d at 398.

12. *Summation*: Merit has been awarded a substantial and decisive preference under diversification because it, unlike its competitor, will bring a new voice to Burney. Both applicants have been credited with 100% full-time participation, and a slight qualitative preference has been awarded to Merit for its somewhat better enhancement for local residence. But even if this preference had favored the Collinses, as the ALJ concluded, it would not have offset the far more significant diversification preference earned by Merit. See *Communications Properties, Inc., supra*. Accordingly, under the diversification and integration factors of the *Policy Statement, supra*, a grant of Merit's application will better serve the public interest and the community of Burney.

13. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed September 13, 1982, and supplemented September 20, 1982, by Merit Broadcasting Corporation, IS GRANTED, and the amendment IS ACCEPTED; and

14. IT IS FURTHER ORDERED, That the application of Merit Broadcasting Corporation (File No. BPH-791108AD) for a construction permit to establish a new FM broadcast station at Burney, California, IS GRANTED, and the application of Thomas C. and Essie L. Collins, Tenants in Common (File No. BPH-790604AB), IS DENIED.

JOSEPH A. MARINO
Chairman, Review Board
FEDERAL COMMUNICATIONS COMMISSION

FCC 82D-56

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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THOMAS C. AND ESSIE L. COLLINS, Tenants in Common Burney, California	BC Docket No. 81-298 File No. BPH- 790604AB
MERIT BROADCASTING CORPORATION Burney, California	BC Docket No. 81-299 File No. BPH- 791108AD
For Construction Permit for a New FM Station	

Appearances

Harold McCombs, on behalf of Thomas C. And Essie L. Collins, Tenants in Common; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin*, on behalf of Merit Broadcasting Corporation; and *Arthur I. Steinbert* and *Brian Kilbane*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

(Issued: July 29, 1982 Released: August 3, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Thomas C. and Essie L. Collins, Tenants in Common (Collinses) and Merit Broadcasting Corporation (Merit) for authority to construct and operate a new FM broadcast station in Burney, California.[1] By Order (BC 34130) released May 5, 1981, the captioned applications were designated for hearing on the following issues:

(1) To determine with respect to Merit Broadcasting Corporation:

(a) the source and availability of additional funds over and above the $14,500 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

[1] The applications of J. Nevin Smith & Rose Shelton, d/b/a Smith, Shelton Broadcasters and Shasta Communications Company Corporation, which were also designated for hearing, were dismissed with prejudice at the request of the applicants.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.
(3) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[2]

The Order provided for the consideration of comparative coverage evidence under the standard comparative issue. The two remaining applicants, Merit and Collinses, have stipulated that there is no significant difference in the size of the areas and populations which would receive service from either of their proposals. By Order, FCC 81M-3607, released November 13, 1981, Merit's motion for partial summary decision was granted and issue 1 was resolved in favor of Merit. Accordingly, the standard comparative issue is the only issue which remains for resolution in this proceeding.

2. A prehearing conference was held on July 10, 1981. The hearing was held on December 8, 1981 and the record was closed on that date. By Order, FCC 82M-0412, released February 8, 1982, the record was reopened and reclosed. The record was again reopened and reclosed on March 12, 1982 (see *Order*, FCC 82M-0313, released March 12, 1982). Proposed findings and conclusions were filed by Collinses and Merit on February 2, 1982. Replies were filed by Collinses and Merit on February 16, 1982.

Findings Of Fact

Burney, California

3. Burney, California is located in Shasta County in the northern portion of the state (Collinses Ex. 1, p. 2). The population of Burney is 3187 (Merit Ex. 2). Standard broadcast station KAVA is the only broadcast station licensed to Burney (Tr. 67). KAVA is a Class IV station which operates nondirectionally on 1450 kHz with 1 kilowatt daytime and 250 watts nighttime (Collinses Ex. 1, p. 1; Tr. 104). Burney Falls Cablevision, Inc. operates a cable television system in Burney and nearby Johnson Park. The system has an average of 1273 subscribers in Burney. The *Intermountain News*, a weekly newspaper published in Burney, has an average week circulation of about 2,050 newspapers in Burney[3] (Collins Ex. 3, p. 1–2). Television stations KRCR-TV, Channel 7, Redding and KIXE-TV, Channel 9, Redding, place predicted Grade B or better television signals over

[2] The designated issues have been renumbered for convenience.

[3] The following newspapers published in the indicated communities are circulated in Burney: The Mountain Echo published weekly in Fall River Mills has a Burney circulation of 585; the *Record Searchlight* published daily in Redding has a Burney circulation of 1,208; the *Sacramento Bee*, published daily in Sacramento has a Burney circulation of 920; and the *San Francisco Chronicle*, published daily in San Francisco has a Burney circulation of 60–418 (Collinses Ex. 3, p. 3–6). There is no evidence in the record indicating the extent to which events and concerns relative to Burney are covered in the newspapers.

Burney. KRCR-TV is an ABC affiliate. KIXIE-TV is a non-commercial, educational television station (Collinses Ex. 1, p. 3). Two FM stations, KSHA(CP), Redding and KVIP-FM, Redding, place a 1 mV/m contour over Burney (Collinses Ex. 2, Fig. 3).

Thomas C. Collins and Essie L. Collins
Tenants in Common

4. Thomas C. Collins and Essie L. Collins, husband and wife, filed their application as tenants in common. Mr. and Mrs. Collins, also as tenants in common, own and operate standard broadcast station KAVA, which is currently the only broadcast station licensed to Burney, California (Tr. 67). Mr. and Mrs. Collins have agreed that, if their application in this proceeding were to be granted by the Commission, Mr. and Mrs. Collins would assign portions of their respective interests in KAVA and the new FM station to each other. The result would be that the new FM station would be owned ninety percent by Mr. Collins and ten percent by Mrs. Collins, while KAVA would be owned ninety percent by Mrs. Collins and ten percent by Mr. Collins (Collinses Ex. 1, p. 2).

5. Mr. and Mrs. Collins currently maintain two residences. The first is located in Los Altos, California, a suburb of San Francisco. The second is a rented apartment in Burney. Mr. Collins visits Burney usually on weekends only (Collinses Ex. 1, p. 1; Tr. p. 92). The rest of the week is normally spent by Mr. Collins in San Francisco, where Mr. and Mrs. Collins own and operate Collins Marine Corporation, a company which sells and services marine electronics systems (Collinses Ex. 1, p. 1; Tr. 92). Mr. Collins' practice of traveling to Burney on weekends has been going on for approximately three years (Tr. 92). In an amendment to their application filed on August 6, 1980, the Collinses represented that they then planned to retire from their marine business in San Francisco and to move permanently to Burney in approximately one year (Tr. pp. 90–91). The Collinses still plan to retire from the marine business and move to Burney (Collinses Ex. 1, p. 1). However, this has not yet occurred.

6. For Approximately sixteen hours per week, primarily during his weekend visits to Burney, Mr. Collins performs the role of general manager of KAVA. He also is in telephone contact on a daily basis with the resident station manager at KAVA (Tr. pp. 101–102). Mr. Collins will continue to spend an unspecified time at KAVA, assuming grant of the proposed FM station. He expects to perform the same functions for KAVA as he now performs, in a reduced form. The proposed FM facilities and KAVA will be in the same building (Tr. 100–101). Mr. Collins plans to be involved, in the capacity of general manager, in the operation of the proposed FM station on a full-time basis (*i.e.*, at least forty hours per week) (Tr. p. 114; Collins Ex. 1, p. 2). Mrs. Collins will not be involved in the operation of the proposed FM station (Tr. pp. 111–112). Mr. Collins is a member of the

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Burney Chamber of Commerce, the Economic Development Corporation of Eastern Shasta County, and the Burney VFW (Collinses Ex. 1, p. 5). Mr. Collins testified that he holds no position as an officer or director of any of those organizations (Tr. 118–119).

7. The Collinses' proposal includes a plan to purchase and install an auxiliary power generator at the proposed FM station (Collinses Ex. 1, p. 6).

Merit Broadcasting Corporation

8. Merit was formed in late 1979 by Jeffrey Benjamin Martin, his wife Janes Frances Martin and his brother Michael Jonathan Martin. All of the 15,000 shares of Merit's common voting capital stock for which subscriptions are outstanding have been subscribed to by Jeffrey, Jane and Michael Martin. Jeffrey and Jane Martin together have subscribed to 7,500 shares, while Michael Martin has subscribed to 7,500 shares (Merit Ex. 1, p. 1). Jeffrey Martin is president and director of the corporation, Michael Martin is vice president and director, and Jane Martin is Secretary, Treasurer and director (Off. Not. taken of Section II, p. 3 of Merit's application).

9. Jeffrey and Jane Martin presently own ten percent of the issued and outstanding common voting capital stock of NorCal Broadcasting Corporation (hereinafter, NorCal), the licensee of standard broadcast station KSXO at Redding, California. The remaining ninety percent of the issued and outstanding common voting capital stock of NorCal is owned by John P. Martin and C. Lucille Martin, the parents of Jeffrey and Michael Martin (Merit Ex. 1, p. 1). As stated in Merit's original application, Jeffrey and Jane Martin have committed themselves to divest all of their NorCal stock if Merit is granted a construction permit for the new FM station in Burney. In this regard, NorCal has agreed to redeem the shares of its stock now held by Jeffrey and Jane Martin (Merit Ex. 1, p. 2). Apart from the minority interest in NorCal presently held by Jeffrey and Jane Martin, none of the three principals of Merit owns any interest in any other medium of mass communication (Merit Ex. 1, p. 2).

10. Jeffrey Martin will serve as the general manager of the new station, working a minimum of 40 hours per week. Jane Martin is proposed as the business manager of the station, initially working on a full-time basis. Once the initial period of construction and operation of the station has stabilized and her services are no longer needed on a 40 hours per week basis, her commitments as business manager will be reduced to part-time, but in no event fewer than 20 hours per week, including time spent both at the station and at home. Michael Martin will become the sales manager for the new

station on a full-time basis, with a commitment of not fewer than 40 hours per week (Merit Ex. 1, p. 1–2).[4]

11. Jeffrey Martin has had past experience in broadcasting. Jeffrey Martin has been employed in the broadcasting industry on a full-time basis for ten years. In January of 1972 he was employed as a full-time salesman at radio station KOPO in Tucson, Arizona. After approximately six months at KOPO, he became employed as sales manager at KHYT, another radio station in Tucson. In December of 1974, he left the position at KHYT to become sales manager and vice president at radio station KATA in Arcata, California which was then owned by John P. and C. Lucille Martin. Finally, in September of 1977, Jeffrey Martin left KATA to become general manager of KSXO in Redding. He has served in that position since that time. He also serves as vice president and a director of NorCal, the licensee of KSXO (Merit Ex. 1, p. 2–3).

12. Both Jane Martin and Michael Martin have been involved in broadcasting since the fall of 1977. Jane Martin has worked as a part-time bookkeeper for KSXO, working at least twenty hours per week, since September of 1977. Michael Martin joined KSXO as an account executive in November of 1977 and has worked for the station on a full-time basis since that time. In October of 1981, he was promoted to the position of sales manager at KSXO in recognition of his excellent performance in sales and motivation (Merit Ex. 1, p. 3).

13. All three of the Merit principals presently reside in Redding, California (Merit Ex. 1, p. 1). Redding is within the service area of the proposed station (Tr. 135). If Merit is awarded the construction permit for the new FM station at Burney, all three of the Merit principals will move to Burney (Merit Ex. 1, p. 2). During the time that the three Merit principals have been working at KSXO, each has taken an active role in local civic and community affairs in Redding, both as individuals and as part of the KSXO staff. They have been personally involved in such charitable activities as the March of Dimes "Gourmet Gala" benefitting the Northern California Chapter of the March's Birth Defects Foundation; the Mental Health Association of California's "Mental Health Skate-a-Thon;" the Shasta County Muscular Dystrophy Association's Telethon and County Fair; the Shasta Dam Area Public Utility District's Spring Festival Arts and Crafts Fair; and the Shasta Blood Center's blood drive. Along with the personal involvement in these activities by Jeffrey, Jane and Michael Martin, the work of local civic and charitable organizations has been actively promoted on KSXO. In addition, Jeffrey Martin is an active member of the board of the Redding Chamber of Commerce (Merit Ex. 1, p. 4).

[4] None of Merit's principals were called for cross examination.

14. Merit proposes to purchase and install an auxiliary power generator at the proposed station (Merit Ex. 1, p. 4).

Conclusions

15. This proceeding involves the mutually exclusive applications of Collinses and Merit to construct a new FM station in Burney, California. The only question to be resolved is the comparative issue. That issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*: (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

16. In the landmark case of *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Supreme Court set as a First Amendment objective the maximum possible diffusion of communication facilities. In its *1965 Policy Statement*, the Commission describes diversification of control of the media of mass communications as "a factor of primary significance," constituting "a primary objective in the licensing scheme," *Id.* at 394. Diversification is even more significant than integration of ownership and management since it stands alone as one of the two pillars of the Policy Statement while integration is but one of several criteria in determining which applicant would provide the best practicable service to the public. *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977). See also *Terre Haute Broadcasting Corp.*, 25 FCC 2d 348 (Rev. Bd. 1970). In determining what weight to be accorded a media interest under the diversification criterion, the Commission considers local media interests within the principal community to be served to be of most significance, *1965 Policy Statement*, 1 FCC 2d at 394.

17. Jeffrey and Jane Martin presently own a 10% interest in NorCal, the licensee of standard broadcast station KSXO in Redding. However, in light of their commitment to dispose of this interest, the minority interest can not be attributed to them for comparative purposes. *Alexander S. Klein*, 86 FCC 2d 423, 427 (1981).[5] Thus, Merit's principals have no ownership interests in any medium of mass communications. By contrast, the Collinses together own 100% of KAVA, which is the only broadcast station licensed to Burney,

[5] Collinses acknowledges the *Klein* holding, but tries to distinguish its facts from the facts in this case. Collinses point to the proximity of Burney to Redding and the fact that following divestment, NorCal will be owned entirely by Jeffrey Martin's parents. However, nothing in Klein suggests that the distance of the other broadcast station from the community specified by the applicant or divestitute to one's parents rather than a brother is relevant to whether a broadcast interest is attributed to an applicant. In this connection, Collinses' request for a real party in interest issue was rejected (*Order*, FCC 81M-2356, released July 30, 1981).

and they propose to own 100% of the new FM station. It is clear that Merit is entitled to a substantial preference.[6] *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd. 1981); *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980); *Windham Broadcasting Group*, 49 FCC 2d 566 (Rev. Bd. 1974); *KALT-FM, Inc.*, 49 FCC 2d 61 (Rev. Bd. 1974).

Best Practical Service to the Public

18. In determining which application will insure the best practical service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395.

19. Mr. Collins, who will own 90% of the proposed FM station, is proposed as full-time general manager. Mrs. Collins, who holds the remaining 10% interest, will not be involved in the operation of the proposed FM station. Collinses will be credited with 90% full-time integration. Collinses' integration proposal is qualitatively enhanced because of Mr. Collins' local residence and involvement in local activities. However, such enhancement is diminished by the fact that Mr. Collins visits Burney mostly on weekends only and spends the rest of the week in Los Altos, near San Francisco, a substantial distance from Burney. Further, Mr. Collins holds no positions as an officer or director of the three local organizations to which he belongs and there is no evidence in the record as to the extent to which he has actually participated in the activities of those organizations. Collinses is not entitled to the slight credit accorded for prior broadcast experience since there is no evidence that Mr. Collins has participated in the day-to-day operation of KAVA, the station which he and Mrs. Collins own.

20. Merit will be credited with 75% full-time integration and 25% part-time integration. Jeffrey Martin and Michael Martin, representing 75% of Merit's stock, will be employed on a full-time basis in the positions of general manager and sales manager, respectively. Jane Martin, who holds the remaining 25% stock interest, has committed herself to continue on a 40-hour per-week basis as long as her full-time services is needed. In light of her

[6] Contrary to Collinses' assertion, the availability of non broadcast media in Burney and reception services to Burney does not diminish Merit's preference. On the contrary, unlike this case, even where other broadcast stations are licensed to the community, a substantial preference has been awarded. See, for example, *Radio Laredo*, *supra*; *Poet's Seat*, *supra*. Moreover, *Julie P. Minor* v. *FCC*, 662 F.2d 152 (D.C. Cir. 1980) is inapposite. Collinses is not seeking a different frequency and proposing to contemporaneously vacate its present frequency in order to upgrade its existing AM station. Collinses is seeking an additional broadcast facility.

conditional commitment, Jane Martin will not receive credit for full-time participation. However, she is entitled to credit for part-time participation since her commitment to work part-time is firm and unconditional. Collinses asserts that no credit should be accorded for Jane Martin's proposed participation since, according to Collinses, the record suggests that her position as business manager will involve bookkeeping duties. The contention is rejected. An examination of Merit Exhibit 1 reveals that Jane Martin will be the business manager for the new station and contains no suggestion that she will perform only bookkeeping duties. If Collinses felt a need for a more detailed analysis of Jane Martin's role, they should have called her or her husband for cross-examination at the hearing. Collinses, however, chose not to call any of the Merit principals for cross-examination. The record stands uncontradicted that as business manager, Jane Martin will carry out the duties commonly associated with that term. Further, in the *Policy Statement*, the Commission included the position of business manager in the list of important management positions to which particular weight is to be given. *Policy Statement*, *supra*, at 395. The qualitative attributes of Merit's integrated owners enhance its proposal. Specifically, although none of the Martins are Burney residents, they are entitled to some credit for residence within the service area of the proposed station and active participation in civic activities in Redding and Shasta County, the county in which both Redding and Burney lie, *Waters Broadcasting Corporation*, 88 FCC 2d 1204, 1209–10 (Rev. Bd. 1981). Further, Jeffrey and Michael Martin are entitled to credit for prior broadcast experience. However, Jane Martin's employment as a part-time bookkeeper does not involve activity which would entitle her to credit for prior broadcast experience. Merit also receives credit for female ownership and participation, *Waters*, *supra*.

Other Comparative Factors

21. Both applicants receive a similar preference for proposing to install an auxiliary power generator.

Final Comparative Evaluation

22. Merit is entitled to a substantial diversification preference. Collinses proposal of 90% full-time integration merits a slight preference over Merit's proposal of 75% full-time integration and 25% part-time integration. The attributes of Merit's participating owners are qualitatively superior to those of Collinses. It is settled, however, that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference, *Van Buren Community Service*, 87 FCC 2d 1010, 1022 (Rev. Bd. 1981). Merit's substantial diversification preference clearly outweighs Collinses' slight integration preference.

It is therefore, concluded that a grant of Merit's application would better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Merit Broadcasting Corporation IS GRANTED and the application of Thomas C. and Essie L. Collins, Tenants in Common IS DENIED.[7]

JOSEPH CHACHKIN
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Basic Qualifications
Fairness Doctrine
Fairness Doctrine, Complaint Procedure

No fairness violation established absent evidence licensee failed to address controversial issues of public importance. Quantitative approach rejected in favor of complaint procedure. Applicant disqualified for failure to show equipment availability or adequate finances. Disqualification for site availability overruled where based on licensee's denial of applicant's access to proposed site.
–*United Broadcasting Company*
Docket No. 20611

FCC 83–50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
UNITED BROADCASTING COMPANY (KBAY-FM) San Jose, California	Docket No. 20611 File No. BRH-1402
For Renewal of License	
PUBLIC COMMUNICATORS, INC. San Jose, California	Docket No. 20612 File No. BPH-9229
For Construction Permit	

Appearances

Norman E. Jorgensen, John G. Johnson, Jr., Carl W. Northrop and *Peggy Kobacker Shiffrin*, on behalf of United Broadcasting Company; *Phil Jacklin, Dick Cantu, David McNeil, Len Krimerman* and *James White* on behalf of Public Communicators, Inc.; *Charles M. Firestone* and *Jessica Frazier* on behalf of the American Civil Liberties Union, Santa Clara Valley Chapter, *Amicus Curiae*; and *Charles W. Kelley* and *Barbara A. Kreisman* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: January 27, 1983; Released: February 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER RIVERA NOT PARTICIPATING.

I. INTRODUCTION

1. This proceeding involves the mutually exclusive applications of United Broadcasting Company (United) and Public Communicators, Inc. (PCI) for the same FM broadcast facilities in San Jose, California. On July 31, 1974, United filed an application for renewal of its license for station KBAY-FM.[1] On November 1, 1974, PCI filed its application for a construction permit to establish a new FM broadcast station, specifying the same channel currently used by KBAY-FM.[2] Pursuant to Section 309(e) of the Communications Act,[3] the two applications were designated for hearing under the standard comparative issue.[4]

2. The Review Board (Board) subsequently enlarged the issues in the proceeding as to PCI's basic and comparative qualifications.[5] The added issues were: (a) whether PCI is financially qualified to construct and operate its proposed station; (b) whether PCI has reasonable assurance of the availability of its proposed transmitter site; (c) whether PCI possesses sufficient technical equipment and, if not, the effect thereof upon its technical qualifications; (d) whether PCI's staffing is adequate to effectuate its proposed operation; (e) whether PCI has maintained a public file at its specified location pursuant to Section 1.526; (f) whether PCI's ascertainment was

[1] United's previous license term was the period 1971–1974. United is also the licensee of KEEN, a standard broadcast radio station in San Jose, California. At the time of the hearing, the majority of United's stock was owned by three principals (George D. Snell, Floyd Farr, and George Mardikian). These three principals were then also owners of KCVR Radio (a partnership), the licensee of standard broadcast station KCVR and FM broadcast station KWIN-FM in Lodi, California. Following the conclusion of the evidentiary hearing in this proceeding, George Mardikian passed away. His wife and two children are equal legatees under his will. *See* I.D. Findings, para. 8. Subsequently, George D. Snell transferred his 32.26% share of United common voting stock to the Snell Family Capital Partnership. Also since the hearing, the licenses for standard broadcast station KCVR and FM broadcast station KWIN-FM have been assigned to George D. Snell, Jr., Stephen P. Snell, Christopher R. Snell and Jonathan H. Snell, a California general partnership d/b/a The Snell Brothers Partnership, B. Floyd Farr, and Haig Mardikian and Anita Naz Mardikian, Co-Executors of the Estate of George Mardikian, Deceased, d/b/a KCVR Radio.

[2] PCI is a non-profit corporation operated by a 13-member Board of Directors. *See* I.D. Findings, para. 9.

[3] 47 U.S.C. §309(e).

[4] Order, 40 FR 51501, published November 5, 1975, and issued by the Chief of the Broadcast Bureau pursuant to delegated authority.

[5] Memorandum Opinion and Order, 58 FCC 2d 1346, released April 23, 1976.

conducted as required; and (g) whether PCI's application was properly certified and executed.

3. Thereafter, the Board added the following issues regarding United's basic and comparative qualifications:[6] (1) whether United adequately served the community's needs with respect to public affairs programming during the past license term; (2) whether United has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during the past license term; (3) whether the station's public affairs programming during the past license term reasonably conformed to United's proposal as set forth in its 1971 renewal application; (4) whether United provided equal employment opportunity to Spanish-surnamed persons; (5) whether United has the requisite qualifications to be a Commission licensee; (6) whether United has failed to comply with Section 1.526 and, if so, the effect thereof on its comparative qualifications; and (7) whether there are significant differences between the two applicants as to the scheduling of public affairs programs and, if so, whether such differences demonstrate superior devotion to community service.

4. Prehearing conferences were held in Washington, D.C., on December 10, 1975, August 12, 1976, and March 2, 1977. An admissions hearing was held, also in Washington, D.C., on May 16, 17, 18, 23, and June 30, 1977. Evidentiary hearings were conducted in San Francisco, California, during July 18–22, and 25–29, 1977.

5. The Initial Decision of Administrative Law Judge (ALJ) James K. Cullen, Jr., granted United's renewal application and denied PCI's application.[7] The ALJ found in favor of United under the basic qualifying issues and disqualified PCI with respect to the following basic issues: financial qualifications; technical qualifications; transmitter site availability; staffing; and ascertainment. The ALJ concluded that the comparative issues were mooted by PCI's disqualification. Hence, the Initial Decision did not discuss those issues.

6. In Exceptions to the Initial Decision, filed November 8, 1978,[8] PCI makes two procedural objections. PCI complains that Commission procedures place applicants without legal counsel, such as PCI,

[6] Memorandum Opinion and Order, 59 FCC 2d 1412, released July 13, 1976. The Board placed the burden of proceeding with the introduction of evidence with respect to issue (2) on PCI. Both the burden of proceeding with the introduction of evidence and the burden of proof in all other respects were placed on United.

[7] Initial Decision, FCC 78D-51, released July 26, 1978.

[8] The first Exceptions filed by PCI on September 15, 1978, were dismissed because they exceeded the page limitations imposed by Section 1.277(c) of the Commission's Rules. Order, FCC 78M-1578, released October 24, 1978. On November 8, 1978, PCI filed a pleading styled "PCI Exceptions to the Initial Decision as Abridged Pursuant to Order." PCI's Abridged Exceptions were deemed timely filed under the deadline prescribed in the Commission's Order of October 24, 1978, *supra*. Order, FCC 78M-1924, released December 26, 1978.

at an unfair disadvantage. Second, PCI excepts to the ALJ's scheduling of the admissions hearing in Washington, D.C. PCI also argues that it is qualified to be a Commission licensee in all respects, and that the ALJ improperly excluded certain evidence which would have demonstrated its basic qualifications. PCI further contends that United should have been found disqualified under the issue regarding the adequacy of United's public affairs programming during the 1971–1974 license term, the Fairness Doctrine issue, and the promise versus performance issue. United and the Broadcast Bureau (Bureau) have each filed a Reply supporting the ALJ's conclusions.[9]

7. On September 15, 1978, United filed limited Exceptions. United contends that the Board erred in designating the basic qualifying issue concerning the Fairness Doctrine and that the ALJ erred in excluding from evidence United's Exhibit 2. On September 28, 1978, the Bureau filed a Reply supporting United's position regarding the Fairness Doctrine issue but urging affirmance of the ALJ's evidentiary ruling. United is the only party which has requested oral argument.[10]

8. Also before the Commission is a Motion for Leave to Intervene as *Amicus Curiae* and to File Brief, and accompanying Brief, filed January 26, 1982, by the American Civil Liberties Union, Santa Clara Valley Chapter (ACLU); Oppositions thereto filed by the Bureau and United on February 3 and 16, 1982, respectively; a Response to those Oppositions, filed March 1, 1982, by the ACLU; a Motion to Strike ACLU's Response, filed March 10, 1982, by United; and an Opposition to Motion Strike, filed March 22, 1982, by the ACLU.[11] In its Response, ACLU points out that it is not seeking full party status in this proceeding, but rather simply wants the

[9] United's Reply was filed on January 10, 1979. In a pleading filed November 30, 1978, the Bureau requested the Commission to accept its earlier Reply, filed September 28, 1978, in response to PCI's original Exceptions, as a Reply to PCI's Abridged Exceptions. The request was granted. Order, FCC 78M-1924, released December 26, 1978.

[10] United's request pursuant to Section 1.277(c) of the Commission's Rules was filed on September 19, 1978. Other outstanding pleadings before the Commission are: (1) a Petition to Enlarge Issues filed by United on January 23, 1980, to add issues regarding the dismissal of Phil Jacklin (a PCI Officer and Director) by San Jose State University and the effect thereof on PCI's character qualifications; (2) an Opposition to (1) filed by the Bureau on February 6, 1980; (3) a Reply to the Bureau's Opposition filed by United on February 14, 1980; (4) a Motion for Leave to Amend Application and accompanying amendment reporting the resignation of PCI Director and Treasurer, Phil Jacklin, filed by PCI on February 20, 1980; (5) Comments on (4) filed by United on February 27, 1980; and (6) a Motion for Leave to Amend application and accompanying amendment, filed February 8, 1982, by United. United's Petition to Enlarge Issues is rendered moot by our result in this Decision. PCI's and United's Motions for Leave to Amend Application are granted.

[11] For the reasons set forth in its Motion for Extension of Time request, filed February 2, 1982, we have accepted United's Opposition.

Commission to accept and consider its *amicus* brief. Recognizing ACLU's asserted interest in the Commission's Fairness Doctrine, which is one of the matters at issue in this proceeding, we will grant its request.[12]

9. After reviewing the record, the Initial Decision and the various pleadings filed by the parties to this proceeding, we conclude that the ALJ's ultimate conclusion is correct and affirm the grant of United's renewal application. However, we disagree with some of the findings and conclusions regarding the basic qualifying issues. We conclude that PCI is not qualified to be a Commission licensee, but base that conclusion on PCI's failure to make an adequate showing under the financial and technical issues designated against it. We further conclude that PCI did make an adequate showing under the transmitter site issue and the staffing issue. The ascertainment issue designated against PCI must now be deleted from the proceeding pursuant to our recent *Report and Order in the Matter of Deregulation of Radio.*[13] The Initial Decision is thus modified in accordance with our findings and conclusions on these latter issues. Regarding United's basic qualifications, we affirm the ALJ's conclusions in favor of United. However, upon reviewing United's Limited Exceptions and the Bureau's Reply, we conclude that the Board erred in designating the Fairness Doctrine issue against United. Finally, we concur in the ALJ's conclusion that the comparative issues are mooted by resolution of the basic qualifying issues.

10. United's request for oral argument will be denied. We do not believe oral argument on United's Limited Exceptions would materially assist us in our resolution of this proceeding.

II. PCI'S PROCEDURAL CONTENTIONS

11. *Due Process.* PCI claims that it was denied due process because Commission proceedings are inaccessible and incomprehensible to parties unable to afford legal counsel. Both the Bureau and United reply that PCI is an applicant seeking a construction permit for a commercial FM radio station, and as such, it voluntarily chose to initiate this comparative renewal proceeding and must be held to the same standards as other applicants. Furthermore, the Bureau and United argue that PCI was forewarned about the difficulties of

[12] In light of our holding, *supra*, United's Motion to Strike is denied. While the Commission's Rules do not provide for *amicus* briefs, their acceptance is a matter of agency discretion. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018–19 (1981), *appeals affirmed sub nom. Central Florida Enterprises, Inc.* v. *FCC*, No. 81–1796 (D.C. Cir., filed July 13, 1982); *The Trustees of University of Pennsylvania*, 42 RR 2d 871 (1978).

[13] 84 FCC 2d 968 (1981), *recon. denied*, FCC 81–366, released August 28, 1981, *appeal docketed sub. nom. Office of Communication of the United Church of Christ, et al.* v. *FCC and USA*, Nos. 81–1032, *et al.* (D.C. Cir., petition for review filed January 14, 1981).

proceeding without legal counsel, and that the ALJ on several occasions adjusted procedures in deference to PCI's lack of familiarity with Commission practices.

12. We agree with the Bureau and United that an unsuccessful *pro se* applicant is not entitled to relief simply because it was not represented by counsel. Where, as here, a party elects to proceed *pro se*, it must assume the burden of becoming familiar with Commission Rules and conforming to Rule requirements.[14] An applicant who elects to proceed without counsel cannot be allowed to disavow its decision after an unfavorable result.[15]

13. PCI chose voluntarily to proceed without benefit of counsel, despite the ALJ's warnings about the disadvantages of *pro se* representation.[16] Also, during the course of the proceeding the ALJ explained Rule requirements and repeatedly made allowances for PCI's lack of familiarity with Commission procedure. For example, PCI was granted numerous extensions of time to file pleadings. Due to a possible misunderstanding as to the time for discovery, PCI was also granted discovery after it had already received United's exhibit exchange.[17] Finally, in reviewing PCI's Exceptions, we too have overlooked numerous procedural deficiencies and have undertaken an exhaustive review, on our own motion, both to assure fair treatment of PCI before the Commission and to assure a result that best serves the public interest.

14. *Location of Admissions Hearing.* PCI excepts to the ALJ's refusal to hold the admissions portion of the evidentiary hearing near Jan Jose, California.[18] Admissions sessions took place at the Commission's office in Washington, D.C., on May 16–18, 23, and June 30, 1977. The evidentiary hearing was conducted in San Francisco,

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[14] *Family Television, Inc.*, 85 FCC 2d 986 (1981); and *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739 (1972).

[15] *Enterprise Broadcasting, Inc.*, 60 FCC 2d 852, 857 (1976); and *South Sausalito Cable TV*, 63 FCC 2d 516 (Rev. Bd. 1977).

[16] Tr. 21, 98, 103, 115–16.

[17] Transcript of March 2, 1977 prehearing conference; Order, FCC 77M-443, released March 4, 1977.

[18] The direct testimony in this case was required to be reduced to writing. Tr. 126–30. Prior to the evidentiary hearing, several admissions sessions were held. At these admissions sessions the ALJ ruled on the admissibility of the various exhibits which each party intended to offer as evidence at the evidentary hearing. PCI contends that the admissions sessions constituted part of the evidentiary hearing because the ALJ considered the first admissions session as commencing the evidentiary hearing in his Memorandum Opinion and Order, FCC 77M-114, released June 21, 1977, dismissing PCI's Motion for Summary Decision as untimely under Section 1.251(a) of the Commission's Rules. In terms of the actual reception of evidence, however, the evidentiary hearing is distinct from the admissions hearing.

California, on July 18–22, and 25–29, 1977. PCI argues that the two Orders designating the admissions hearing in Washington, D.C.,[19] contravened an earlier Order specifying a hearing location near San Jose[20] in response to PCI's Petition for Local Hearing, filed November 18, 1975. PCI argues further that the designated hearing location violated Section 1.253(d) of the Commission's Rules, which gives it a right to a local hearing. PCI claims that it was prejudiced because only one of its Directors (Len Krimerman) was available to attend the admissions sessions in Washington, D.C., and he was unfamiliar with PCI's prepared case. The Bureau and United reply that PCI never objected to the location prior to the admissions hearing, that PCI did not suffer any prejudice because it was represented at each session and, further, that PCI has failed to demonstrate any specific error in the ALJ's evidentiary rulings.

15. There is no right to a local hearing under Section 1.253 of the Commission's Rules. Commission policy in scheduling field hearings is founded upon public interest considerations.[21] Moreover, the actual evidentiary hearing in this proceeding was conducted near San Jose, consistent with the Commission's customary practice of scheduling renewal hearings at the station's location.[22]

16. As to the separate admissions hearing, we conclude that the ALJ did not err in convening this part of the proceeding in Washington, D.C. In *Rocket Radio Inc.*,[23] the Commission was faced with a change of venue request for the evidentiary hearing and ordered a change to a field situs. That case involved serious character issues which required credibility and demeanor findings, a large number of witnesses who resided in the proposed community of license, and a competing applicant, which was a non-profit corporation that would have been unable to bear the expense of transporting witnesses to Washington, D.C. None of these considerations apply to an admissions hearing. The admissions hearing in this proceeding was for the sole purpose of determining the admissibility of evidence. No evidence was actually received. Exhibits intended as direct and rebuttal testimony were merely identified, and the ALJ ruled on their admissibility. Hence, credibility and demeanor findings were

[19] FCC 77M-443, released March 4, 1977; and FCC 77M-1108, released June 20, 1977.

[20] By Memorandum Opinion and Order, FCC 75M-2067, released December 8, 1975, the Chief Administrative Law Judge ordered a transfer of the hearing to a location near San Jose, California, pursuant to PCI's request.

[21] Commission practice in scheduling evidentiary hearings is not founded solely on the particular type of proceeding involved, but on the overriding public interest consideration to conduct fair and impartial hearings and to compile full, complete, and accurate records. *Cathryn C. Murphy*, 23 FCC 2d 204 (1970). *See also Rocket Radio, Inc.*, 57 FCC 2d 759 (1976).

[22] It is Commission policy to schedule the evidentiary hearing in a renewal case at the station's location and in a new license case, in Washington, D.C. *Cathryn C. Murphy*, 23 FCC 2d 204 (1970).

[23] 57 FCC 2d 759 (1976) (comparative hearing for new FM broadcast station).

not at issue, the presence of local witnesses was not required, and the only expense borne by the applicant involved representation costs.

17. Additionally, PCI has not demonstrated how it was prejudiced by the location of the admissions hearing. Elsewhere in its Exceptions PCI alleges error in certain evidentiary rulings, and we have treated these matters separately. However, PCI offers no argument as to how a local admissions hearing would have made a difference, except to suggest that Len Krimerman, the only PCI Director able to attend the hearings, was not as familiar with the evidentiary presentation as were other members of PCI's Board of Directors. PCI does not name any of its other Directors who were allegedly better acquainted with the case but unable to attend the hearing. Len Krimerman represented PCI throughout the admissions hearing, and he was PCI's duly authorized representative.[24] Morever, prior to the commencement of the admissions hearing, the ALJ explained its purpose and gave PCI ample opportunity to indicate then how its representation would be hampered by the location, but PCI made no such showing.[25] In view of the foregoing, we not only fail to see how PCI was prejudiced by the location of the admissions hearing, but we are convinced that the ALJ made substantial efforts to protect PCI's rights.[26]

III. UNITED'S LIMITED EXCEPTIONS

18. In response to a Petition to Enlarge Issues filed by PCI, the Review Board enlarged the issues to, *inter alia*, include:[27]

(1) whether United adequately served the community's needs with respect to the public affairs programming during the 1971–74 license term; and

[24] Len Krimerman was designated by the Board of Directors, along with PCI's four officers, to represent the applicant at any prehearing conference and throughout the hearings. Motion for Leave to File Certified Corporate Resolution, filed June 10, 1976. Tr. 52. In fact, Mr. Krimerman continued as one of PCI's representatives during the evidentiary hearings.

[25] During the prehearing conference on August 12, 1976, the ALJ specifically asked PCI if it would be burdened by sending its authorized representative (Len Krimerman) "or any other party" to the admissions hearing in Washington, D.C. Although PCI suggested the possibility of a local admissions hearing, PCI never indicated then that its representation would be hampered in any way by the Washington, D.C. location. Tr. 71–74.

[26] The ALJ rescheduled the admissions hearing from May 18th to May 23rd in order to accommodate Krimerman's schedule. Tr. 502–03; Order, FCC 77M-955, released May 20, 1977. Although Krimerman was not presented at the June 30th session, the ALJ determined that all PCI Exhibits at issue should be admitted to protect PCI's rights. Tr. 674–90.

[27] Memorandum Opinion and Order, 59 FCC 2d 1412 (Rev. Bd. 1976). United appealed the Board's enlargement of issues, but the Commission dismissed the interlocutory appeal on procedural grounds, noting that the merits of the questions raised could be considered after the Initial Decision is released. Order, FCC 77-141, released March 3, 1977 (Chairman Wiley issuing a concurring statement).

(2) whether United has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during its past license term.

In its Limited Exceptions, United argues: (1) that the Board erred in adding the second issue (Fairness Doctrine); and (2) that under the first issue (program responsiveness), the ALJ erred in rejecting an evidentiary submission which would have shown how public interest programming could be "fitted into" United's program format.

19. *Designation of a Fairness Doctrine Issus.* PCI filed a petition for enlargement of issues alleging that Station KBAY-FM broadcast insufficient public issue programming. PCI based its Fairness Doctrine charge on the percentages given for news and public affairs in United's 1971 and 1974 renewal applications and on five days of monitoring KBAY-FM's programming. PCI claimed that KBAY broadcast only about 13.4 minutes of public affairs programs a week; that national news served almost exclusively as the source of supply for the "issue-oriented" news; that the size of the news staff (one announcer editing the wire services) and the absence of any local news-seeking sources indicated a lack of interest in "informational programming" and that only two nationally-syndicated, program-length public affairs programs were presented during that monitoring period. PCI also relied on the affidavit of Al Calame who stated that he recorded the station's programming between the hours of 6:00 A.M. and midnight from June 26 through July 2, 1974, and that at no time did United publicize upcoming public affairs programs, present "issue-oriented" spot messages apart from anti-smoking announcements, or broadcast rebuttals to any of the station's non-issue-oriented editorials.

20. The Board designated the Fairness Doctrine issue pursuant to Section 315 of the Communications Act,[28] noting "the paucity of public affairs generally, the absence of a local news staff, and the licensee's failure to furnish any information with respect to its coverage of controversial issues of public importance . . ."[29] United contends that a licensee's compliance with the Fairness Doctrine should not be evaluated as part of the triennial renewal process, citing the Commission's 1974 Fairness Report.[30] United further argues that specification of the Fairness Doctrine issue here

[28] 47 U.S.C. §315(a).

[29] 59 FCC 2d at 1414-14. The Board cited *In re Complaint of Representative Patsy Mink*, 59 FCC 2d 987 (1976).

[30] *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 FCC 2d 1 (1974), *aff'd on recon.*, 58 FCC 2d 691 (1976), *remanded in part on other grounds sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

contravenes the Board's own precedent in the case of *Federal Broadcasting System, Inc.*,[31] and that, since the responsiveness issue necessarily includes a Fairness Doctrine inquiry, specification of a separate Fairness Doctrine issue was superfluous.

21. The Bureau agrees that the Board erred in specifying the issue because PCI failed to comply with the specificity requirements of Section 1.229(d) of the Commission's Rules. PCI did not identify the local issues of public importance, or indicate any local issues which received less than adequate coverage. However, as to United's other arguments, the Bureau asserts that *National Citizens Committee for Broadcasting* v. *FCC*.[32] did not foreclose evaluation of a licensee's compliance with the Fairness Doctrine at renewal. That case simply affirmed the Commission's position that review of Fairness Doctrine complaints *only* at the time of renewal would discourage the filing of complaints and deny the Commission the ability "to remedy violations before a flagrant pattern of abuse develops."[33] The Bureau also distinguished *Federal Broadcasting System, Inc.*,[34] where the Board designated a broad program responsiveness issue and did not add a separate Fairness Doctrine issue. The Bureau claims that the responsiveness issue in *Federal Broadcasting System, Inc.*, encompassed all non-entertainment programming, whereas the programming "responsiveness" issue here was limited to public affairs programming.

22. We conclude that a Fairness Doctrine issue should not have been designated against United.[35] PCI's Petition to Enlarge Issues did not make the requisite showing for designation of a Fairness Doctrine issue. Its pleading presented general conclusory allegations concerning KBAY-FM's news and public affairs programming, and did not identify a single controversial issue of public importance which was not adequately covered during the license term.[36] It was

[31] 62 FCC 2d 861, 865 (Rev. Bd.), *recon. dismissed*, FCC 77R-26 (1977).

[32] n. 30 *supra*.

[33] 567 F.2d at 1116. The Bureau also cites *Columbia Broadcasting System, Inc.*, 56 FCC 2d 313 (1975).

[34] n. 31, *supra*.

[35] We reject United's argument that it is inappropriate to consider licensee compliance with the Fairness Doctrine as part of the renewal process. It is true that the *1974 Fairness Report*, 48 FCC 2d at 18–21 and *Fairness Doctrine*, 89 FCC 2d 916, 920–24 (1982), found that a case by case consideration of Fairness Doctrine allegations, predicated on the filing of timely complaints, will enable the Commission to respond to the public when compliance is questioned; and that the complaint process provides for more effective enforcement than a review of compliance during renewal proceedings. There is, however, nothing in the *1974 Fairness Report*, *Fairness Doctrine*, or any other Commission precedent, which would prevent us from considering properly raised fairness allegations as part of the renewal process.

[36] Subsection (d), 47 C.F.R. §1.229(d), provides that motions to enlarge issues: shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be

incumbent upon PCI to make a *prima facie* showing that United's "Fairness Doctrine obligations are being avoided, or that 'critical' issues are being ignored."[37]

23. In connection with the Fairness Doctrine issue, we deem it appropriate to address briefly the *amicus* comments presented by ACLU. Our conclusion that a Fairness Doctrine issue should not have been designated is based upon existing Commission precedent. ACLU urges the Commission to adopt a "quantitiative" standard for judging compliance with the Fairness Doctrine. Noting that the Board specified a fairness issue based upon the amount of time (or lack thereof) which United devoted to controversial public issues, ACLU argues that the Commission should affirm this approach and require a minimum level of attention to controversial issues, whether or not a "burning issue" is identified. Under this approach, the Commission would assess the amount of time a licensee gives to controversial matters and the timing of the broadcasts (such as prime time versus early morning hours of low listenership). ACLU argues that this offers a more "content-neutral framework" for evaluating a licensee's efforts to meet the Fairness Doctrine and also is consistent with the Commission's recent *Report and Order in the Matter of Deregulation of Radio.*[38]

24. ACLU has failed to convince us that the Commission's approach to the evaluation of licensee compliance with the Fairness Doctrine should be changed. Our present policy involves a content-neutral review in response to listener complaints. The Commission does not endeavor to determine which issues should be addressed, and Fairness Doctrine compliance is reviewed only when evidence is presented that a licensee failed to cover a specific, significant controversial issue. However, even then, the Commission's review of a licensee's programming judgments is concerned only with whether the licensee acted reasonably to fulfill its fairness obligations.[39]

25. Nor are we persuaded that the "quantitative" approach suggested by ACLU would be more effective than our present procedures. We recently addressed the propriety of a quantitative approach in denying reconsideration of the *Fairness Doctrine Inquiry.*[40] There, the petitioner argued that the Commission need only be concerned with whether the licensee has devoted a reasonable amount of time to controversial issues of public importance, and that we should not get involved with the appropriateness of the

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supported by affidavits of a person or persons having personal knowledge thereof.

See also Mount Hood Radio and Television Broadcasting, 58 FCC 2d 288, 296, *recon. denied*, 59 FCC 2d 1198 (1976); *American Broadcasting Cos., Inc.*, 56 FCC 2d 275, 277–80 and 282–84 (1975), *recon. denied*, 60 FCC 2d 509 (1976).

[37] *Fairness Doctrine, supra*, 89 FCC 2d at 921.

[38] 84 FCC 2d 968 (1981).

[39] *1974 Fairness Report, supra*, 48 FCC 2d at 10.

[40] 74 FCC 2d 163 (1979), *recon. denied*, 89 FCC 2d 916 (1982).

issues covered. We rejected this argument finding that effective enforcement of the Fairness Doctrine requires specific scrutiny of issues to determine if they are both controversial and of public importance. Any review of fairness complaints without consideration of whether issues presented were controversial issues of public importance would be meaningless. Hence, a quantitative approach for evaluating fairness concerns would not afford a significantly better method for enforcement of the Fairness Doctrine.[41] Finally ACLU's argument concerning the *Deregulation of Radio* [42] is misplaced. The Memorandum Opinion and Order in the *Deregulation of Radio* made clear that none of the procedures contemplated in that proceeding would alter the Fairness Doctrine obligations of licensees.[43] Moreover, in *Fairness Doctrine*, we specifically held that the *Deregulation of Radio* had no impact on the Commission's approach to dealing with Fairness Doctrine concerns.[44]

26. *ALJ's Evidentiary Ruling.* United also excepts to the ALJ's rejection of Exhibit 2,[45] which it submitted in response to the program responsiveness issue.[46] United's Exhibit 2 contains certified copies of excerpts from license renewal applications of 58 FM broadcast stations filed during the years 1973–75. The filings were from 56 FM stations in cities nationwide allegedly having the same "beautiful music format" as KBAY-FM and from two other FM stations in the San Jose area. United claims that the Exhibit was offered to show how FM stations across the country, which present the same format as KBAY-FM, deal with public affairs programming. According to United, the level of responsiveness of a "beautiful music" format differs from the level of responsiveness for other kinds of entertainment formats, such as an all news and talk format.

27. United relies upon Question and Answer 34 of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants (1971 Primer)*[47] for the proposition that programming responsive to ascertained needs may vary with the station's program format. United also relies upon *Moline Television Corp.*,[48] noting that the Commission there compared the performance of the challenged renewal applicant with the performance of other stations. United argues further that the admission of Exhibit 2 into evidence would have enabled the parties to explore the basis, if any,

[41] 89 FCC 2d at 922.
[42] 87 FCC 2d 797 (1981).
[43] *Id.* 84 FCC 2d at 979.
[44] 89 FCC 2d at 924–25.
[45] The ALJ rejected the Exhibit, entitled "Public Affairs Programming by KBAY's FM Peers," at the May 16, 1977 admissions hearing for the reason that the program performance of other stations was not relevant. Tr. 193–200.
[46] *See* para. 18, *supra.*
[47] 27 FCC 2d 650 (1971).
[48] 31 FCC 2d 263 (1971).

which the Board had for treating KBAY-FM differently from similarly situated applicants, contrary to *Garrett Broadcasting Service* v. *FCC*.[49]

28. The Bureau supports the ALJ's evidentiary ruling. According to the Bureau, the *1971 Primer* makes clear that an applicant which proposes a specialized format is still obliged to present programming responsive to ascertained community needs. The Bureau also argues that *Moline Television Corp.* is inapposite, because the data was submitted in response to a promise versus performance issue and the licensee was seeking to show programming needs in its market.[50] Morever, the Bureau contends that United's Exhibit failed to show that the other stations had formats similiar to that of United, since "beautiful music" formats may differ in significant respects. It also argues that the Exhibit merely offers a comparison of KBAY-FM's programming performance with the programming representations in other stations' renewal applications, and, hence, it remained for United to show that these allegedly comparable stations had performed as promised. The Bureau argues that the Exhibit has no probative value, as the ALJ ruled, because an evaluation of a licensee's programming performance is based upon its responsiveness to community problems, needs, and interests, not upon a comparative ranking of stations in a market.[51]

29. In *Moline*, the Commission found that the comparison with public affairs programming from stations serving the "same market or elsewhere" provides a "pertinent standard" for determining whether a licensee's programming is responsive to the public.[52] The comparison in that proceeding, however, was confined to stations serving the same market. Unlike the stations compared in *Moline*, 56 of the stations documented in Exhibit 2 are not in the same market as San Jose. While *Moline* recognized that data from stations in other markets may be of value, there is no evidence that the communities those stations serve have needs and interests similar to San Jose. Absent such a threshold showing, we find that the data concerning those stations would be meaningless for determining whether United's programming is responsive to the needs and interests of San Jose. Moreover, in light of our resolution of the program responsiveness issue,[53] any error in excluding Exhibit 2 from evidence and in failing to consider programming of similar stations, would not be of decisional significance.

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[49] 513 F.2d 1056 (D.C. Cir. 1975). The language, which United quotes, states the proposition that agency action will be set aside when the agency fails to reconcile an apparent difference in treatment accorded litigants in like circumstances.

[50] *See* n. 48 *supra*.

[51] The Bureau cites *Hubbard Broadcasting, Inc.*, 48 FCC 2d 517 (1974), *aff'd sub nom. Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732 (1976).

[52] 31 FCC 2d at 265, 269–70.

[53] Paras. 30–39 *infra*.

IV. UNITED'S BASIC QUALIFICATIONS

30. *Responsiveness of Public Affairs Programming to Community Needs.* The ALJ's findings, based upon United's 1971 ascertainment survey, list the following ten most significant needs in the San Jose community:[54] (1) crime, law and order, police protection; (2) improved educational facilities; (3) lack of mass transportation; (4) air and water pollution and waste disposal; (5) moral laxity; (6) unemployment, recession, job losses; (7) drug abuse; (8) welfare; (9) minority problems including housing; and (10) population congestion.

31. United alleged that these 13 public affairs programs were regularly carried during the license term in response to ascertained needs: (1) "Community Focus;" (2) "You and Your Community;" (3) "San Jose Rescue Mission;" (4) "State Capitol Report;" (5) "Washington Window;" (6) "UN Week in Review;" (7) "San Jose Yesterday and Today;" (8) "Perspective;" (9) "Overseas Assignment;" (10) "Editorials;" (11) "Free Speech Messages;" (12) "Public Service Announcements;" and (13) "Guestitorials" (guest editorials). The findings also note that the station presented regular newscasts. Although KBAY-FM did not maintain a local news director or a local news staff, and its news source was the United Press International wire service, 25 percent of the news did address local matters.[55] The ALJ's findings recite the evidence concerning program formats, topics covered on the public affairs programs, broadcast times and dates, and the qualifications of the program hosts.[56]

32. The ALJ concluded that United adequately served the community's needs with respect to its public affairs programming during the 1971–74 license term.[57] The ALJ cited, as public affairs programming, "You and Your Community," "San Jose Yesterday and Today," station editorials and public service announcements, the local newscasts, free speech messages, "Community Focus," and the four nationally produced programs, "Washington Window," "Perspective," "UN Week in Review," and "Overseas Assignment".[58] The ALJ concluded that these broadcasts covered both

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[54] I.D. Findings, para. 12; United Ex. 1 at 1.

[55] I.D. Findings, paras. 42–43; United Ex. 19 at 2 and 7; tr. 1722–25.

[56] I.D. Findings, paras. 14–44.

[57] I.D. Conclusions, paras. 99–103(a). The ALJ cited, at para. 99, *In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant* (Docket No. 19154), 66 FCC 2d 419 (1977) (subsequent history omitted); *SRD Broadcasting, Inc.*, 57 FCC 2d 354 (1975); *Storz Broadcasting Company*, 58 FCC 2d 1333 (1975); *KSAY Broadcasting Company*, 47 FCC 2d 584 (1974); *Chicago Federation of Labor and Industrial Union Council*, 48 FCC 2d 1174 (Rev. Bd. 1974), *recon. denied*, 50 FCC 2d 559 (Rev. Bd. 1975).

[58] I.D. Conclusions, paras. 100–01. The list does not include "San Jose Rescue Mission," "State Capitol Reports" and "Guestitorials," which were discussed in the findings.

national and local matters adequately. Further, there was no evidence that United had ignored a strongly expressed problem of the community or had otherwise unreasonably exercised its programming discretion. The ALJ concluded that, even though many of the broadcasts were aired during potentially low audience periods, the programming still reached a sizable audience, as evidenced by the letters which United received from listeners commenting on the broadcasts.[59]

33. In its Exceptions, PCI claims that there is no finding as to the amount of public affairs programming broadcast during an average week. Nor do the findings consider the fact that United's local public affairs programming, with the exception of "San Jose Yesterday and Today," was introduced four months before the license term expired. PCI argues that testimony from the host of "You and Your Community" indicates that the program was erroneously classified as public affairs. Also, according to PCI, "San Jose Yesterday and Today" can only be considered 50% public affairs programming, and of its 139 scheduled broadcasts, only 89 broadcasts were actually presented. PCI argues that United's scheduling of public affairs programming is a relevant consideration, as the Board determined and contrary to the ALJ's conclusions.[60] PCI objects further to the ALJ's failure to adopt and/or respond to certain of PCI's Proposed Findings.[61] The Bureau's Reply generally affirms the ALJ's analysis under the this issue. United's Reply claims that PCI's Exceptions fail to meet the specificity requirement of Section 1.277 of the Commission's Rules,[62] and that PCI is merely complaining that the ALJ refused to adopt its version of the case.

34. PCI's objection to the lack of a specific finding on the amount of public affairs programming broadcast weekly is without merit. The Initial Decision actually provides more specific findings than the findings sought by PCI. The ALJ tabulated each broadcast of public affairs programming, so that the findings even reflect irregularities caused by schedule changes.[63] Furthermore, the adequacy of a

[59] I.D., Conclusions, paras. 102–03. In addition to the letters received from listeners, United introduced as evidence a survey conducted by Pulse, Inc., for the period June-September, 1974, which indicated that the station reached 1,300 people every quarter hour between midnight and 6:00 A.M. when station editorials were aired. I.D. Findings, para. 46; Joint Ex. 4 at 18–19.

[60] PCI notes that the Board, 59 FCC 2d at 1414, cited *KSAY Broadcasting*, 47 FCC 2d 584 (1974) and *New Mexico Broadcasting Co.*, 54 FCC 2d 126, *modified*, 56 FCC 2d 788 (Rev. Bd. 1975).

[61] This aspect of PCI's Exceptions, which refers to its earlier filed "Proposed Findings," fails to comply with the requirements of Section 1.277(a) of the Commission's rules.

[62] United cites *Burns- Rieke & Voss Associates*, 45 FCC 2d 264 (Rev. Bd. 1974) (subsequent history omitted); and *Harvest Radio Corp.*, 40 FCC 2d 685, *affirming* 39 FCC 2d 160 (Rev. Bd. 1973).

[63] I.D. Findings, paras. 15–38. We can discern the following figures from the ALJ's

licensee's responsive programming is not governed by quantitative standards.[64] The licensee has considerable leeway in the area of programming, and the bare assertion that a certain percentage of public affairs programming is not sufficient does not establish a *prima facie* case that a licensee has failed to serve the public interest.[65] The Commission will not interfere with a licensee's discretion in determining the amount, kind, and time periods during which public affairs and other informational programming should be presented absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise

findings. Excluding program repeats and the three programs which the ALJ did not mention in the conclusions, ("State Capitol Report," "San Jose Rescue Mission," and the "Guestitorials") KBAY-FM aired a weekly average of 3 hours and 15 minutes of full-length public affairs programming and, also on a weekly basis, presented station editorials, local newscasts, public service announcements, and Free Speech Messages. The responsiveness issue against United, as added by the Board, specified public affairs programming, although the Board acknowledged that "news programming may be relevant to this examination." 59 FCC 2d at 1414. Pursuant to Section 73.1810(b) of the Commission's Rules, "public affairs programs" comprise a category separate from other program categories such as news, entertainment, religion and instructional programs. The ALJ considered the station's local newscasts under the responsiveness issue, and we note that this is permitted by Question and Answer 33 of the *1971 Primer*, 27 FCC 2d at 677–78. In doing so, the ALJ identified the local news items which were covered. I.D. Findings, para. 43. The other types of programs which the ALJ cited—station editorials, public service announcements, and Free Speech Messages—were also properly considered under the responsiveness issue. Although the *1971 Primer* indicates that responsiveness to community needs should be provided largely through programming rather than announcements or editorials, the *Primer* does recognize that public service announcements and editorials can serve as vehicles to address ascertained needs under certain circumstances. Questions and Answers 32, 62, and 65 of the *1971 Primer*, 27 FCC 2d at 674–77. The ALJ's findings list specific examples of community concerns which the announcements and editorials addressed. I.D. Findings, paras. 36–37 and n. 18.

[64] The Commission has repeatedly reiterated the inherent limitations of quantitative measurements of licensee performance. Answer 31 of the *1971 Primer*, *supra* n.44, 27 FCC 2d at 676–77, emphasizes that the licensee has considerable latitude in determining the proportion of time devoted to responsive programming. *E.g.*, *Radio Ohio, Inc.*, 38 FCC 2d 721, 738 (1973), *aff'd sub nom. Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320 (D.C. Cir. 1974); and *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 335 (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972), *reh. denied*, 466 F.2d 331. *See Amendment of Part 0 of the Commission's Rules - Commission Organization - with Respect to Delegation of Authority to the Chief, Broadcast Bureau*, 43 FCC 2d 683 (1973), *and Amendment to §0.281 of the Commission's Rules: Delegation of Authority to the Chief, Broadcast Bureau*, 59 FCC 2d 491 (1976), which sets forth procedural, not substantive, guidelines. *See also Broadcast Renewal Applicant*, 66 FCC 2d 419, 428 (1977), *aff'd sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978); and *Report and Order in the Matter of Deregulation of Radio*, 84 FCC 2d 968 (1981).

[65] *Storer Broadcasting Co.*, 41 FCC 2d 792 (1973). *See also Sonderling Broadcasting Corp.*, 62 FCC 2d 303, 306 (1976), *recon. denied*, 64 FCC 2d 731 (1977); *Lance Communications, Inc.*, 57 FCC 2d 1235, 1241 (1976); and *Storz Broadcasting Company*, 58 FCC 2d 1333, 1337 (1975).

unreasonably exercised its discretion in the station's overall programming.

35. In this regard the ALJ concluded there was no evidence that United had ignored a strongly expressed problem of the community or otherwise unreasonably exercised its programming discretion. The ALJ also concluded that United presented numerous programs which were responsive to community needs. As to PCI's argument that all the *local* programs, except "San Jose Yesterday and Today," were introduced during the last four months of the license period, we do not fault United for relying in part on network supplied programs. The Commission has recognized that licensees can rely on any programming which is responsive to local needs to serve its community of license.[66] Furthermore, United is entitled to receive some credit for programming which was introduced in August, 1974, since the programming was begun within the license period and PCI filed its competing application on November 1, 1974.[67]

36. PCI also complains that United was credited with two programs which were misclassified as public affairs programming. PCI's contention that half the programs on "San Jose Yesterday and Today" were historical and informational is simply a conclusory statement. PCI does not identify the particular programs in question or discuss why any of these alleged programs lack public affairs characteristics.[68] In addition, Section 73.1810(d)(1)(iv) of the Commission's Rules provides a broad definition of "public affairs programs."[69] For a series to be credited as public affairs programming, the Commission does not require that the entire broadcast and each individual program of a series have public affairs characteristics,[70] and the Commission grants licensees wide discretion in programming classification.[71]

37. United has provided specific examples of how crime and minority problems were treated on "San Jose Yesterday and Today." Many of the other topics treated on the program also fall within the

[66] *WHEC, Inc.*, 52 FCC 2d 1079, 1085, *recon. denied*, 55 FCC 2d 687 (1975).

[67] *See Alabama Educational Television Commission*, 50 FCC 2d 461, 475–76 (1975); and *RKO General, Inc.*, 35 FCC 2d 100, 103 (1972) (subsequent history omitted).

[68] PCI merely refers to its earlier "Proposed Findings" which falls short of the pleading requirements of Section 1.277(a) of the Commissions Rules.

[69] This section defines public affairs programs (PA) as programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables, vignettes, and extended coverage (whether live or recorded) of public events or proceedings, such as local council meetings and Congressional hearings. *See also* FCC Form 303, Section IV-A, at 2.

[70] It may be appropriate in some instances to give a series only partial public affairs credit. *E.g., Chicago Federation of Labor and Industrial Union Counsel*, 38 FCC 2d 417, 424 (1972) (subsequent history explained in Initial Decision), 54 FCC 2d 477 (ALJ 1975).

[71] *Lance Communications, Inc.*, 57 FCC 2d 1235, 1244 (1976).

broad category of public affairs. For example, according to Ray Blackmore, the show's host, programs were conducted on the problems of Mexican-Americans, civil demonstrations, pre-trial publicity, a proposed local sports arena, public landmarks, and retirement. Blackmore also conducted programs informing the public about community fund raising projects such as lighting for the police athletic league, housing for the Mexican Chamber of Commerce, and the City of Hope charitable organization.[72] We therefore conclude that the ALJ correctly considered "San Jose Yesterday and Today" as contributing toward the fulfillment of United's public affairs obligation.

38. We likewise affirm the public affairs classification of "You and Your Community." The show's host described her interview program as informative and educational. The Initial Decision lists the broadcast dates, program guests, and the interview subjects. Many of the topics pertained to community activities and events such as upcoming drama and music events, taping books for the blind, the area Children's Theater, and communications problems relating to the University.[73]

39. PCI also contends that United's scheduling of public affairs programming during the early morning hours rendered the programming ineffectual. We find, however, that United did not abuse its discretion in this regard, even though it relegated most of its informational programming to late evening and early morning hours.[74] We have traditionally hesitated to intrude upon licensee discretion in the scheduling of public affairs and informational programming, and licensees are accorded wide discretion in making such programming determinations.[75] Here United has demonstrated that its public affairs and informational programming reaches a sizable audience and has been reasonably effective in meeting its public interest obligations.[76] Thus, we find no basis for overturning the ALJ's conclusion that United's public affairs programming adequately serves San Jose's community needs.[77]

40. *Fairness Doctrine*. We previously found that the Fairness Doctrine issue should not have been designated against United.

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[72] *See* I.D. Findings, para. 34. We also note that the ALJ specifically listed the dates of each broadcast. I.D. Findings, para. 33. PCI offers no record support for its assertion that 50 of the 139 scheduled broadcasts never occurred.

[73] *See* I.D. Findings, paras. 25–26.

[74] *See* I.D. Findings, paras. 10–35. We note that licensees are expected to broadcast non-entertainment programs at times when they "reasonably could be expected to be effective." *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418, 445 (1976).

[75] Question and Answer 36 of the *1971 Primer*, 27 FCC 2d at 678–79, 687; *Sonderling Broadcasting Corp.*, 68 F 2d 752, 756 n. 9 (1978); *Storz Broadcasting Co.*, 58 FCC 2d 1333, 1336–39 (1975); and *SRD Broadcasting, Inc.*, 57 FCC 2d 275 (1975).

[76] *See* I.D. Findings, paras. 45–47.

[77] I.D. Conclusions, para. 103(a).

However, in light of the resolution of that issue, we conclude that the error is not of decisional significance. Moreover, we affirm the ALJ's finding that United did not violate its fairness obligations during the license term.[78] In addition to noting generally that United's public affairs programming dealt with numerous controversial issues, the ALJ specifically mentioned "San Jose Yesterday and Today" and "Community Focus" as two programs which dealt with local controversies. The ALJ discounted the fact that United did not employ a local news staff, since local news obtained from UPI's audio line was aired. In response to PCI's contention that United failed to provide access to local voices, the ALJ noted that Mr. Blackmore on "San Jose Yesterday and Today" represented a local voice.[79] The ALJ also concluded that PCI did not meet its burden of proceeding with the introduction of evidence; it presented no showing of a specific controversial issue of public importance or any specific viewpoint which was not adequately covered by United.

41. Throughout this proceeding PCI has placed great emphasis on United's alleged fairness violations. The allegations are predicated on PCI's apparent misunderstanding of the Doctrine's application. PCI's main objection to United's programming is that it rarely included "voices" of persons other than station personnel. In other words, United did not employ "actualities" (recorded voices of newsmakers), and it rarely invited people, aside from regular contributors, to participate on public affairs programs. PCI cites "San Jose Yesterday and Today" as a prime example, noting that the program host discussed controversial issues by analyzing the opposing viewpoints himself. The Fairness Doctrine, however, does not require broadcast licensees to air the "local voices" of spokespersons for different sides of a controversial issue. It does not confer a general right of access.[80] PCI's argument in this regard was addressed and rejected by the Commission in the *Fairness Doctrine Inquiry*. There, the Commission found the Fairness Doctrine is concerned with the discussion of controversial issues of public importance, and that an access proposal which placed its emphasis on speakers rather than on the dissemination of ideas is at cross purposes to the Doctrine.[81] Moreover, PCI has not demonstrated how the absence of any speaker or of a spokesman for a given viewpoint has rendered United's public affairs programming ineffective.

42. PCI's remaining exceptions illustrated further its misconception of the Commission's approach to the Fairness Doctrine. PCI

[78] I.D. Findings, paras. 48–49; Conclusions, paras. 104–06.

[79] The ALJ relied on *American Broadcasting Cos., Inc.*, 56 FCC 2d 275 (1975), *recon. denied*, 60 FCC 2d 509 (1976).

[80] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

[81] *Fairness Doctrine Inquiry*, 74 FCC 2d 163, 171 (1979).

asserts that the ALJ was required to determine how much air time was devoted to the presentation of controversial issues. PCI also would have us draw the conclusion that no cognizable amount of time was devoted to *local* controversial issues prior to United's program upgrading during the last four months of the license period. PCI claims that during the majority of the license term United's only local programming consisted of local newscasts, and "San Jose Yesterday and Today," the latter being the only full-length program, and it was aired Sunday mornings at 7:00 A.M. PCI also excepts to United receiving full credit for its local newscasts and "San Jose Yesterday and Today."

43. PCI would have the Commission, in essence, evaluate United's overall programming and declare that it does not satisfy the licensee's Fairness Doctrine obligations.[82] This has never been our approach to the Fairness Doctrine. The Commission requires a *prima facie* showing of specific prejudice to the community being served. In other words, it is incumbent upon the complaining party to specify a particular controversial issue of public importance that received inadequate coverage. Then, and only then, will the Commission act. The kind of programming scrutiny which PCI urges would unnecessarily involve this Commission in second guessing the editorial judgments of licensees in a manner inconsistent with our goals of deregulation. We believe that the procedure suggested by PCI would increase the scope of our administrative review of licensee fairness determinations without concomitant benefit.[83]

44. These principles have been enunciated in numerous cases and policy statements.[84] They bear repeating here merely to clarify PCI's apparent misunderstanding of the Doctrine. We conclude that PCI failed to show a *prima facie* Fairness Doctrine deficiency both at the time the issue was designated and subsequently at the evidentiary hearing.

45. *Promise versus Performance.* A promise versus performance

[82] PCI's specific objections are also without merit. The mere absence of a separate staff for local news and reliance on a broadcast wire service, without any additional evidence, does not show a lack of service or deficiency of local news coverage. *Amalgamated Music Enterprises, Inc.*, 54 FCC 2d 761, 764 (1975). We have already concluded, that "San Jose Yesterday and Today" was properly credited as a public affairs program, and for the same reasons we conclude that the program represents a reasonable attempt to fulfill the licensee's fairness obligations. In addition, United was credited with other programming—editorials which regularly addressed local issues, news coverage of regional, state, national and international stories, "Washington Window,"—and "UN Week in Review"—all of which did air throughout the license term.

[83] *See Fairness Doctrine*, 89 FCC 2d 916, 926 (1982).

[84] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *1974 Fairness Report*, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976); *Fairness Doctrine Inquiry*, 74 FCC 2d 163 (1979); and *Fairness Doctrine*, 89 FCC 2d 916 (1982).

issue was designated against United based on evidence that United's 1971 renewal application promised 2 hours and 45 minutes of public affairs programming each week, whereas the composite week of United's 1971–74 program logs showed only one hour and 41 minutes of weekly public affairs broadcasts.[85] The ALJ found that "Guestitorials," "San Jose Yesterday and Today," and "State Capitol Report" were not broadcast during the composite week even though United has represented in its 1971 renewal application that these three programs would air weekly.[86]

46. At the evidentiary hearing United presented evidence to explain the discrepancies. Regarding the absence of the promised number of "Guestitorials",[87] the ALJ's findings note that United's solicitations for guest commentators went largely unheeded. "San Jose Yesterday and Today" was not broadcast during the composite week, but was frequently aired during the license period. As to why the program was not included in the composite week, United's President, George D. Snell, testified that the program's host was "probably out of town." Snell also conceded that the absence of "State Capitol Report" and "Guiestitorials" from the regular broadcast schedule should have been reported to the Commission.[88]

47. The ALJ concluded that United intended to perform as promised in its renewal applications and satisfactorily explained the deviations in its programming performance. ALJ found in fact that the promises were substantially performed, apart from several deviations which, in the ALJ's view, were beyond United's control. Underscoring United's overall programming, which adequately addressed community needs, the ALJ concluded that the station's public affairs programming during the license term reasonably

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[85] 59 FCC 2d at 1415.

[86] United's renewal application, dated August 23, 1971, proposed "State Capitol Report" (35 min.), station editorials (42 min.), "Guestitorials" (28 min.) and "Community Spectrum" as public affairs programs. In response to a Commission letter indicating that "Community Spectrum" was improperly classified, United amended its application on December 13, 1971 to reflect the addition of the following public affairs programs: "Washington Window" (30 min.), "UN Week in Review" (15 min.), and "San Jose Yesterday and Today" (15 min.). *See* I.D. Findings, para. 51; and *United Broadcasting Company (KBAY)*, 59 FCC 2d at 1415 n. 9.

[87] Under its "Guestitorials" proposal, United promised to air 28 mins. of guest editorials each week to allow listeners to air views on issues of their choice. The "Guestitorials" would be in addition to its promised schedule of station editorials (42 minutes each week). Only eight such programs, apparently running two minutes during each regular editorial time slot, were actually aired throughout the license period. *See* I.D. Findings, paras. 37, 41 and 51.

[88] *See* I.D. Findings, para. 53. The ALJ's findings disclose elsewhere that "State Capitol Report," which was renamed "Assemblyman Richard Hayden" during the latter part of license term, did air during the term, albeit irregularly, but sometimes as often as five nights a week.

conformed to the proposal set forth in United's 1971 renewal application.[89]

48. PCI's Exceptions under the promise versus performance issue repeat its earlier complaint that the ALJ made no finding as to the amount of public affairs programming which KBAY-FM actually broadcast. PCI also excepts to the ALJ's failure to note the percentage discrepancy between United's proposal and its programming performance, especially concerning United's promise to air 25% local news weekly as compared with the 13.8% local news aired during the week PCI monitored the station. PCI further claims that the reasons offered by United for not airing all of the promised public affairs programming are insufficient. The Bureau's Reply endorses the ALJ's findings and conclusions. United's Reply under the responsiveness issue also addresses PCI's Exceptions under the promise versus performance issue. In addition, United supports the ALJ's refusal to draw any inference from the one week PCI monitored KBAY-FM's programming.

49. PCI's Exceptions are without merit. In the area of promise versus performance, the Commission has not set minimum programming requirements to qualify for renewal. The licensee must show substantial compliance with its programming promises, or else justify any substantial variations. The Commission never intended prospective programming proposals to be absolutely binding, and, hence, insubstantial variations do not raise a question concerning the licensee's ability to operate in the public interest.[90] In evaluating a reduction in promised programming, the Commission considers the licensee's overall programming responses to ascertained community problems as well as the explanation given for deviations from the prior programming proposal.[91]

50. We have already determined that United's programming was responsive to ascertained community needs. Further, the difference

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[89] I.D. Conclusions, paras. 107–09. The ALJ relied on *Hubbard Broadcasting, Inc.*, 48 FCC 2d 22 517 (1974); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975) (hearing designation order); *Leflore Broadcasting Co. Inc.* (WSWG-AM), 46 FCC 2d 980 (1974) (hearing designation order).

[90] *West Coast Media, Inc.*, 79 FCC 2d 610, 614–15 (1980), *recon. denied*, 86 FCC 2d 331 (1981), *appeal docketed sub nom. West Coast Media, Inc.* v. *FCC*, No. 81–1548 (D.C. Cir., filed May 21, 1981); *Malrite of New York, Inc.*, 71 FCC 2d 241, 248 n. 7 (1979).

[91] Even when a licensee fails to broadcast promised programming, a favorable public interest finding can be made if the licensee intended in good faith to effectuate the proposal, but was prevented from doing so by factors beyond his control, such as financial inability. *Hubbard Broadcasting*, 41 RR 2d 979, 988 (1977).

in programming promised versus performed, as found by the Board, was based on United's composite week.[92] One of the programs, "San Jose Yesterday and Today," which did not air during the composite week and accounted for 15 minutes of the difference, was regularly broadcast during the license term. The other two programs accounting for the remainder of the difference were not broadcast regularly. United offered a reasonable explanation for its failure to air "Guestitorials" as promised. The series, which provided listeners with an opportunity to voice their opinions, was discontinued because of lack of listener response. "State Capitol Report" was presented sometimes as often as five times a week, but then aired infrequently during 1972 and subsequently was broadcast as a public service announcement within another progam.[93] In view of United's overall programming performance and responsiveness to ascertained needs, we conclude that United made a good faith effort to comply with its 1971 proposal. We need not address PCI's Exceptions alleging deficiencies in United's local news coverage since the promise versus performance issue as designated only focused on United's public affairs programming.

V. PCI'S BASIC QUALIFICATIONS

51. *Pleadings.* PCI generally excepts to all of the findings which resulted in its disqualification. PCI argues that it was denied a full and fair hearing because the ALJ refused to admit numerous Exhibits into evidence. PCI also objects to the rejection of its Amendment of July 27, 1977, as supplemented August 5, 1977, which specified a different tower on its proposed transmitter site.[94] PCI claims that the proffered testimony, together with this amendment, would have evidenced the feasibility of its staffing and technical proposals within the level of finances available. PCI also alleges that the ALJ applied unreasonable standards in deciding the transmitter site and staffing issues. In separate Replies, the Bureau and United argue that PCI's Exceptions are procedurally defective. On the merits, they support the ALJ's resolution of each of the designated issues.

52. *Procedural Matters.* Commission Rules require that Exceptions to an Initial Decision state with particularity any alleged

[92] 59 FCC 2d at 1415. The "composite week" consists of seven different days of the week designated annually by the Commission in a Public Notice. *See* FCC Form 303, Section IV, p. IV.

[93] United conceded that this program change should have been reported to the Commission. *See* I.D. Findings, paras. 29–30.

[94] The record discloses that during the hearing on July 27, 1977, PCI indicated its intent to file a technical amendment. The written amendment was filed with the Commission on August 1, 1977 and supplemented on August 8, 1977.

material error and contain specific references to the hearing transcript.[95] In objecting to the ALJ's refusal to admit proffered testimony and exhibits into evidence,[96] PCI makes specific references only to Exhibits 3, 4, 5, 6, 12, and 24.[97] Further, PCI has provided us with only a conclusory argument that the exclusion of its proffered evidence resulted in the ALJ's adverse findings. PCI's Exceptions do not address the specific reasons which the ALJ gave for the evidentiary rulings, nor do they offer any justification for admitting the Exhibits in question. Because PCI's Exceptions lack the requisite particularity, the evidentiary objections may be deemed waived. However, in deference to PCI's *pro se* posture, we have chosen, despite the procedural deficiencies of its pleading, to make our own independent review of the record. Hence, we will review the ALJ's exclusion of those exhibits specifically mentioned by PCI, along with the ALJ's findings and conclusions under each of the disqualifying issues.

53. *Technical and Financial Qualifications.* The Review Board designated a technical issue concerning the adequacy of PCI's equipment proposal because PCI had stated that it may not have available the used equipment proposed in its application.[98] PCI thereafter stipulated that the proposed studio equipment specified in its application was no longer available. PCI never amended its application to show substituted equipment.[99] The ALJ concluded that without sufficient technical equipment to operate the proposed station, PCI lacked the requisite technical qualifications to be a Commission licensee.[100]

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[95] Section 1.276(a)(2) of the Commission's Rules, 47 C.F.R. §1.276(a)(2), and Section 1.277(a) of the Commission's Rules, 47 C.F.R. §1.277(a), the latter of which also provides, "any objection not saved by exception filed pursuant to this section is waived".

[96] PCI offered 63 exhibits as direct evidence. Of these, 34 exhibits were completely rejected and Exhibit 17 was partially rejected. PCI offered five rebuttal exhibits, of which two were rejected.

[97] PCI also notes that it was prepared to present affidavits and oral testimony from 16 named individuals, but offers no transcript or exhibit references and does not indicate the substance of any of these witness' testimony. Instead, PCI simply refers us to its "Offers of Proof" and a PCI Exhibit containing a "Motion for Review and Reclassification of Certain Rejected PCI Exhibits." This aspect of PCI's pleading is deficient under Section 1.277(a) of the Commission's Rules. *Chapman Radio and Television Company*, 19 FCC 2d 157, 183 n. 1 (1969). The Rule permits neither references to earlier filed pleadings which contain transcript citations nor incorporation by reference of earlier filed pleadings which contain those references. *Nuance Corp.*, 47 RR 2d 1405 (Rev. Bd. 1980). Although we have made allowances for procedural deficiencies in PCI's pleadings elsewhere, PCI was previously given an opportunity to correct these deficiencies and affording PCI an additional opportunity to correct its pleading would unduly delay the final resolution of this proceeding.

[98] 58 FCC 2d at 1354–55.

[99] Tr. 476–79 and 2559; PCI Ex. 20; United Ex. C.

[100] I.D. Findings, paras. 73–74; Conclusions, paras. 124–25.

54. The financial issue was designated to determine whether PCI's cost estimates were sufficient to construct the station and operate it for the first three months, and whether PCI had sufficient funds (excluding revenues) available to meet these costs.[101] PCI estimated $26,050 as the total cost for construction and for the first three month's operation. A total of $12,700 was allocated for construction costs, and $13,350 for the first three month's operating expenses.[102]

55. The ALJ concluded that PCI's construction cost estimates did not consider such items as program origination equipment, acquisition of a transmitter site,[103] or possible legal fees.[104] Moreover, PCI's antenna system estimate was based upon a three-bay antenna, whereas its application proposed a six-bay antenna.[105] The ALJ also concluded that PCI was relying upon a proposed studio location for the unrealistic amount of $30 per month rent with no reasonable

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[101] *See generally*, I.D. Findings, paras. 64–70; Conclusions, paras. 117–120. Instead of the one-year requirement established in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965), the Board applied the three-month standard for applicants seeking to replace a station with an established record of advertising revenues. 58 FCC 2d at 1351. In recent actions the Commission has relaxed the first-year expense requirement to ninety days for all applicants seeking new radio and television construction permits and applicants seeking to acquire broadcast stations through a license assignment or transfer of control. *New Financial Qualifications Standard for Broadcast Assignment and Transfer Applicants*, 49 RR 2d 1291 (Public Notice, released June 23 1981); *New Financial Qualifications Standard for Broadcast Television Applicants*, 72 FCC 2d 784 (Public Notice, released May 11, 1979); and *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (Public Notice, released August 2, 1978) Significant changes concerning the financial reporting requirement have also been made to Form 301-Application for Construction Permit for a Commercial Broadcast Station. The Commission no longer requires a detailed itemization of projected expenditures and sources of funds or the submission of a balance sheet, yearly income statement, and other documentation. The revised application consists of two questions that can be answered yes or no and provides Commission staff with the option to request additional information if circumstances warrant. *Revision of Application for Construction Permit for Commercial Broadcast Station* (FCC Form 301), 50 RR 2d 381 (1981). It should be noted, however, that this streamlined application Form does not modify the underlying substantive requirement—the financial ability to construct and operate the proposed facility for three months.

[102] Tr. 2475–76; PCI Ex. 2.

[103] Tr. 2486.

[104] According to David McNeil, PCI President and acting technical director, the category "legal fees, public notice" includes registration or business taxes and legal fees that may be required prior to going on the air. Tr. 2487. McNeil testified that PCI hopes to obtain volunteer counsel. However, none had been secured and no additional funds were set aside in the event volunteer counsel can not be secured. Tr. 2563.

[105] There is no record evidence as to the cost of a six-bay antenna. Tr. 2549–50.

expectation of the location's availability or that the rent will be $30 per month at the time of a grant.[106] PCI further made no showing that the used equipment, on which its estimates were based, was available and it presented no alternate financial plan.[107] Finally, PCI admitted at the hearing that sufficient funds were not allocated for anticipated operating expenses.[108]

56. PCI proposed to meet estimated construction and the first three-months' operating costs by relying on unsecured personal loans from nine individuals totaling $39,000.[109] In his conclusions, the ALJ noted that the financial statements of these individuals reflect liquid assets of only $21,200, which is insufficient to support "the promised loan of $39,000."[110] The ALJ concluded that PCI did not have sufficient funds available to meet even its underestimated costs.

57. In its Exceptions, PCI argues that the ALJ improperly rejected exhibits showing the availability of used and alternative equipment. We have considered those exhibits to which PCI specifically refers (Exhibits 3, 4, 5, 6 and 12), and Exhibit 16, which was also offered in connection with the technical and financial issues. We conclude that the ALJ's evidentiary rulings were correct and affirm his ultimate conclusions on both issues.

58. Several of the exhibits in question were rejected because they did not conform to PCI's proposal and were speculative.[111] From the outset of this proceeding, the ALJ repeatedly explained the require-

[106] Tr. 2562.

[107] All of PCI's equipment-related estimates were based upon the proposed acquisition of used equipment. Tr. 2553–54.

[108] David McNeil conceded that operating costs would amount to "a couple thousand" more than the proposed $13,350. Tr. 2476, 2552, 2563.

[109] PCI Ex. 2 and 2A.

[110] *See* I.D. Findings, para. 67–70; Conclusions, para. 119–20. In his findings, the ALJ discounted testimony regarding a $1,000 pledge from Florence Poyadue, because no financial statement or balance sheet was submitted and PCI's application was never amended to reflect reliance on this loan. I.D. Findings, n. 25. For the proposition that the Commission requires evidence of sufficient liquidity to support a promised loan, the ALJ cited *Viking Television, Inc.*, 16 FCC 2d 1018 (1969); *cf. La Fourche Valley Enterprises, Inc.*, 30 FCC 2d 539 (Rev. Bd. 1971) (enlargement of issues); and *Rocket Radio, Inc.*, 65 FCC 2d 589 (Rev. Bd. 1977) (enlargement of issues).

[111] PCI Ex. 3 is an affidavit of Jeremy D. Lansman giving his background as an engineer and stating relative costs of certain technical equipment. The Exhibit was rejected as speculative because it was not based on PCI's application. For example, Lansman represented that PCI would be able to rent telephone lines rather than use a broadcast RF link in the SFL band as originally proposed, although he did not give any cost for telephone line rental. Tr. 387–395. PCI Ex. 4 is another statement from Lansman showing the costs of various used equipment, including some program origination equipment, which might comprise a "possible inexpensive station." The Exhibit was also rejected as speculative and unrelated to PCI's proposal. Tr. 395–400. PCI Ex. 16 is a letter from Communications Systems, Inc., proposing selling prices of various equipment. The list also includes various recording and stereo equipment. In addition

ment that PCI had to present a firm proposal, and not vague plans for the station's operation.[112] These Exhibits were rejected properly[113] on grounds of variance and vagueness. Rejection of two other Exhibits as hearsay was also proper[114] and Exhibit 12 was properly rejected as lacking in relevance to PCI's proposal.[115]

59. Furthermore, admission of the Exhibits in question would not have altered the findings and conclusions under the technical and financial issues. The critical facts with respect to the technical issue were that the used equipment proposed in PCI's application was no longer available, and that PCI never amended its application to specify any substituted equipment. An applicant is required to show that the essential items of equipment are either possessed or reasonably available at a cost which would not impair its financial qualifications.[116] Although PCI may have intended to obtain comparable used equipment, it is not sufficient simply to allege that comparable equipment is available.[117] PCI's testimony and proffered Exhibits refer to the availability of *various* used equipment, but PCI never filed an amendment showing a specific alternative proposal or the cost of used equipment comparable to those items specified in its application.[118] Such an amendment is required under Section 1.65 of the Commission's Rules.[119] We thus conclude, as the ALJ did, that

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to stating that PCI already had a proposal of record, the ALJ refused to accept the Exhibit as an amended proposal because, among other reasons, PCI's Board of Directors never formally approved the equipment list. Tr. 448–54.

[112] Tr. 45–46.

[113] *Norman Broadcasting Co.*, 56 FCC 2d 1046 (Rev. Bd. 1975) (an applicant can not present evidence of two proposals).

[114] *See* Administrative Procedure Act, 5 U.S.C. §556(d). PCI Ex. 5 is a typed list of FM permits granted in 1974 and 1975, showing the successful applicant's construction and operating costs. The list was allegedly compiled from Broadcasting Magazine. The ALJ rejected the Exhibit on hearsay grounds. Tr. 400–402. PCI Ex. 6 is an affidavit of David McNeil citing the price ranges of various equipment which he found upon examining the Spring 1975, catalogue of the Broadcast Equipment & Supply Co. of Bristol, Tennessee. The Exhibit was rejected as hearsay. Tr. 403–405.

[115] Exhibit 12 contains a statement from Lorenzo W. Milam concerning, *inter alia*, the costs of establishing and operating several "community" broadcast stations and his estimate for PCI's proposal. The ALJ noted that Mr. Milam's statement failed to establish his familiarity with PCI's proposal, and that there was no evidence that the costs for the other stations' operations would be similar to the applicant's. Tr. 426–34.

[116] *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011, 1021 (Rev. Bd. 1969).

[117] *WVOC, Inc.*, 32 FCC 2d 765, 767 (Rev. Bd. 1971) (enlargement of issues).

[118] Tr. 2559–60.

[119] PCI was apprised of the procedure for filing a technical amendment. In an earlier pleading PCI requested leave to report that the proposed equipment was no longer available. By Order, FCC 77M-15, released January 6, 1977, the ALJ dismissed the pleading without prejudice, citing the Bureau's comments which explain why PCI's pleading failed to conform to Section 1.65 of the Commission's Rules. *See also* Tr. 45–50. Elsewhere in connection with its financial qualifications, PCI filed an amendment which was accepted. PCI Ex. 2; Order, FCC 77M-539, released March 18, 1977.

PCI failed to make the minimal showing required under this issue and that it lacks the requisite technical qualifications to be a Commission licensee.

60. Concerning PCI's financial ability to construct and operate its proposed station, we concur in the ALJ's conclusion that PCI's estimated costs for construction and the first three months of operation are unrealistically low. The $26,050 estimate does not reflect costs for the proposed six-bay antenna, possible legal fees, acquisition of a transmitter site, program origination equipment to replace the used equipment proposed in PCI's application (valued at $5,855.15), and a realistic rental for the studio location.

61. Moreover, PCI does not have the funds available to meet even its underestimated budget of $26,050. PCI relies upon separate pledges from nine individuals which total $39,000. A $1,000 pledge from Florence Poyadue must be discounted because it is not supported by a financial statement or balance sheet.[120] According to the financial statements for the remaining pledges, however, only $21,200 in net liquid assets is available. Because the liquid assets available to PCI fall short of meeting its proposed budget and the proposed budget has been underestimated, we must conclude that PCI has not demonstrated its financial qualifications.[121]

62. *Transmitter Site Availability.* PCI proposed the same transmitter site currently used by KBAY-FM on the tower of Station KNTV which is located on the summit of Mount Loma Prieta. Alternatively, PCI proposed to add another antenna to this tower. However, as the ALJ found, the KNTV tower is owned by Gill Industries, licensee of Station KNTV, and Gill Industries has leased space to United. The United lease extends to 1985 with an option available to renew for another ten years. The Vice-President and General Manager of KNTV (Robert M. Hosfelt) testified that the KNTV tower already is utilized to its maximum wind loading capacity, and, hence, he would not accept PCI's application for space. According to United's President, George Snell, United would still be in the communications business even if it is unsuccessful in this case, and it would not lease space to PCI because the company is a bad credit risk.[122] Based on the foregoing, the ALJ concluded that PCI had no reasonable assurance of the availability of its proposed transmitter site and its application did not propose an alternate site.[123]

63. In light of recent Commission precedent, we shall reverse the

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[120] *See* n. 110, *supra*. FCC Form 301, Financial Qualifications of Broadcast Applicants, No. 4b, requires each lender to submit either a balance sheet or financial statement.

[121] *Rocket Radio, Inc.*, 65 FCC 2d 589 (Rev. Bd. 1977).

[122] I.D. Findings, paras. 71–72; tr. 1156, 1158–59, 1180–81, 1859–61, 2155–56, 2161–63; United Ex. A at 1–2; PCI Ex. 17 at 2.

[123] *See* I.D. Conclusions, paras. 121–23.

ALJ's disqualification of PCI on this ground. Preliminarily, however, we note that the ALJ's findings and conclusions under the issue followed existing case law,[124] and also that the ALJ properly denied PCI's last minute attempt to amend its site proposal.[125] Nonetheless, after release of the Initial Decision and while this case was pending on appeal, the Commission overturned the procedural practice followed in designating transmitter site issues—*i.e.*, *pro forma* designation of an issue against a challenger who lists the site of an incumbent opponent and is then denied permission to use the site. Under the new policy enunicated in *George E. Cameron Jr. Communications*,[126] a site availability issue will not be designated where a challenger lists the site of a renewal applicant, even if the incumbent licensee refuses to sell or lease the site. The Commission specifically stated, "during the comparative proceeding . . . we will not countenance an existing licensee's assertion that it will deny use of its site to any other party even if its own application is denied."[127] Recently, *Belo Broadcasting Corp.*, held that the new standard applied retroactively to a non-final Commission proceeding.[128]

64. For the reasons articulated in *Belo*, we are persuaded that PCI should have the opportunity to proceed under the Commission's new policy. In this case the Order specifying a site availability issue against PCI presents no problem under *Cameron*, since the issue was added for reasons other than the incumbent's refusal to allow use of its site.[129] However, at the hearing PCI presented evidence of its

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[124] The ALJ relied on *Ken Stephens*, 53 FCC 2d 383 (1975). The ALJ also cited two Review Board Orders adding site issues, *Belo Broadcasting Corp.*, 42 FCC 2d 1011 (1973) (subsequent history omitted), and *Alabama Citizens for Responsive Public TV, Inc.*, 62 FCC 2d 755 (1977), for the proposition that an applicant challenging a licensee can reasonably assume that a renewal applicant, whose application has been denied, would be receptive to an offer to purchase its transmitter and antenna sites, "absent some contrary indication or unusual circumstances."

[125] PCI did not attempt to amend its application to specify an alternative site until after the evidentiary hearings were completed. Its Motion for Leave to Proffer a Technical Amendment filed August 1, 1977, as supplemented August 8, 1977, was rejected as untimely. Memorandum Opinion and Order, FCC 77M-1597, 41 RR 2d 921, released September 15, 1977.

[126] 71 FCC 2d 460 (1979).

[127] 71 FCC 2d at 467 (1979). This new approach seeks to avoid inquiry into the motives of an incumbent licensee for denying use of its site. The intent is to hold in abeyance all considerations relating to a challenger's transmitter site until after the comparative evaluation. If the challenger is found to be comparatively superior and continues to specify the same transmitter site, it still must obtain the site and contruct within certain time limits. The incumbent may present evidence concerning the site's availability at the time the Commission considers any modification of the proposed transmitter site. *Belo Broadcasting Corp.*, 88 FCC 2d 922 (1981) (*petition for recon. granted in part*).

[128] 88 FCC 2d 922 (1981) (petition for recon. granted in part). In *Belo* the policy change occurred after affirmance of the Initial Decision and while a petition for reconsideration was pending.

[129] 58 FCC 2d at 1351–52.

proposal to use the site currently used by KBAY-FM, and United's refusal to rent to PCI was the basis for the ALJ's findings and conclusions on the issue. The clear import of *Cameron* and *Belo* requires us to conclude that PCI's disqualification under this issue must be reversed.

65. *Staffing.* The Board added a staffing issue "[t]o determine whether the staff proposed by Public Communicators, Inc. is adequate to effectuate its proposed operation." PCI proposed to broadcast 168 hours per week (24 hours daily), without network affiliation.[130] It proposed operation includes extensive public affairs programming and local news coverage.[131] To effectuate the station's programming, PCI will have four paid staff persons, working full-time: a sales director, an engineer, a news director, and an "access" director.[132] PCI also proposes to have a full-time station manager, although the individual designated for the position will not be paid during the first three months of station operation.[133] PCI also relies upon pledges of volunteer time from 13 persons, totaling 143 hours of

[130] 58 FCC 2d at 1357–58.

[131] Tr. 2509.

[132] PCI's application indicates that 17.3% of total air time will be devoted to news, public affairs programming, and all other programs, exclusive of entertainment and sports. In Exhibit 11 to the application, PCI states that its news programming will consist of 50% local news and 15% regional news. According to David McNeil, President of PCI, the locally produced public affairs programming includes (tr. 2511–15, 2517, 2519, 2522–23, 2530):

Program	*Length*	*Frequency of Broadcast*
"Youth Forum"	30 min.	Once per week
"Consumer Report	5 min.	12 times per week
"Women's Program	30 min.	Once per week
"Mini-Series"	10 min.	10 times per week
"City Council"	2 min.	Twice daily
"Service Awareness Spots"	5 min.	Twice daily
"Health Program"	5 min.	6 times per week
"Citizens Editorials"	2 min.	3 times daily
"Free Speech Messages"	1 min.	Several times daily
"You and the Law"	10 min.	Once per week
"Children's Hour"	1 hr.	Once per week

McNeil also estimated the approximate number of volunteers, working 5–10 hrs. per week (tr. 2530), which would be required for each program over the course of a year: "Youth Forum" and "Consumer Report will require "hundreds of volunteers" (tr. 2517); "Women's Program," "Mini Series," "Health Program," "You and the Law" and "Children's Hour" will each require approximately two volunteers a week; and the paid station staff will work on the "Service Awareness" and "City Council Spots" (tr. 2522–23).

[133] Tr. 2531. All of the paid staff will be required to work with the volunteers. The "access" director, station manager and news director are primarily responsible for station programming. The "access" director is responsible for coordinating the station volunteers. Tr. 2527–28, 2530–31. The staffing plans do not provide for a paid staff member to be at the station during all its operating times. Tr. 2534.

volunteer time per week. The ALJ's findings detail the amount of time each volunteer has pledged, areas of volunteer interest, and other commitments on the volunteer's time.[134]

66. The ALJ concluded that many of the volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time. According to the ALJ, PCI's statement that "the complete list of volunteers . . . will have to wait until the awarding of the license" amounted to mere conjecture. The ALJ concluded that PCI's staffing was so minimal as to be "inherently incapable of effectuation."[135]

67. PCI argues that an unreasonable standard was applied to the staffing issue, since an applicant which relies on volunteers to operate its station cannot be expected to establish which named individuals will be available at unspecified future dates. PCI also objects to exclusion of Exhibit 12 which contains a statement from Lorenzo W. Milam showing that he was able to operate successfully a broadcast station with 125 volunteers. The Bureau supports the ALJ's findings and conclusions concerning the staffing issue.

68. We previously ruled that the ALJ's exclusion of Exhibit 12 was proper.[136] The Commission has held that assertions regarding another station's operations have little evidentiary value, absent a showing that those operations are similar to the applicant's.[137] Since Mr. Milam's statement did not indicate that the operations of other "community" stations were comparable to PCI's operation and offers no evidence concerning the availability of PCI's volunteer staff, Exhibit 12 has no probative value with respect to the staffing issue.

69. We do not agree, however, with the ALJ's conclusions under the staffing issue. In designating a staff adequacy issue,[138] the Board described PCI's staffing plan as unrealistic "in light of the extensive public affairs programming and local news coverage proposed." The Board noted two deficiencies in PCI's application. PCI failed to indicate what duties and responsibilities would be assigned to each of the four paid full-time employees, and PCI failed to provide any assurance that its proposed volunteer help will actually be available.

70. At the hearing PCI presented evidence which responded to the two deficiencies noted by the Board. The full-time staff will consist of a station manager (volunteer), "access" director, news director, engineer, and sales director. The first three will be responsible for programming. The "access" director will be in charge of volunteer programming, the news director will supervise news

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[134] I.D. Findings, paras. 78–88; PCI Ex. 23.

[135] The ALJ cited *United Broadcasting Industries, Inc.*, 49 FCC 2d 313 (1974), and *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (1974). I.D. Conclusions, paras. 126–28.

[136] N. 115 *supra*.

[137] *Martin Lake Broadcasting Co.*, 23 FCC 2d 721 (1970); *United Broadcasting Industries, Inc.*, 49 FCC 2d 313 (Rev. Bd. 1974).

[138] 58 FCC 2d at 1357.

production, and the station manager will oversee all programming.[139] Local news production will be based upon wire services and news gathering by approximately ten volunteers a week.[140] David McNeil, PCI's President, offered testimony explaining how volunteers would assist in the production of the locally originated public affairs programming.[141] For example, the ALJ's Conclusions, at para. 127, note that two weekly programs will require "hundreds of volunteers" over the course of the year. PCI's plan is not as unrealistic as these volunteer figures alone might suggest. According to McNeil's testimony, one of the programs, "Youth Forum", would be broadcast live each week. A team of students from an area high school would be responsible for each weekly program. "Consumer Report, the other program requiring hundreds of volunteers annually, would involve two volunteers in the weekly preparation of 5 minute programs. The twelve "Consumer Report" weekly broadcasts would not involve 12 separate programs, but rather three to six programs rotated during the course of the week. Area consumer organizations, activists, and ordinary consumers would be invited to develop the programs.

71. In response to the second problem noted by the Board, PCI provided assurance that volunteer assistance would actually be available. PCI presented pledges from 13 individuals, totaling 143 hours of volunteer time per week.[142] It would have been preferable, certainly, if PCI had presented an announcer-operator schedule for its proposed 168 hours of station operation and also the precise amount of time volunteers would devote to their designated areas of interest.[143] However, we believe that PCI has met its burden of proof under the staffing issue as designated. As stated in *Bisbee Broadcasters, Inc.*,[144] ". . . the Commission has no rigid rules or standards prescribing personnel or staffing requirements; there is only a general one that there be a reasonable likelihood that an applicant can effectuate its proposed operation with its staff." (footnote omitted)

72. PCI's proposed staff of paid full-time employees and complement of volunteers, which includes a present commitment of 143 volunteer hours per week, appears reasonable to effectuate its

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[139] Tr. 2527–32.

[140] Tr. 2528–30.

[141] N. 132 *supra*.

[142] PCI Ex. 23.

[143] Each proposed volunteer filled out a "volunteer pledge form." The form includes a list of areas that require volunteers. Each volunteer checked the activities in which he or she was interested. None of the volunteers had given any thought to the precise amount of time that would be allocated to each category. Tr. 2059, 2077–78, 2132.

[144] 48 FCC 2d 291, 292–93 (Rev. Bd. 1974), *application for review denied*, 51 FCC 2d 8 (1975).

proposed. The Commission has accepted staffing proposals in the past that were similarly demanding.[145] And we see no reason to penalize PCI simply because its staffing proposal relies in part on volunteers.[146] Quite the contrary, PCI's specific plan for involving volunteers and community organizations in the station's programming offers added assurance that it will be able to effectuate its programming proposal.

73. Furthermore, we reject the ALJ's conclusion (and related findings), at para. 127, that "many of these volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time. . . ." The most significant pledge is from Lawrence Bensky who volunteered his time, without pay, to serve as full-time station manager for the first three months. The ALJ's findings indicate that at the time of the hearing Bensky was unemployed and actively seeking employment. Bensky testified that he may not be available to serve as station manager if he were to obtain employment.[147] However, the record discloses that Bensky expressed a present intention to contribute his time, and we believe this is sufficient. The Commission cannot reasonably expect a more binding volunteer commitment, especially given the length of time involved in many comparative proceedings.[148] When called to testify, Bensky affirmed his willingness to contribute time if PCI obtained the license "now." He simply indicated that because of the length of time already involved in this proceeding, he could not remain unemployed on the expectation that PCI would be the successful applicant at some indefinite future date.[149]

74. The pledges of the other volunteers were limited only by other demands on their time, such as full-time employment, family responsibilities, or commuting distance. Each of these volunteers made a good faith pledge, and we find nothing in the record which

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[145] In *Crosthwait*, 79 FCC 2d 191, 199–201 (1980), on remand, the Commission declined to add a staffing issue. The FM applicant proposed a staff consisting of himself and his wife, who would each work full-time, and two part-time employees. He planned to broadcast 112 hours per week, including 12 hours and 10 minutes of news (60% local), and without network affiliation. *See also Mace Broadcasting Co.*, 27 FCC 2d 630 (ALJ 1971), where the ALJ accepted as adequate a staffing proposal of five persons to effectuate an AM station operation consisting of a 125 hour broadcast week and 12.2% live programming.

[146] In fact, several of the volunteers have broadcast and/or engineering experience. Steven A. Burt (10 hours pledged) holds a second class FCC operators license and is working toward a first class license; he has also done radio announcing and programming. Cathell Toscan (3 hours pledged) is a production assistant at a television station. Charles Sweeney (10 hours pledged) is currently music editor for Zodiac News Service, a national news service, and has been involved in broadcasting since 1963. PCI Ex. 23.

[147] I.D. Findings, para. 81.

[148] *Southwestern Bell Telephone Company*, 47 RR 2d 561, para. 12 (Rev. Bd. 1980), *application for review denied*, FCC 81-233, released May 11, 1981.

[149] Tr. 2031–32.

would compel us to hold otherwise. Nor does the record contain any evidence that the pledge limitations would actually preclude the volunteers' commitments.[150]

75. To the contrary, at the hearing the volunteers who testified offered reasonable explanations of how their volunteer time would fit into their regular schedules. We need only cite two examples. Florence M. Poyadue pledged five hours a week; areas of interest noted were secretarial work, announcing, program production, and community and access outreach. Although she works approximately 20 hours a week as a nurse educator and has several small children,[151] she was certain that she could accommodate her schedule to meet the five hour commitment to the station. She testified that she would either go to the station for a couple of hours a day or for five hours at one time, or else do secretarial work at home in the early evening while her children are asleep.[152] The ALJ's findings also underscore that Mary Jo Foote lives an hour from San Jose.[153] However, she has pledged two hours of volunteer time per week in the areas of public relations and news, and neither area requires her presence at the station in San Jose.[154]

76. For all the foregoing reasons, we conclude that there is a reasonable likelihood that PCI could effectuate its proposed operation with the staff proposed and, hence, its staffing proposal is acceptable. However, this error along with the ALJ's treatment of the site availability issue, are not of decisional significance since PCI is disqualified on other grounds.

77. *Ascertainment.* Recently, in its *Report and Order in the Matter of Deregulation of Radio,*[155] the Commission abolished the formal ascertainment requirements for all commercial radio stations. There, the Commission also stated that the new policy, as of its April 3, 1981 effective date, "should apply to pending applications for

[150] In *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (Rev. Bd. 1974), the Board overturned the ALJ's rejection of the Wrye staffing proposal. Mr. and Mrs. Wrye proposed to operate an FM station 119 hours per week, with a studio in their home. Both Mr. and Mrs. Wrye proposed to work 40 hrs. per week, respectively at the station (Mr. Wrye was also employed full-time with the U.S. Army and Mrs. Wrye was a part-time student and had family responsibilities). Wrye planned to hire four part-time employees, each working 15 hours per week, and a non-salaried commissioned salesperson to sell advertising. The Board, concluding that there was no reason to believe Mr. Wrye could not adhere to a 16 hour a day work schedule, quoted from the Bureau's proposed findings and conclusions: ". . . since Wrye is fully cognizant of the burdens of his undertaking, and is nevertheless confident he will be able to fulfill his commitments, his testimony in this respect should not be brushed aside unless compelling evidence to the contrary is available." 48 FCC 2d at 293.

[151] *See* I.D. Findings, para 87.

[152] Tr. 2280.

[153] I.D. Findings, para. 87.

[154] Tr. 2234–36.

[155] N. 13, *supra*.

new facilities that have been desiganted for hearing at all stages of the hearing process." Hence, in accordance with the policy enunciated therein and its retroactive application, the ascertainment issue against PCI must be deleted.

78. Although we have resolved the site availability and staffing issues in PCI's favor and deleted the ascertainment issue, we concur with the ALJ's resolution of the financial and technical issues. We conclude therefore that PCI is not qualified to be a Commission licensee. Having determined that United is fully qualified, we conclude that the public interest will be best served by granting United's renewal application and denying PCI's application for a new station.

79. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Intervene as *Amicus Curiae* and to File Brief filed by American Civil Liberties Union, Santa Clara Valley Chapter, on January 26, 1982, IS DENIED; that ACLU's accompanying Brief IS ACCEPTED as an *Amicus Curiae* brief; and that the Motion to Strike, filed March 10, 1982, by United Broadcasting Company IS DENIED.

80. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues filed by United Broadcasting Company on January 23, 1980, IS DISMISSED as moot; that the Motion for Leave to Amend Application filed by Public Communicators, Inc., on February 20, 1980 IS GRANTED and the accompanying amendment IS ACCEPTED; and that the Motion to Amend Application filed by United Broadcasting Company on February 8, 1982 IS GRANTED and the accompanying amendment IS ACCEPTED.

81. IT IS FURTHER ORDERED, That the Exceptions filed November 8, 1978, by Public Communicators, Inc., and the Limited Exceptions filed September 15, 1978, by United Broadcasting Company, ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED.

82. IT IS FURTHER ORDERED, That the Initial Decision of Administrative Law Judge James K. Cullen, Jr., FCC 78D-51, released July 26, 1978 IS MODIFIED to the extent indicated herein and that the application of United Broadcasting Company for renewal of its license for station KBAY-FM, San Jose, California (File No. BRH-1402) IS GRANTED, and the mutually-exclusive application for a construction permit (File No. BPH-9229), filed by Public Communicators, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

FCC 78D-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of UNITED BROADCASTING COMPANY (KBAY) San Jose, California	Docket No. 20611 File No. BRH-1402
For Renewal of License PUBLIC COMMUNICATORS, INC. San Jose, California	Docket No. 20612 File No. BPH-9229
For Construction Permit	

Appearances

Norman E. Jorgensen, Esquire and *John G. Johnson, Jr.*, Esquire, on behalf of United Broadcasting Company (KBAY); *Phil Jacklin*, *Dick Cantu*, *David McNeil*, *Len Krimerman* and *James White*, on behalf of Public Communicators, Inc.; and *Barbara A. Kreisman*, Esquire, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JAMES K. CULLEN, JR.

(Issued: July 13, 1978; Released: July 26, 1978)

Preliminary Statement

1. On July 31, 1974 United Broadcasting Company (United) filed its application for renewal of United's FM radio station KBAY license, San Jose, California. On November 1, 1974 Public Communicators, Inc. (PCI) filed its mutually-exclusive application for construction permit, specifying the facilities currently used by KBAY. By *Order* released October 29, 1975, the Chief of the Broadcast Bureau (Bureau) designated the two mutually-exclusive applications for comparative hearing on the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

See 40 Fed. Reg. 51501 (November 5, 1975).

2. By *Memorandum Opinion and Order* released April 23, 1976, 58 FCC 2d 1346, the Review Board enlarged the issues in this

proceeding to include the following additional issues regarding the basic and comparative qualifications of PCI:

(a) To determine with respect to the application of Public Communicators, Inc., the reasonableness of its estimated costs to construct and operate its proposed station for a period of three months; whether it will have available sufficient funds to meet those costs; and whether, in view of the evidence adduced, Public Communicators, Inc. is financially qualified to construct and operate its proposed station.

(b) To determine whether Public Communicators, Inc. has reasonable assurance of the availability of its proposed transmitter site.

(c) To determine whether Public Communicators, Inc. possesses sufficient and suitable technical equipment to operate its proposed station and, if not, the effect thereof upon the applicant's technical qualifications.

(d) To determine whether the staff proposed by Public Communicators, Inc. is adequate to effectuate its proposed operation.

(e) To determine whether Public Communicators, Inc. has maintained its public file at the location specified by it as required by Section 1.526 of the Commission's Rules, and, if not, the effect on its comparative qualifications to be a Commission licensee.

(f) To determine the efforts made by Public Communicators, Inc. to ascertain the public's needs and interests, in the following respects:

(1) whether PCI interviewed community leaders in areas beyond the proposed city of license;

(2) whether PCI's demographic data is sufficient with respect to governmental organizations, public service organizations, and civic and educational activities in San Jose, and if so, whether PCI adequately interviewed representatives of these organizations and activities; and

(3) whether PCI properly listed the ascertained community problems in San Jose; and

(4) whether PCI's survey of the general public included consultations with a random sample of members of the general public, and whether in light thereof, it has complied with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*.

(g) To determine whether the application of Public Communicators, Inc. was properly certified and executed by a principal thereof in accordance with FCC requirements,

and in light of the evidence adduced, whether Public Communicators, Inc. possesses the requisite and/or comparative qualifications to be a Commission licensee.

The Review Board placed the burden of proceeding with the introduction of evidence under issues (b) and (g) on United. The burden of proceeding under Issues (a), (c) and (f) was placed on PCI. The burden of proof under issues (a) through (g) was placed on PCI.

3. *By Memorandum Opinion and Order* released July 13, 1976, 59 FCC 2d 1412, the Review Board again enlarged the issues in this proceeding to include the following additional issues regarding the basic and comparative qualifications of United:

(1) To determine whether United Broadcasting Company (KBAY) adequately served the community's needs with respect to public affairs programming in the 1971–1974 license term.

(2) To determine whether United Broadcasting Company (KBAY) has devoted a reasonable amount of its broadcast time to the presentation of conflicting viewpoints on controversial issues of public importance during the past license term, 1971–1974.

(3) To determine whether United Broadcasting Company's public affairs programming of Station KBAY reasonably conformed during the 1971–1974 license term to its proposal as set forth in its 1971 renewal application.

(4) To determine whether United Broadcasting Company provided equal employment opportunity at Station KBAY to Spanish-surnamed persons.

(5) To determine, in light of the evidence adduced under the above issues, whether United Broadcasting Company has the requisite qualifications to be a Commission licensee.

(6) To determine whether United Broadcasting Company has failed to comply with the provisions of Section 1.526 of the Commission's Rules, and, if so, to determine the effect thereof on its comparative qualifications to be a Commission licensee.

(7) To determine on a comparative basis whether there are significant differences between the applicants with respect to the scheduling of public affairs programs; and, if so, whether such differences demonstrate superior devotion to community service.

The Review Board placed the burden of proceeding with the introduction of evidence with respect to issue (2) on PCI. The burden of proceeding with the introduction of evidence with respect to issues (1), (3), (4) and (5) and the burden of proof with respect to issues (1), (2), (3), (4) and (5) were placed upon United.

4. The Review Board further ordered that a grant of the application for renewal of United's license to operate Station KBAY

would be without any prejudice to whatever action, if any, the Commission deemed appropriate upon conclusion of the proceedings in *Johnson* v. *KLOK, KEEN, KLIV, KSJO,* and *KXRX* (C-73-2138 SC) now pending in the U.S. District Court for the Northern District of California. The Board instructed United to immediately notify the Commission of the final disposition of the case.

5. By *Order* released November 12, 1976, FCC 76M-1486, the presiding judge ordered that United Broadcasting be permitted to adduce evidence under the standard comparative issue to demonstrate the benefits accruing from United's horizontal and vertical antenna polarization and Stereo-FM service.

6. Prehearing conferences were held on December 10, 1975 (this one only before former Presiding Judge Ernest Nash), August 12, 1976, and March 2, 1977 at the offices of the Commission in Washington, D.C. An admissions hearing was held at the Commission's offices in Washington on May 16, 17, 18, 23 and June 30, 1977. Hearings were held in the United States Court of Appeals building in San Francisco, California on July 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, 1977. The record was closed by *Memorandum Opinion and Order* released January 13, 1978 (FCC 78M-50).

7. Proposed Findings of Fact and Conclusions of Law were submitted by Bureau and United on May 4, 1978 and by PCI on May 5 and 8, 1978. Replies were filed by Bureau on June 22, 1978, by United on June 23, 1978 and by PCI on June 26, 1978.

Findings of Fact

The Applicants

8. At the time of the hearing, George D. Snell was the secretary-treasurer, a director and a 32.26% stockholder of United. He had held these positions since March 4, 1963 when KBAY went on the air after Commission grant of its construction permit application. Floyd Farr was the vice-president, a director and a 32.26% stockholder of the corporation.[1] George Mardikian was the president, a director and a 32.25% stockholder of United.[2] (Gregory Mardikian - George Mardikian's nephew - owned the remainder of United stock.) The principals each also owned a one-third interest in Stations KCVR and KWIN(FM), Lodi, California. Since the hearing, Mardikian has passed away and as a result, Snell has been elected president of the corporation.[3] Ray C. Hollingsworth is station KBAY's General Manager. He has held this position since 1963.

[1] Farr did not testify at the hearing. He is incapacitated both mentally and physically as a result of several heart attacks and strokes.

[2] Mardikian did not testify at the hearing. According to an affidavit by Dr. Walter W. Port, Mardikian's appearance would have endangered his life.

[3] In a petition for leave to amend, filed November 8, 1977, United reported that at a corporate meeting held on October 28, 1977, Snell was elected to replace

9. Public Communicators, Inc. is a non-profit corporation operated by a thirteen member board of directors. The PCI directors are Ramiro Asencio, Lawrence Bensky, Al Calame, Ricardo Cantu, George Conklin, Myrna Fabbri, Mary Joe Foote, Phillip Jacklin, Leonard Krimerman, David McNeil, Florene Poyadue, Turhan M. Poyadue and Patsy Williams. The officers of the corporation are as follows: McNeil, President; Poyadue, Vice-President; Cantu, Secretary; and Krimerman, Treasurer.

United Broadcasting Company, Inc. (KBAY)

Issue (1): Public Affairs Programming

10. The Review Board's addition of an issue to determine whether United adequately served the community's needs with the public affairs programming presented in the 1971–1974 license term was based upon an analysis of the licensee's composite week logs. According to the Review Board, an analysis of the licensee's 1971–1974 program logs for the composite week and United's list of typical and illustrative programs broadcast during the license term revealed that United broadcast only 101 minutes of public affairs programs and that it put these programs on at times of low audience potential. In addition, the only full length programs, "Washington Window" and "UN Week in Review," did not appear to address any local problems. They were broadcast between 6:30 and 7:30 a.m., Sunday. The remaining fifty-six minutes of public affairs programs, consisting of locally produced editorials were carried during "graveyard" hours (between 1:01 a.m. and 5:30 a.m.). The Review Board stated, however, that this is not to say that these programs might not have satisfied some local needs, but rather that a question is raised whether such programming is responsive to local needs. 59 FCC 2d at 1414.

11. United conceded that the only full-length programs broadcast in the composite week were "Washington Window" and "UN Week in Review," aired on Sunday during the time period 6:15 to 7:30 a.m. Editorials of two-minute duration were broadcast at 1:00, 2:00, 4:00 and 5:00 a.m. on each day of the composite week. In addition, the program "Assemblyman Richard Hayden" was broadcast at 3:42 a.m. on May 27, 1973 and at 3:44 a.m. on May 31, 1973 of the composite week. Each broadcast was 3 minutes in length. Moreover, United claimed that 10 minutes of the program, "San Jose Rescue Mission," which was broadcast once during the composite week on a Sunday from 7:30 to 8:00 a.m., constituted public affairs programming in the composite week (United Ex. 3, p. 5). Finally,

Mardikian as president of the corporation. Mr. Haid Mardikian was elected corporate vice-president and secretary-treasurer. Under Mardikian's will his wife, Nazenig Mardikian, and his children, Haig and AnitaNaz Mardikian are equal legatees.

United contends that the composite week did not accurately reflect the extent of KBAY's public affairs programming responsive to the community needs and problems ascertained. (United Ex. 1, pp. 1–205).[4]

12. United's 1971 ascertainment survey identified the following as the ten most significant needs in the San Jose community: (1) crime, law and order, police protection; (2) improved educational facilities; (3) lack of mass transportation; (4) air and water pollution and waste disposal; (5) moral laxity; (6) unemployment, recession, job losses; (7) drug abuse; (8) welfare; (9) minority problems including housing; and (10) population congestion (United Ex. 1, p. 1).

13. The programming broadcast by United in response to the significant needs identified were the following: (1) "Community Focus;" (2) "You and Your Community;" (3) "San Jose Rescue Mission;" (4) "State Capitol Report;" (5) "Washington Window;" (6) "UN Week in Review;" (7) "San Jose Yesterday and Today;" (8) "Perspective;" (9) "Overseas Assignment;" (10) "Editorials;" (11) "Free Speech Messages;" (12) "Public Service Announcements;" and (13) "Guestitorials" (Guest Editorials) (United Ex. 1, p. 1).

14. "Washington Window" is a thirty-minute program of interviews and commentary by nationally known persons in government and public affairs concerning national issues. During the time period December 12, 1971 to January 2, 1972 the program was broadcast from 6:00 to 6:30 a.m. on Sundays. From January 3, 1972 to July 29, 1974 the program was broadcast from 6:30 to 7:00 a.m. on Sundays. Thereafter, in addition to the Sunday broadcasts, "Washington Window" was broadcast from 3:30 to 4:00 a.m. on Mondays (United Ex. 1, p. 180).

15. The specific dates of broadcast are as follows (United Ex. 1, pp. 18–19):

December 12, 19, 1971; January 2, 9, 16, 23, 30; Feb. 6, 13, 20, 27; March 5, 12, 19, 26; April 2, 9, 16, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 17, 24, 31, 1972. January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 28; August 5, 12, 19, 26;

[4] United program logs dated December 6, 1971, May 9, 1972, October 18, 1972, March 22, 1973, August 6, 1973, January 12, 1974 and June 16, 1974, and the one week of KBAY tapes monitored by PCI in 1974 indicate that no free speech messages, public affairs programs (other than editorials and "Washington Window") guest editorials or replies to station editorials were broadcast on those dates. In addition, the logs reflect that 25 two-minute editorials were broadcast during the hours 1:00 a.m. to 5:05 a.m. A total of 45 two-minute editorials were broadcast by United during the week in 1974 monitored by PCI. 30 editorials were scheduled during the hours 1:00 a.m. and 5:05 a.m. and 15 were broadcast between 12:00 noon and 7:05 p.m. (Joint Ex. 1; PCI Exs. 35 and 36).

September 2, 9, 16, 23, 30; October 7, 14, 21, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973. January 6, 13, 20, 27;[5] March 3, 10, 17, 24, 31; April 7, 14, 21, 28; May 5, 12, 19, 26; June 2, 9, 16, 23, 30; July 7, 14, 21, 28; August 2, 4, 5, 11, 12, 18, 19, 25, 26; Sept. 1, 2, 8, 9, 15, 16, 22, 23, 29, 30; October 6, 7, 13, 14, 20, 21, 27, 28; Nov. 3, 4, 10, 11, 17, 18, 24, 25, 1974.

DECEMBER, 1971

Exemples

Agriculture Secretary Earl Butz says he is against the 25 percent increase in price supports for grain before Congress. He says the legislation, if passed, would "sabotage the Farm Act of 1972."

JANUARY, 1972

2 — John W. Gardner, Chairman of Common Cause, says most state legislatures are "riddled with conflict of interest, riddled with corruption, and wholly inadequate instruments of self-government."

9 — C. Jackson Grayson, Chairman of the Price Commission, says the President's economic stabilization program will be in operation until April 30, 1973, but adds that some "aspects of the program will begin to decontrol" by spring this year.

AUGUST, 1973

5 — Barbara Mikulski, Chairperson of the Democratic Delegate Selection Commission, says the job of the Commission is to review and improve the rules of the convention. She explains the "quota system" of the delegate selection and proportional levels that must be present at the convention according to the district's choice.

12 — George Bush, Chairman of the GOP National Committee comments on the Watergate situation and its affect on the Republican Party. He says ". . . . . well, my thesis is that it hurts politics more than it does the party."

JANUARY, 1974

6 — William E. Simon, Director, Federal Energy Office, discusses the energy situation, gas rationing and the Alaskan pipeline.

27 — Robert Carlson, U.S. Welfare Commissioner, discusses the problems of the Welfare Department and the difficulties of administrating welfare to needy families (United Ex. 1, pp. 24–48).

[5] The February 1974 logs had been misplaced by the licensee and could not be located for analysis (United Ex. 1, p. 19).

16. "UN Week in Review", a fifteen minute program addressing the community need of government, reports actions taken by the United Nations. The program was broadcast on KBAY during the period December 12, 1971 to January 2, 1972, Sundays, from 6:30 to 6:45 a.m. From January 2, 1972 to Nov. 19, 1974 the program was broadcast, Sundays, from 6:15 to 6:30 a.m. Thereafter, beginning August 1, 1974 the program was also broadcast, Fridays from 3:30 to 3:45 a.m. (United Ex. 1, pp. 55).

17. The specific dates of broadcast are as follows:[6]

December 12, 19, 1971; February 6, 13, 20, 27; March 5, 19, 26; April 2, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 27; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 24, 31, 1972; January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 29; August 5, 12, 19, 26; September 2, 16, 23, 30; October 7, 14, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973; January 6, 13, 20, 27; May 26; August 4, 9, 11, 16, 18, 23, 25; September 1, 6, 8, 13, 15, 20, 22, 27, 29; October 4, 6, 13, 18, 20, 25, 27; November 1, 3, 8, 10, 15, 24, 1974. (United Ex. 1, p. 55).

18. "Perspective," a fifteen-minute program by UPI reporters and correspondents, addressed the ascertained needs relating to government. According to United, the program discussed national and international news of the week. It was broadcast Tuesdays from 3:30 to 3:45 a.m. on the following dates (United Ex. 1, p. 65):

July 30, August 6, 13, 20, 27, September 10, 16, 24, October 1, 8, 22, November 12, 1974 (United Ex. 1, p. 65).

19. "Overseas Assignment" is a thirty-minute program prepared by the BBC and distributed by Broadcasting Foundation of America, featuring discussions of world events and problems by foreign correspondents. The program addresses ascertained needs relating to government, crime and minorities. It was broadcast, Wednesdays, from 3:30 to 4:00 a.m. on the following dates:

July 31, August 7, 14, 21; September 11, 18, 25; October 2, 9, 16, 23, 30; November 6, 13, 20, 27, 1974 (United Ex. 1, p. 66).

20. The following is an example of the substance of a typical "Overseas Assignment" broadcast (United Ex. 1, p. 67).

DATE: 8–5–74 TIME: 28'15"

Washington— *The New York Times* judiciary reporter describes the mechanics of the impeachment process against Richard Milhous Nixon.

Cyprus— The future of Cyprus—a return to constitutional order.

[6] No program tapes were available when the United Nations was not in session. In addition, the February station logs were not available for analysis (United Ex. 1, p. 55).

Athens— What is the military element in Greek politics after civilian government has been restored?

London— The "social impact" between Britain's labor government and the trade unions.

Madrid— The Spanish Sahara causes conflict between Spain & Morocco.

Laos— The present situation of the Laotian government of Nation Unity, in which pro-and anti-communist parties share power.

Belfast— Internal disputes of Protestant groups in Northern Ireland preceed upcoming constitutional convention election.

Portugal— Recent Portuguese coup has hampered moves toward educational reform.

21. "Washington Window," "UN Week in Review," "Prospective" and "Overseas Assignment" are all programs taped from the UPI Audio line (Tr. 1704). Snell admitted that the programs do not address any uniquely local needs or problems. However, he stated that national problems discussed often have local impact (Tr. 1706–10).

22. "Community Focus" is a fifteen-minute interview program conducted by Lawrence Jones, a black San Jose attorney. The program addresses the community problems of crime, government, minorities, drug abuse, moral laxity, city planning, housing, inflation and recreation. The program was broadcast from 3:30 to 3:45 a.m., Saturdays, and repeated at 11:30 to 11:45 p.m., Sundays, during the period August 1974 through December 1, 1974 (United Ex. 1, pp. 2–4). A summary of the guests presented on "Community Focus" and the topics of discussion are incorporated in the chart below (United Ex. 1, pp. 3–4):

BROADCAST DATES (All 1974)	GUESTS	TOPICS
Aug. 4, 10, 11, 17, 18, 24, 25, 29	SHELDON PORTMAN, Public Defender, Santa Clara	Duties of Public Defenders
	HEWITT JOYNER, Executive Director of Black Council on Alcoholism	Problems of blacks with alcohol
	REV. GEORGE W. SMITH Emmanuel Baptist Church	Church in the community
	ROBERT W. CLARK, Acting, District Administrator, Parole and Community Services, Adult Parole Board	Problems of parolees

BROADCAST DATES (All 1974)	GUESTS	TOPICS
September 1, 8, 14, 15, 21, 22, 28, 29	HAROLD ROSEN, Deputy City Manager	Problems in the hiring of minority applicants
	GEORGE SHIGO, Field Representative, Social Security Administration	Social security benefits
	ROY BEASLEY, Supervisor of Investigations, Child Support Unit, Dept. of Social Services	Support to children without fathers
	BETH BOTTOMLEY, Chrysalis, Inc. Executor Director	Drug abuse and its prevention
Oct. 5, 6, 12, 13, 19, 20, 26, 27	JANET HAYES, BART COLLINS, Candidates for Mayor of San Jose	Campaign rhetoric
	HON. NORMAN MINETA, Candidate for 13th Congressional Race HON. GEORGE MILLAS, Candidate for 13th Congressional Race	Campaigning speeches; campaign questions
Nov. 2, 3, 9, 10, 16, 17, 23, 24, 30	THOMAS MOORE, Professor, Stanford University	(Two Programs) Recession; inflation
	DICK GADE, United Fund	Services of United Fund

23. Jones is the Deputy District Attorney for Fresno County (Tr. 905). He stated that it was his responsibility to select the speakers for "Community Focus" and to determine the topics for discussion. Jones is not an employee of the station. He was not paid for his work there (Tr. 908–09). Jones selected the topics for discussion based on his experiences as a member of a minority group and as an attorney (Tr. 910). According to Jones, he and Snell engaged in discussions regarding the ascertained community needs and problems and the direction of the program in addressing those needs. Jones believes that the program did address the community's needs and problems (Tr. 911). For example, Reverend Smith discussed senior citizen housing projects. Mr. Clark explained the problems of parolees and those graduating from the criminal justice system (Tr. 913). Mr. Rosen discussed problems relating to the police force and minorities (Tr. 914–15). Mr. Shigo spoke about social security benefits, particularly with respect to the aged and disabled (Tr. 915–16). Mr. Beasley discussed the problems associated with absentee fathers and the

qualifications necessary for welfare assistance (Tr. 916). Professor Moore discussed inflation, *i.e.*, why prices are going up every week (Tr. 917).

24. "You and Your Community," which addressed the community needs of education, social services, and welfare, was broadcast during the period August 3, 1974 through December 1, 1974, Saturdays, from 3:45 p.m. to 3:45 a.m. and repeated at 11:45 p.m. to 12 midnight, Sunday (United Ex. 1, pp. 6–8).

25. A summary of the guests presented on "You and Your Community" and affiliated organizations are incorporated in the chart below (United Ex. 1, pp. 7–8).

Broadcast Dates (All 1974)	Guest and Affilicted Organization
Aug. 3, 4, 10, 11, 17, 18, 24, 25, 31	George Costa, San Jose Music Theatre, Resident Director
	Florence Peer, Variety Audio, Vice President; West Valley Federated Women's Club of San Jose, Chairperson
	Danny Hill, Santa Clara County Fair, Supervisor of Publicity; Darien, Russell & Hill, Public Relations and Advertising
	Harvey Fine, Sea Cadets, Commanding Officer, Squadron VP46, Moffett Field
Sept. 1, 7, 8, 14, 15, 21, 22, 28, 29	John Healy, San Jose Childrens' Theatre, Director
	Mrs. John H. Pfeiffer, Catala Club Fashion Show, University of Santa Clara, Club President
	Ann Tunzi, Saratoga Parade Committee, Parade Sponsors Association of Northern California
	Father Terry, University of Santa Clara, President
	Jeff Dooley, Mental Health Association, Public Information Director, Santa Clara County
Oct. 5, 6, 12, 13, 19, 20, 26, 27	George Barati, Santa Cruz Symphony Conductor; Villa Montalvo, Director; Saratoga

Broadcast Dates (All 1974)	Guest and Affilicted Organization
	Don Thomson, Symphony, General Manager
	Harvey Fine, Sea Cadets, Commanding Officer, Squadron VP46, Moffett Field
	Rudy Gatti, Santa Clara Unified School District Superintendent
Nov. 2, 3, 9, 10, 16, 17, 23, 24, 30	Mary Whitfield, Adult Education, Cupertino, Certified Graphologist
	Jerry Beavers, YMCA, San Jose, Health and Physical Education Director
	Marilyn L. Drake, Women's Missionary Council of Bethel Church, President
	Claire Marino, Villa Montalvo Yuletide President of Montalvo Service Group
	Jeanne Spencer, Valle Monte Christmas Tree Elegance, Public Relations, Member 20 years.

26. Pasqualina di Lonardo Rossetti selected the interviewees and hosted "You and Your Community" (Tr. 1125). Rossetti was not an employee of or under contract with Station KBAY. She volunteered her services to the station because she had been doing community work and wanted to participate in an interview program (Tr. 1128). Although Rossetti was not familiar with the specific community needs and problems ascertained by United in 1971, she stated that had she prepared her own list of problems to be addressed by "You and Your Community" it would have been similar to that compiled by United (Tr. 1130). Rossetti testified in detail as to the subjects of her interviews. For example, she stated that George Costa discussed community events relating to drama and music. Florence Peer addressed the program sponsored by "Variety Audio" involving community volunteers who tape books for the blind (Tr. 1131). During the interview with Father Terry, communications problems relating to the university were discussed (Tr. 1133). For the most part, Rossetti described her programs as informative and educational (Tr. 1138). Some of the programs related to a special community event, as the Saratoga Parade Committee and the San Jose Children's theater (Tr. 1139).

27. "San Jose Rescue Mission" is a half-hour program broadcast Sundays from 7:30 to 8:00 a.m. (United Ex. 1, p. 10). According to

Lester Myers, the Superintendent and Executive Director of the San Jose Rescue Mission, United is paid a hundred dollars by the Rescue Mission for the broadcast time (Tr. 1250). The Rescue Mission is a Gospel preaching mission founded for the purpose of presenting the Gospel and feeding the hungry, housing the poor and clothing the naked (Tr. 1226–7). Myers conducts the program, which generally begins with a recitation of two scriptures. Then a particular problem, *e.g.*, drunkenness or crime, is discussed relating perhaps to a family. The particular problem is related to the scripture passage. The scripture thesis and religious matters are addressed throughout the entirety of the program (Tr. 1228–1233). Myers stated that he relates the scripture throughout ". . . because the Scripture has the answer to the problems of you or myself or anybody else" (Tr. 1236). Music of a religious inspirational nature is played on the program (Tr. 1239). The program usually ends with the conclusion that God has the answer to all needs and that he is the solution (Tr. 1247–48).

28. "San Jose Rescue Mission" was broadcast on the following dates during the 1971–74 license period (United Ex. 1, p. 10):

December 5, 12, 19, 26, 1971; January 2, 9, 16, 23, 30; February 6, 13, 20, 27; March 5, 12, 19, 26; April 2, 9, 16, 23; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 17, 24, 31, 1972; January 7, 14, 21, 28; February 4, 11, 18, 25; March 4, 11, 18, 25; April 1, 8, 15, 22, 29; May 6, 13, 20, 27; June 3, 10, 17, 24; July 1, 8, 15, 22, 29; August 5, 12, 19, 26; September 2, 9, 16, 23, 30; October 7, 14, 21, 28; November 4, 11, 18, 25; December 2, 9, 16, 23, 30, 1973; January 6, 13, 20, 27;[7] March 3, 10, 17, 24, 31; April 7, 14, 21, 28; May 5, 12, 19, 26; June 2, 9, 16, 23, 30; July 7, 14, 21, 28; August 4, 11, 18, 25; September 1, 8, 15, 22, 29; October 6, 13, 20, 27; November 3, 10, 17, 24, 1974;

29. "State Capital Report," is a five-minute program prepared and narrated by Richard Hayden, Assemblyman from the 22nd District, State of California, concerning the weeks events in Sacramento. The community needs addressed by the program relate to government. The program was broadcast from 11:30 to 11:35 p.m., Sunday. The program was broadcast on the following dates during the time period December 1971 to December 1972 (United Ex. 1, p. 11).

December 5, 12, 19, 26, 1971;[8] January 16, 23, 30; February 6, 27; March 5, 12, 19, 26; April 2, 9, 16, 23, 30; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3,

[7] The February logs were misplaced and not available for analysis (United Ex. 1, p. 10).

[8] No program was broadcast on January 2, 9, February 13 and 20, 1972 (United Ex. 1, p. 11).

10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 26; December 3, 10, 1972.

30. Thereafter, a hiatus in the broadcast of "State Capital Report" occurred until February 20, 1973 when it was aired within the program "Community Spectrum," which was broadcast from 3:30 to 4:00 a.m. The program name was then changed to "Assemblyman Richard Hayden" and it was logged as a public service announcement (United Ex. 1, p. 11).[9] The dates of broadcast in 1973 and 1974 are as follows (United Ex. 1, pp. 11–13):

February 20–23, 26–28, March 1–2, 5–9, 19–23, 26–30, April 2–6, 9–13, 16–19, 23–27, 30, May 1–4, 7–11, 14–18, 21–25, 28–31, June 1, 4, 21, 22, 25; August 7–10, 13, 23, 24, 27–31; September 10–14, 7–21, 24–28, October 1–5, 11, 12, 15–19, 22, 23, 1973; August 18, 1974.

31. The following represents a sample of the specific topics addressed by "State Capital Report." The dates noted do not reflect the date of broadcast but the date of the script. It was not possible to correlate the script dates with the actual broadcast dates (United Ex. 1, p. 14):

December 10, 1971	Report on activity of the Legislature in 1971.
December 23, 1971	The 18-year-old voter.
February 18, 1972	Mass Transportation.
February 25, 1972	Property tax relief for senior citizens.
March 10, 1972	Importance of educational institutions and their support.
March 24, 1972	Pollution of the environment; the antipollution initiative on June ballot.
March 31, 1972	The Catastrophic Health Insurance plan proposed by the Governor.
April 7, 1972	The Coastline Preservation Bill is discussed.
April 28, 1972	Consumer protection measures are commented on; consumers can provide their own best protection by becoming informed.
July 7, 1972	Discussion of the Equal Rights Amendment.
July 14, 1972	Views on the reapportionment of State Senators and Assemblymen.
April 13, 1973	Drug abuse.

32. "San Jose Yesterday and Today" is a fifteen-minute program of interviews and commentary conducted by Ray Blackmore. The program addresses the ascertained needs of crime and government. "San Jose Yesterday and Today" was broadcast from 7:15 to 7:30 a.m., Sundays, in 1971 and from 7:00 to 7:15 a.m., Sundays, in 1972

[9] United claims that the program was erroneously logged as a public service announcement and that it is a public affairs program (United Ex. 1, p. 11).

through 1974 with a repeat of the program at 3:30 to 3:45 a.m., Fridays, beginning August 24, 1974 (United Ex. 1, p. 56).

33. The specific dates of broadcast follow (United Ex. 1, pp. 56–57):

December 5, 12, 19, 26, 1971; January 2, 9, 16, 23; February 6, 13, 20; March 5, 12, 19, 26; April 2, 9, 16, 23; May 7, 14, 21, 28; June 4, 11, 18, 25; July 2, 9, 16, 23, 30; August 6, 13, 20, 27; September 3, 10, 24; October 8, 15, 22; November 12, 19; December 3, 10, 17, 24, 31, 1972; January 14, 21, 28; February 4, 18, 25; March 4, 18; April 1, 22; June 10, 17, 24; July 8, 29; August 12, 26; September 16, 30; October 14, 21, 28; November 11, 18, 25; December 2, 9, 23, 30, 1973; January 20;[10] March 3, 17, 24; April 7, 14, 21, 28; May 19, 26; August 4, 6, 9, 11, 13, 16, 18, 20, 23, 25, 27; September 1, 2, 6, 8, 10, 13, 15, 16, 20, 22, 24, 27; October 1, 4, 6, 8, 11, 13, 15, 18, 20, 22, 25, 27; November 1, 3, 5, 8, 10, 12, 15, 17, 19, 22, 24, 29, 1974.

34. Ray Blackmore was the Police Chief of San Jose for over 24 years. On some of the programs guest speakers were presented. However, for the most part, Blackmore personally addressed various community problems based upon his experiences in the community.[11] (Tr. 1185). Blackmore's participation on Ramsey Clark's committee on riots served as one of the topics of discussion (Tr. 1182–1186). Other programs addressed problems Blackmore encountered as a part-time professor at San Jose State University (Tr. 1187). His participation in the San Jose Police Athletic League drive to raise $500,000 to obtain lighting for the playing fields (Tr. 1188), in locating housing for the Mexican Chamber of Commerce (Tr. 1188), and in the central YMCA (Tr. 1188) provided basis for several programs. Blackmore also discussed the charitable organization City of Hope on "San Jose Yesterday and Today" (Tr. 1189). Blackmore is a trustee on the Music and Artists Foundation of Santa Clara. Blackmore served on the Board of Directors of a Mexican-American association. The problems of the Mexican-American community were discussed (Tr. 1196–7). He also advocated a new sports arena on several programs. This arena was a controversial issue in Santa Clara County because of the 22 million dollar cost involved (Tr.

[10] United's February 1974 logs were misplaced and not available for analysis (United Ex. 1, p. 56).

[11] Blackmore is the past president of the California Peace Officers Association, International Association of Professional Footprinters, California Chapter, Bay Counties Peace Officers Association, and Bay Area Traffic Executive Council. He is a graduate of the FBI National Academy, Washington, D.C., and a Life Member of the International Association of Chiefs of Police. Blackmore is also a member of the International Association of Chiefs of Police Public Relations & Research Committees, Attorney General Ramsey Clark's Committee on Riots, Governor Edmund Brown's Committee on Children and Youth, and Attorney General Stanley Mosk's Committee on Crime Statistics. He is also involved in many other community activities and was elected one of the six most respected individuals in Santa Clara County (United Ex. 1, p. 58–64).

1208–9). Pre-trial publicity and civil demonstrations were also discussed by Blackmore. During the hearing, he related a speech he had prepared on civil demonstrations and the First Amendment. The speech he had prepared was recited during one of the programs (Tr. 1208–9). Blackmore broadcast programs as diversified as one discussing public landmarks and another advising people entering retirement (Tr. 1215–16).

35. United also broadcast editorials during the 1971–74 license term that addressed ascertained community needs. Beginning December 1971, editorials were aired daily at 1:30 and 5:30 a.m. (or within an hour of these times). Starting March 10, 1972, editorials were presented at 1:01, 2:01, 4:01 and 5:01 a.m. Editorials ran daily at 1:01, 2:01, 3:01, 4:01 and 5:01 a.m. beginning May 5, 1974. Finally, as of June 10, 1974, editorials were broadcast daily at 1:01, 2:01, 3:01, 4:01, 5:01 a.m.; and 1:00, 2:00 and 7:00 p.m.

36. The editorials were written by Snell and on occasion by Hollingsworth (United Ex. 1, p. 117–18). Hollingsworth recorded the editorials (United Ex. 1, p. 118). According to Snell, they were broadcast in rotating sequence, and as a matter of normal station procedure, at a week's end the editorials recorded were erased (United Ex. 1, p. 119). Jeanne Langstaff, KBAY's traffic manager and bookkeeper, testified that during the period fall 1972 to December 1974, she was responsible for insuring that editorials were properly logged and that an editorial tape was in the control room to be broadcast at the time it was scheduled on the station logs. Langstaff stated that she performed her duties. (United Ex. 1, p. 120; Tr. 1081–82). John Vincent McKay, a station KBAY employee during the period April 30, 1972 until May 1, 1975, disputed the testimony of Langstaff and Snell. He stated that "new editorials were only read when Snell got around to it," and that sometimes they would not be changed for several months (Tr. 1982, 2024). McKay's employment at the station had been terminated by Hollingsworth (Tr. 1973).

37. The following list sets forth a sample of the editorials broadcast during the license term categorized under the ascertained need that it addressed (United Ex. 1, pp. 79–116). The dates noted next to each editorial reflect the date the editorial was written or recorded (United Ex. 1, p. 76).[12]

CRIME/LOCAL (Law and Order, Police Protection, Etc.)[13]

2–12–72 Six steps to take in preventing home thefts
2–5–73 Locked cars reduce crime's incidence
3–5–73 Support is given to a Federal Bill backed by San Jose

[12] The editorials were categorized according to community need and problem addressed by Robert L. Athnos, a copy writer at Station KBAY (United Ex. 1, p. 76, Tr. 1338).

[13] All editorials were two minutes in duration (United Ex. 1, p. 77).

Police Chief Murphy which would secure funds for police protection through revenue-sharing on a direct city basis

9–3–74 State Student Training on Prevention (STOP) Program praised

IMPROVED EDUCATIONAL FACILITIES/LOCAL (Curriculum, School Concepts, Educational Problems, etc.)

1–15–72 The free public library system should be a source of pride

3–7–72 The 'year-round' school system has merit

4–1–72 Reading skills are of primary importance

7–30–74 A listener's response to an editorial which states "the poor quality of education can be objected to, by voting down schools bonds."

10–14–74 Steps must be taken to alleviate violence in the schools

TRANSPORTATION/LOCAL (Traffic Congestion, No-Fault Insurance, Mass Transit, Traffic Safety, Etc.)

1–6–72 Improvements at the San Jose Municipal Airport that would increase traffic and add new airlines, favored.

2–14–72 Traffic congestion/car pools advocated

2–5–73 Eliminate unnecessary road-way obstructions

2–17–73 Hitchhiking dangers must be re-emphasized to youth

* * 74 Voter approval is needed for a sales tax or property tax to provide funds—to be matched by the Federal Government—to proceed with eventual establishment of a Santa Clara County mass transit system (#84).[14]

POLLUTION/LOCAL (Air, Water, and Waste)

12–9–71 Environmental 'clean-up' undoubtedly means greater local taxation

12–23–71 Needed is a better system of collecting recyclable items

6–6–72 Priority must be given to utilization of variant modes of transportation

2–17–73 Keeping the Stanislaus River as a wilderness area river is advocated

MORAL LAXITY/LOCAL

2–28–72 Term papers—pre-written by professionals and purchased for 'turn-in' by students—is a definite lapse of moral values

4–12–73 A recommendation that the courts "throw out" a suit

[14] This editorial was not dated. Pursuant to an editorial numbering system instituted in 1974, the editorial is presumed to have been written, recorded and aired in 1974 (United Ex. 1, p. 77).

for damages filed against the San Jose Police Department for removing material from a pornographic book store

ECONOMY/LOCAL (Unemployment, Recession, Inflation, Taxes, etc.)

5–12–73 Social Security is *not* a 'nest egg to security'.
8–18–73 Unemployment/need for technical training
12–27–74 Reply to listener response/Congressional responsibility to curb inflation

DRUG ABUSE/LOCAL (Addiction, Intoxication, Programs, etc.)

1–6–72 A two-step plan—submitted by Santa Clara County executive, Campen—which would endeavor to rehabilitate those arrested for drunkenness, is supported
* * 74 An answer to an editorial elicits a 'salute' to Mr. Joe Mann of Redwood City, and the alcoholic Rehabilitation unit at Crystal Springs Hospital in Redwood City.[15]

WELFARE/LOCAL

12–9–71 Welfare cheating may be more 'fiction' than 'fact'.
3–5–73 Strong measures by the Santa Clara County Board of Supervisors are urged, in light of a county welfare report showing waste and inefficiency

MINORITY PROBLEMS/LOCAL (Discrimination, Housing, Etc.)

3–5–73 A neighborhood development program grant received by San Jose from the Federal Department of Housing and Urban Development (HUD) is explained and commended
* * 74 Rules for 'fairness in lending' to females should be defined[16]

POPULATION/LOCAL (Congestion, Specific Age Groups, Demographics, etc.)

1–9–72 A research corporation survey shows that resident want a 'slow down' in Santa Clara County's rapid urbanization. Urged, is a 'middle of the road' course

GOVERNMENT/LOCAL (Politics, Federal Spending, etc.)

3–5–73 A Santa Clara County survey shows that county residents are opposed to subsidized political campaigns. This station agrees with the survey results

ENERGY/LOCAL (Oil, Electricity, Nuclear Power, Conservation, Etc.)

8–18–73 The Alaskan pipeline, and nuclear power plants are vital to alleviate our future energy shortages

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[15] Pursuant to United's numbering system, this editorial is presumed to have been broadcast in 1974 (United Ex. 1, p. 77).

[16] Pursuant to United's numbering system, this editorial is presumed to have been broadcast in 1974 (United Ex. 1, p. 77).

10–14–74 Alternate sources of energy—such as the investigation of solar energy—are the beneficial by-products of the energy crisis

38. United broadcast "free speech messages" during the period August through October 1974. Free speech messages are recorded by a person from the organization sponsoring the message (Tr. 868). The message may be a comment by a member of the community on an issue of local importance (Tr. 866). Broadcasts were scheduled at the following times:

Monday through Friday: 9:20, 11:20 a.m.; 9:20 p.m.
Saturday: 8:16 a.m.; 4:20, 7:20 p.m.
Sunday: 3:20, 5:20, 8:20 p.m.

39. The following is a sample of the organizations broadcasting messages on KBAY and the ascertained need addressed:

August	1	League of Women Voters: Government
	2	Black Council on Alcoholism: Drugs
	5	Social Action Research Center: Minorities; Health
	6	Space Program: Environment
	9	Educational Opportunity Program: Education & Minorities
	18	Teamsters Cannery Local @@679: Health
	20	Headstart: Minorities; Education
	21	Peace Corps: Social Service
	24	Chicano Employment: Minorities, Employment
	25	East Valley Alcohol Clinic: Drugs
	29	Committee for Open Media: Media
Sept.	2	Friends of the Earth: Energy
	3	S.J. Youth Commission: Education
Oct.	1	League of Women Voters: Government & Education
	2	Committee for Women's Center: Minorities
	4	Alviso Community Center: Drugs
	6	Frontlash: Education

40. Some of the free speech messages were initiated by members of the community. Others were specifically solicited by station KBAY (Tr. 866). John David Webster, public affairs director, since April 1974, was responsible for acquiring free speech messages (Tr. 870–71). Webster stated that it was difficult to obtain the announcements. According to Webster, although people had ideas that they wanted broadcast, they would want somebody else to record the message (Tr. 882).

41. Eight "guest editorials" (editorials written or voiced by guest listeners) addressing ascertained community needs were broadcast by KBAY during the 1971–1974 license term. Guest editorials were broadcast in regular editorial time slots (Tr. 881). An editorial dated July 30, 1974 addressed the topic "improved educational facilities." Three editorials broadcast in 1974 addressed problems relating to the economy. The subject of drug abuse was discussed in three editorials, broadcast in 1972, 1973 and 1974. Problems related to

population were discussed in an editorial dated May 9, 1972 (United Ex. 1, p. 183).

42. During the period 1971 through 1974, KBAY did not maintain a local news staff. There was no local news director. However, Snell stated that twenty-five percent of United's news addressed local matters (Tr. 1722–1725). The source for KBAY news was the United Press International wire service (United Ex. 19, p. 2). In January 1971, five minutes of news was broadcast at 6:00, 7:00 and 8:00 a.m. with 6:30, 7:30 and 8:30 a.m. sportscasts. On September 1, 1972, an additional news broadcast was added at 5:55 p.m. In January 1974, 5 minute newscasts were added to the schedule at 12 noon, 3:00, 5:00 and 5:55 p.m. According to Snell, the amount of news time was increased in order to provide news principally between the hours of 6:00 to 8:30 a.m. and 4:30 to 6:00 p.m. to coincide with the traditional news-listening, peak traffic hours (United Ex. 19, p. 2).[17]

43. An analysis of KBAY newscasts during the period June 26 to July 2, 1974 indicates that two stories originated in Santa Clara County. One story related to a local drowning, and the other to local earthquake predictions. Twenty-two stories originating from the Sacramento State Legislature addressed matters affecting Santa Clara County, such as the state budget and local pay raises. Twenty-seven stories of a regional nature were broadcast which affected Santa Clara County, as the state carpenters strike and transportation problems. Twenty-eight stories were of regional origin, not directly affecting Santa Clara County. Examples include a human interest story on the San Francisco Zoo and a story on Patty Hearst (Joint Ex. 3, pp. 1–7).

44. Snell testified that he believes certain public service announcements also constitute public affairs programming.[18] United broadcast approximately 135 public service announcements in the composite week ranging in length from 10 to 60 seconds (United Ex. 5, p. 5–12). Snell testified that the public service announcements are informational usually having to do with something of interest or value to the public (Tr. 1715–16). He stated that when the 1071 renewal application was filed he did not consider public service announcements as public affairs programming. He stated that he counted the number of public service announcements and entered that number in the public service announcement category on the renewal application (Tr. 1718). However, after designation of the

[17] As of August 1974, KBAY broadcast 5 minute newscasts at: 12 midnight, 1:00, 2:00, 4:00, 5:00, 6:30, 7:30, 8:30, 9:00 a.m. 8 minute newscasts were broadcast at: 6:00, 7:00 and 8:00 a.m. 5 minute broadcasts were also scheduled at: 12:00 noon, 2:55, 5:00 and 9:00 p.m. (United Ex. 19, p. 7).

[18] An example is the "can-do recycling center" public service announcement, urging the public to bring its aluminum cans for recycling (Joint Ex. 2, pp. 1–2). United set forth a number of public service announcement scripts and identified the ascertained community need that each addressed (United Ex. 5, pp. 5–97).

instant proceeding, Snell began to think about the cross-over between public service announcements and public affairs programming (Tr. 1721–22).

45. According to Snell, the public affairs programs for the most part were scheduled for the early morning hours because "we felt that those are hours when people who are listening listen attentively. They are not distracted . . ." (Tr. 1706). Moreover, in the context of the KBAY "easy music" program format, Snell stated that it was the most workable time to place public affairs programming. Snell is of the opinion that KBAY's audience would be reduced if a fifteen minute talk program was broadcast at an hour when listeners were accustomed to listening to background music (Tr. 1706).

46. According to United, listener response to the 12:00 midnight to 6:00 a.m. public affairs programming is reflected, in part, by several letters the station received addressing editorials scheduled in that time period. For example, between May 13 and 31, 1974, the station received letters concerning an editorial defending ex-President Richard Milhous Nixon which had been broadcast in that time period. A letter of May 22, 1974 discussed an editorial pertaining to the enlargement of the San Jose Airport. A June 9, 1974 letter referred to an editorial on drug abuse. Both editorials were broadcast in the midnight to 6:00 a.m. time period (United Ex. 9, pp. 10–20). The Pulse, Inc. survey for the period June through September 1974 indicates that Station KBAY reached 1300 people during the average one-quarter hour between the hours 12:00 midnight to 6:00 a.m. The survey reflects that the total audience reached by San Jose stations during the average one-quarter hour in that time period is approximately 20,300 (Joint Ex. 4, p. 18). The survey also reflects that Station KBAY's audience at other times is greater, *e.g.*, the average one-quarter hour audience between 6:00 a.m. and 7:00 p.m. is 7100 (Joint Ex. 4, p. 19).

47. United submitted affidavits from Station KBAY listeners Juan de Heras, C.G. Deane, Jack P. Peak, Robert J. Hiam, William N. Kidwell, Ronald R. James, Herbert Crawford, and Bernard B. Siner. Although they all recall listening to the station during the period December 1973 to August 1974, with few exceptions none could recollect specific programming addressing community needs and problems (Tr. 735–36, 751–59, 764–75, 786, 789–90, 801–2, 813–18, 934, 1073–76, 1680). Siner could recollect an editorial broadcast during the 1971 to 1974 time period addressing the evils of alcoholism (Tr. 933). James, former Mayor and officer of the Chamber of Commerce, recalled his participation during the period 1971 to 1974 on a KBAY program where he discussed transportation problems (Tr. 1680).

ISSUE (2): Fairness Doctrine

48. Issue (2) seeks to determine whether United devoted a

reasonable amount of time to the discussion of conflicting views on controversial issues of public importance. The issue was added by the Review Board in light of the paucity of public affairs generally, the absence of a local news staff, and the licensee's failure to furnish any information with respect to its coverage of controversial issues of public importance. 59 FCC 2d at 1414.

49. In September 1974, KBAY broadcast a series of anti-nuclear power radio spots produced on behalf of Friends of the Earth, California for Safe Nuclear Energy, California Citizen Action Group, San Francisco Ecology Center and San Francisco Consumer Action and Zero Population Growth. A contrary view was expressed in a Station KBAY editorial entitled "energy shortage" recorded on December 6, 1975 (United Ex. 4, pp. 2–9). Several of United's public affairs programs addressed local controversial issues. Ray Blackmore advocated a controversial sports arena on "San Jose Yesterday and Today." In addition, such topics as civil demonstrations and the First Amendment were discussed. See para. 34, *supra*. (Tr. 1200–1211).

ISSUE (3): Promise versus Performance

50. Issue (3) concerns the apparent discrepancy between KBAY's promise of public affairs programming in its 1971 renewal application and its 1971–1974 performance. The licensee's proposal was for 2 hours and 45 minutes of public affairs programming per week. Of this amount, the Review Board determined that only one hour and 41 minutes was actually carried.[19] 59 FCC 2d at 1415.

51. The August 23, 1971 KBAY renewal application represented to the Commission that two hours and forty-five minutes of public affairs programming would be broadcast per week (Tr. 1655–56). The programs to be broadcast were "State Capital Report" (thirty-five minutes); editorials (forty-five minutes); guest editorials (twenty-eight minutes); and "Community Spectrum" (sixty minutes) (Tr. 1655–56). In response to a December 6, 1971 letter from the Chief, Renewal and Transfer Division, Broadcast Bureau, informing United that "Community Spectrum" was improperly classified (Bureau Ex. 1), United amended its application on December 13, 1971 to reflect the addition of the following public affairs programs: "Washington Window" (thirty minutes), "UN Week in Review" (fifteen minutes), "San Jose Yesterday and Today" (fifteen minutes) (Tr. 1658, 1689).

52. According to Snell, he, Farr and Hollingsworth, conferred on a daily basis about programming matters (Tr. 1694). Snell directed Hollingsworth to instruct the traffic department to schedule the public affairs programs specified in the KBAY application and also to instruct the program department to make sure that the required

[19] The Review Board stated that according to the composite week logs, the promised programs, "State Capital Report," "San Jose Yesterday and Today" and "Guest Editorials," were dropped from the schedule. 59 FCC 2d at 1415.

program tapes were available (Tr. 1690). While Hollingsworth was generally familiar with the programs specified in the 1971 KBAY application, he did not know that the licensee was committed to broadcast the programs. Nor was he knowledgeable as to the amount of public affairs programming promised by the licensee. Hollingsworth was directly in charge of programming (Tr. 1417–18).

53. Snell testified that although Station KBAY attempted to secure guest editorials it was not successful in doing so and that is why none were broadcast during the composite week. Snell testified that United broadcast an editorial during the 1971–74 license term referring to the "silent majority" and the difficulty encountered by the station in securing people to come to the station to make their views known and record editorials (United Ex. 1, p. 191; Tr. 1698). In addition, Snell stated that United broadcast eleven more minutes of editorials during the composite week then promised in the 1971 application. The editorials addressed ascertained community problems, see para. 37, *supra*. Snell acknowledged that "San Jose Yesterday and Today" was not broadcast during the composite week. He testified that Mr. Blackmore was probably out of town and therefore not available to tape the program at that time (Tr. 1699). Snell concedes that he should have reported to the Commission the absence of the program "State Capital Report" and guest editorials from KBAY's programming schedule (Tr. 1893).

ISSUE (4): Equal Employment Opportunity

54. Issue (4) seeks to determine whether United has made reasonable and good faith efforts to recruit and hire Spanish-surnamed persons. The Review Board stated in adding the issue that if the licensee has been unable to hire such individuals despite recruitment efforts no sanctions will be imposed. 59 FCC 2d at 1424–25.

55. United's Annual Employment Report for 1975 reflects that no Spanish-surnamed personnel were employed by the station as of March 31, 1975 (PCI Ex. 42). According to the 1970 Census, 17.5 percent of the county of Santa Clara, where San Jose is located, falls under the category "Spanish language and/or surname" (United Ex. 16, p. 29).[20]

56. During the period 1971 through 1976, Station KBAY hired a total of 52 employees. The following Spanish-surnamed or Spanish-

[20] However, according to a May 11, 1976 report by the County of Santa Clara Planning Department, only 11.6 percent of the population is actually of Spanish heritage. The report claims that the "Spanish surname and/or language" category includes persons who are not of Spanish heritage but have the same surnames (United Ex. 16, p. 22, 29).

language employees were hired during that period: Maria Augusto, a secretary, September 1971; Jorge Layton, a custodian, April 1971;[21] Diane Vasquez, office help, May 1972; Rebecca Torres, typist, 1973; Elsa Hernandez, receptionist, June 1974; and Roy Avila, a station announcer, April 1975 (United Ex. 7 (a), pp. 1–3). During 1977, four Spanish-language or Spanish-surnamed persons were hired to work at Station KBAY. Janet Cesania was hired as a trainee-announcer at the station. Jean Hernandez was hired as a receptionist and Elsie Ferman was hired as a bookkeeper. A bookkeeper, Jessie Munos, was also hired, but she is no longer in KBAY's employ (Tr. 1399–1400).

57. United has undertaken efforts to recruit and hire minority employees. On May 9, 1973, Hollingsworth met with other San Jose radio and television executives to plan the Santa Clara County Skills Bank. The purpose of the bank was to encourage minorities to become proficient in broadcasting skills. A scholarship program in conjunction with the bank was established (United Ex. 6, pp. 2, 6–7). Hollingsworth was elected treasurer of the bank and a member of the executive committee (United Ex. 6, p. 2). Station KBAY broadcast announcements advertising the Santa Clara County Skills Bank in April, 1975 (United Ex. 6, p. 7). In addition, Kevin McKay, Client Relations Director for United's stations, had a number of meetings commencing in 1971 with James E. Stratten, then Chief of the Division of Apprenticeship Standards for the State of California (hereinafter "the Division") (United Ex. 6, p. 3; United Ex. F., p. 2; Tr. 2649). According to Stratten, he did not have any discussion with McKay regarding station KBAY's employment of Spanish-surnamed individuals (Tr. 836). However, he did have discussions with Snell and McKay regarding affirmative action. The theme of those discussions was the development of guidelines for the establishment of equal opportunity in apprenticeship-level hiring in the communications field. Stratten enlisted the help of KBAY in the development of standards in apprenticeship hiring. However, Stratten left his position with the Division before the completion of the project (Tr. 834–41, United Ex. 7, p. 2, United Ex. 26, p. 5–6).

58. Letters maintained in Station KBAY files reflect that in 1972 Henry Breitross, Department of Communications, Stanford University, Jack A. Peterson, Director of Continuing Education, University of Santa Clara and Clarence Flick, Director, Radio-TV Department, San Jose State College, were contacted by United in an effort to obtain minority personnel. Furthermore, letters dated in 1974 reflect that United contacted, among others, Manuel Lerma, the Model Cities Program, Ray Rodrigqez, Chicano Airways Committee, Jose Villa, Executive Director, Mexican-American Community Service Agency, Gus Adams, Indian Center of San Jose, Jose

[21] Eventually Layton's duties were expanded to include dubbing tapes (United Ex. 7).

Vasquez, Chairman, Chicano Employment Commission and George Castro, President, Mexican-American Political Association, seeking minority and, in particular, Spanish referrals for employment at the station (United Ex. 7, pp. 30–31; Tr. 2178–9).

59. Victor H. Camacho, Affirmative Action Officer for the Campbell Union School District, Santa Clara County, stated that since December 1975, he has worked with Kevin McKay implementing KBAY's affirmative action program. Camacho stated that he has interviewed individuals from minority and ethnic groups with a view toward employment at the station. Camacho referred Gary Dias, Susie Garcia and Jessie Munos to Station KBAY for employment (United Ex. 26, p. 15, Tr. 1006–09, 1014). Comacho recommended Garcia for a receptionist-typist position and Dias for an announcer position. United hired both individuals on Camacho's recommendation (Tr. 1012–1015, 1026).

60. In 1976, the station made additional efforts to obtain Spanish-speaking employees. An advertisement was placed by the station in the California Affirmative Action Bulletin advertising a secretary-typist position (United Ex. 7, p. 18). In a letter of April 16, 1976, the Santa Clara Valley Broadcast Skills Bank was requested to refer to KBAY a Chicano woman to work in the traffic department (United Ex. 7, p. 14). A letter was sent to Clarence Flick, Director Radio-TV Department, San Jose State University, by Steve Snell, KBAY program director. It stated in part:

> As of this date, I have not been approached by any students at all from San Jose State. Does this mean there are no minority students? Or, does, it mean there are none interested? (United Ex. 7, p. 7).

61. Joe E. Levitt, President and General Manager of KXRX and General Manager of KEZR(FM), San Jose, and Dan Tapson, General Manager of radio Station KONE, San Jose, testified as to the difficulty in obtaining Spanish-surnamed or Spanish-ethnic employees (United Ex. 6, p. 8–9).

62. Relying upon information furnished him by an employee, Levitt testified that his stations were not able to find a good source from which to obtain Spanish-speaking employees. Levitt said that KXRX was instrumental in forming the Santa Clara Skills Bank, but that the bank had not proven to be a good source for Spanish-language personnel (Tr. 1032–33). In addition, Levitt testified that KXRX has sought out private and public manpower organizations, participated in high school career days and sponsored an entry-level training program and internship[22] in an effort to employ Spanish-language individuals (Tr. 1034–1038). Levitt stated that KXRX has a staff of 40 full-time and 20 part-time employees. The station employs

[22] Levitt stated that the training program related to news and that it had not been productive (Tr. 1038).

4 full-time and 3 part-time Spanish-surnamed persons (Tr. 1031–32). KEZR employs a staff of six full-time and three part-time employees. One full-time and two part-time employees are Spanish-surnamed (Tr. 1032).

63. Tapson also testified that Station KONE was unable to locate a good source for Spanish-speaking personnel (United Ex. 6, p. 8). According to Tapson, Station KONE employs a 20 person staff. Five of the staff are part-time. One full-time Spanish-speaking individual is employed in a management sales position (Tr. 1061). Station KONE also accepts a student from San Jose State College in an internship program (Tr. 1064). Tapson was President of the Santa Clara Skills Bank for the year 1975 (Tr. 1064). At that time a coordinator was hired who went out to make contacts to obtain minority applicants. Despire the foregoing, the bank was not a good source for Spanish-speaking personnel (Tr. 1062–63).

Public Communicators, Inc.

ISSUE (a): Financial Qualifications

64. This issue seeks to determine whether the cost estimates proposed by the applicant are sufficient to construct the station and operate it for a period of three months and whether it will have available sufficient funds to meet those costs. 59 FCC 2d at 1364. PCI estimates that total costs for construction and first three-months operation will be $26,050 (Tr. 2475–6). The amount of the total funds allocated for construction is $12,700. PCI's application does not reflect nor was David McNeil, the PCI principal who testified with respect to the financial issue, able to provide a breakdown of the construction costs (Tr. 2476). The specific cost estimates reflected in the PCI application are as follows (PCI Ex. 2, p. 10):

Antenna system: $1,750 RF Generating Equipment: $5,350 Misc. Equipment: $2,000 Studio Construction: $2,000 Legal costs and public notice: $1,000 Engineering costs: $600

The total amount of funds allocated for three months operating expenses is $13,350 (PCI Ex. 2).

65. David McNeil is the applicant's president and acting technical director (Tr. 2459–2552). He conceded that operating costs to be incurred by the applicant would amount to "a couple of thousand" more than the proposed $13,350 (Tr. 2476, 2552, 2563). Funds have not been allocated for program origination equipment or for tower and transmitter site rent (Tr. 2486). A total of $30 a month has been allocated for studio rent. McNeil testified that the proposed low-rent studio may not be available at the time of the license grant and that no contingency funds have been set aside for rent if the studio is not available (Tr. 2562). According to McNeil, the category "legal fees, public notice" includes registration or business taxes and legal fees that may be required prior to going on the air (Tr. 2487). McNeil

testified that PCI hopes to obtain volunteer counsel. However, none has been secured and no additional funds have been set aside in the event that volunteer counsel cannot be secured (Tr. 2563). Moreover, the antenna system estimate of $1,750 is based on the funds required for a 3-bay antenna. PCI's application reflects a proposal for a 6-bay antenna. There is no record evidence as to the cost of a 6-bay antenna (Tr. 2549–50). Estimated engineering fees are based on McNeil's "own personal suspicions"[23] (Tr. 2488). In addition, McNeil did not have a record of PCI's budget for such items as telephone lines and service (Tr. 2562). All of the PCI equipment-related estimates are based upon a proposed acquisition of used equipment (Tr. 2553–54).

66. To meet the estimated construction and first three-months operating costs, PCI relies upon loans from the following persons:[24] Lucius R. Eastman, Jr. ($5,000), Michael G. Chatzky, President, International News Keyus ($4,000), Phil Jacklin ($2,500), Lawrence Bensky ($2,500), David McNeil ($3,000), George Conklin Jr. ($5,000), Myrna Fabbri ($8,000) and Len Krimerman ($8,000). The monies relied upon total $38,000 (PCI Exs. 2, 2A).[25] All of the loans are to be unsecured and repaid by PCI at a rate of 10 percent annual interest in no more than three years after PCI begins broadcasting (PCI Ex. 2).

67. Lucius Eastman, Jr.'s October 8, 1975 financial statement reflects liquid assets in the amount of $1,000. His pledge to PCI is in the amount of $5,000 (PCI Ex. 13, p. 2; Ex. 2 p. 2–4; Tr. 2127). International News Keyus, Inc. relies upon its August 1, 1974 to June 30, 1975 statement of income, expenses and retained earnings to demonstrate sufficient liquidity for the promised $4,000 loan to PCI. However, the financial statement reflects losses during that period in the amount of $26,794 and no current assets (PCI Ex. 2, p. 5–8, Ex. 13, p. 3–4).

68. To support his pledge of $2,500 to PCI, Phil Jacklin relies on a financial statement of July 26, 1975. The financial statement reflects no liquid assets (PCI Ex. 2A). Len Krimerman's financial statement, dated October 4, 1974, reflects $16,600 in liquid assets sufficient to support his pledge to PCI in the amount of $8,000. According to the statement, Krimerman has not incurred any liabilities (PCI Ex. 2A; Tr. 2306).

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[23] McNeil is a history professor at San Jose State University. He is not an engineer. (United Ex. C).

[24] Jon Newhall, proprietor of Zodiac News Service, pledges to provide to PCI a free one-year subscription to its materials. This subscription constitutes a contribution of $520.00 according to Newhall (PCI Ex. 8).

[25] PCI also indicated at hearing that it relies upon a $1,000 loan from Florene Poyadue (Tr. 2274–75). While Poyadue claimed that she had sufficient liquid assets to cover a $1,000 loan to PCI, no financial statement or balance sheet have ever been submitted for Poyadue. Moreover, PCI's application has never been amended to reflect reliance on a loan from Poyadue.

69. To support his pledge of $2,500 to PCI, Lawrence Bensky in a letter of August 29, 1975 stated that he had in excess of $5,000 in the Eureka Federal Savings and Loan Association, San Francisco. A financial statement dated October 15, 1974 indicates that Bensky has no liabilities (PCI Ex. 2A). David McNeil has pledged to loan PCI the sum of $3,000. A financial statement dated October 17, 1974 indicates that McNeil has $2,482 in bank accounts. In addition, he testified that he holds a ninety day certificate of deposit in the amount of $1,000. The financial statement reflects no short-term liabilities. The only long term liability noted is the mortgage on McNeil's house (PCI Ex. 2A; Tr. 2467–69).

70. To support his pledge to loan PCI $5,000, George C. Conklin, Jr. relies upon his personal funds of $10,000 in a savings and loan association account as reflected in a financial statement of October 20, 1974 (PCI Ex. 2A). In addition, Conklin testified that his net worth has increased as the result of a bequest by approximately $100,000 since the completion of the financial statement (Tr. 1551–58). Conklin stated that the rate of interest to be applied to the loan has not yet been determined (Tr. 1561). An October 25, 1974 financial statement for Myrna Fabbri demonstrates that he has only $1,700 in liquid assets available to support her loan to PCI in the amount of $8,000. Fabbri has also incurred short-term liabilities in the amount of $600 and long term liabilities in the amount of $31,500 (PCI Exs. 2A; 13, p. 1).

ISSUE (b): Availability of Transmitter Site

71. PCI proposes to use the same tower that KBAY is presently using and to mount its antenna in the same position as the existing station KBAY system. KBAY's antenna is located on the summit of Mount Loma Prieta on a tower owned by Gill Industries, licensee of television Station KNTV, San Jose, California. The summit of Mount Loma Prieta consists of two contiguous parcels of land. One portion is owned by the Chy Company of Sacramento, California. The other is owned by Richard D. Spight and his partner Jay Watson. The two owners have entered into an agreement to jointly manage the two sites. Gill Industries has a lease with the Chy Company for its tower and transmitter building sites. The lease extends until 1985 with an option available to Gill Industries to renew for another ten years (United Ex. A, p. 1–2; PCI Ex. 17).

72. Gill Industries has subleased space on its tower to United. The United-Gill Industries lease also extends to 1985 with an option available to United to renew for another ten years. Robert M. Hosfelt, Vice-President and General Manager of Station KNTV, testified that he would not accept PCI's application for space on the KNTV tower. According to both Spight and Hosfeldt, the KNTV tower has used up its maximum allowable wind loading capacity. In addition, Snell stated that if United was no longer involved in FM

broadcasting, it would still be in the communications business and thus would retain its leasehold on the KNTV tower. In that event, Snell stated that United would lease the antenna space to some other communications company. He stated that United would not rent out the space to PCI because Snell considers the applicant a bad credit risk. (Tr. 1156, 1158–59, 1180–81; 1859–61, 2155–56, 2161–63; United Ex. A, p. 1–2; PCI Ex. 17, p. 2).

ISSUE (c): Technical Qualifications

73. Issue (c) seeks to determine whether PCI possesses sufficient and suitable technical equipment to operate its proposed station. The instant issue is based upon the applicant's statement to the Review Board that it may or may not use the Hilsabeck/Droese studio equipment represented in its application. The Board concluded that the applicant's statement raised serious questions concerning the adequacy of its proposal. 58 FCC 2d at 1354–55.

74. PCI stipulated that the Hilsbeck/Droese studio equipment was not available and would not be used by the applicant (PCI Ex. 20). That equipment consisted of the following:

1 McMart in Model B-502 Five Mixer Audio Control Console-Stereo
2 Russco Cue-Master 3-speed turntables
2 Russco Model RA-12 12 inch tone arms
2 Stanton Model 68 1EE Phone Cartridges
2 Ramko Turntable Pre-Amps Model SP-8E
2 Otari MX 7000 2SP Two-channel, Stereo Record/reproducer in portable case
2 Electro-Voice Model 1751 Electret Condensers, cardiod pattern
2 Studio Monitor Speakers
1 Audio Lab Bulk Tape Eraser (PCI application, Exhibit 7).

The PCI application was not amended to reflect any substituted studio equipment (Tr. 2559, United Ex. C).

ISSUE (d): Staff Adequacy

75. When the Review Board added issue (d) it stated that a substantial question had been raised as to the adequacy of PCI's staff to effectuate its proposed operation of 168 hours per week. The Board noted that there was no indication in PCI's application as to what duties and responsibilities it intended to assign to each of its four full-time employees. The Review Board stated that, on its face, PCI's staffing plan appeared unrealistic in light of the extensive public affairs programming and local news coverage proposed. Moreover, as to PCI's representation that the station will be staffed almost exclusively by volunteers who will be trained to operate the station, the Review Board stated that the applicant failed to provide any assurance that its proposed volunteer help would actually be available. 58 FCC 2d at 1357–58.

76. David McNeil testified that PCI proposes to broadcast 24 hours a day, 168 hours per week (Tr. 2509). The proposed locally produced programming includes the following: "Youth Forum," a thirty-minute program broadcast once a week; "Consumer Report," five minute spots broadcast twelve times a week; "Women's Program," a thirty-minute program, broadcast once a week; "Mini-Series,"[26] a ten-minute program broadcast ten times a week (Tr. 2511); "City Council Spots," two-minute programs broadcast twice daily; "Health Program," a five-minute program broadcast six times a week; "Service Awareness Spots", five-minute programs broadcast twice a day; "Citizens Editorials" two-minute programs broadcast three times daily; "Free Speech Messages," one-minute broadcasts, aired several times a day;[26] "You and the Law," a ten-minute program broadcast once a week;[26] and "Children's Hour," a one-hour program broadcast once a week (Tr. 2512–15). According to McNeil, over the course of a year the programs "Youth Forum" and "Consumer Report" will require "hundreds of volunteers" (Tr. 2517). "Women's Program," "Mini Series," "Health Program," "You and the Law" and "Children's Hour" will each require approximately two volunteers a week. NcNeil defines a volunteer as someone who will work five to ten hours per week at the station (Tr. 2530). The paid station staff will work on the Service Awareness and City Council Spots (Tr. 2522–23).

77. PCI proposes four paid staff persons, consisting of a sales director, an engineer, a news director and an "access" director (Tr. 2531). They will each work forty hours a week. All of the paid staff will be required to work with the volunteers (Tr. 2530–31). The "access" director, station manager and news director are primarily responsible for station programming. The "access" director is responsible for coordinating the responsibilities of the station volunteers (Tr. 2527–8). The station manager will not be paid during the first three months of station operation (Tr. 2531). Proposed staffing plans do not provide for a staff member to be at the station at all times it is operating (Tr. 2534). To meet its requirements for volunteers, PCI relies upon pledges of volunteer time to the station by thirteen persons. In total, 143 hours of volunteer time per week have been pledged to PCI (PCI Ex. 23).

78. Ramiro Vasquez Ascencio has pledged that he will devote fifteen hours per week to the operation of the proposed station. He expects that his primary responsibility at the station will be news gathering. The pledge of volunteer time will be in effect for two years. Asencio is employed in a forty hour a week job and must also attend Army Reserve sessions one weekend a month (Tr. 2442–45; PCI Ex. 23).

79. Father Barry Verdi, a professor of Television and Communi-

[26] These programs will be broadcast more than once (Tr. 2514, 2519).

ty Media at San Jose State University and a priest at the Episcopal Community Church in San Jose, has pledged to devote three hours per week to the proposed station working in the areas community and access outreach, public relations, market research and analysis and commercial spot production.[27] The commitment is open-ended. Father Verdi lives in Alameda, a fifty minute drive from San Jose. He is involved in University associated activities approximately three days a week and his church activities occupy approximately three days a week (PCI Ex. 23; Tr. 1952–57).

80. Charles Sweeney pledged to devote 10 hours per week to PCI. The time period for which the pledge is good is open-ended. Sweeney is a music editor for a Zodiak News Service. He lives in Oakland, approximately an hour and a half from San Jose. Sweeney states that he could do work for the proposed station using his home production facilities. His interests are in the areas of on-air personality, production of programs, commercial spots and news. Although Sweeney had not yet secured permission from Mr. Newhall, owner of Zodiak News Service, he stated that six of the ten hours pledged would be time spent doing interviews for Zodiak and that they would also be used for PCI (Tr. 2351–58, PCI Ex. 23).

81. Lawrence Bensky has pledged to contribute his services as station manager. He will not expect to be paid a salary during PCI's first three months of operation. At the time of hearing he was not employed. He stated that his pledge would depend upon whether he was employed at the time of a grant of the PCI application. He indicated that if he was employed at that time he may not be available to work as the volunteer station manager (Tr. 2030; PCI Ex. 11). In fact, Bensky testified that he is actively seeking employment (Tr. 2032). Although Bensky stated that his primary responsibility as station manager would be to coordinate volunteers, he has done nothing to establish a plan by which the station would obtain such volunteers (Tr. 2034).

82. Also contributing ten hours of time a week to PCI is Al Calame, a handyman. Calame is interested in working at the station in the areas of program production, news, community and access outreach and general maintenance. Calame stated that he works approximately twenty hours a week in his regular employment (PCI Ex. 23; Tr. 2058–59).

83. Myrna Fabbri is a full-time secretary employed forty hours a week by San Jose State University. She pledges to work 15 hours a week at the proposed station. She does not expect to receive a salary for her work. She intends to work two hours each day at the station, Monday through Friday, and every Saturday. The pledge of volun-

[27] Each proposed volunteer filled out a "volunteer pledge form." The form includes a list of areas that require volunteers. Each volunteer checked the activities in which he was interested. None of the volunteers had given thought to the precise amount of time that would be allocated to each category (Tr. 2059, 2077–78, 2132).

teer time is valid for two to three years from the date of the hearing. Fabbri will do secretarial, accounting and general office work at the station. She noted that some of the work could be done while she was at home and that she may be able to fulfill her pledge by working a portion of the 15 hours per week at home (Tr. 2128, 2130–32; PCI Ex. 23).

84. Cathell Toscan, production assistant for a television station, has pledged three hours of volunteer work a week to the proposed PCI station. Toscan will work in the program production and community and access outreach areas. Toscan is also an active member in the organization Committee for Open Media. She is employed thirty to forty hours per week. Toscan lives in Oakland, (Tr. 1884–9; PCI Ex. 23).

85. Steven Burt pledges to work ten hours per week at the station. Engineering work is among his areas of interest. Burt is currently working on a Bachelor of Science degree in Industrial Technology. He is in his senior year of school. Burt holds a second class operators permit and plans to apply for a first class license. His pledge of time is valid for at least a year from the date of the hearing. Burt admitted that he wanted to obtain a paid position at the station, as opposed to being an unpaid volunteer. During summers, Burt works at a temporary job (Tr. 2135–40; PCI Ex. 23).

86. Ricardo Cantu pledges ten hours per week to the proposed station. According to Cantu, the time pledged will not be for work done at the station itself. Beginning in September 1977, Cantu will be away from San Jose attending the University of California Law School at Los Angeles. Cantu stated that he will work for PCI while at law school, by providing legal services for the station (Tr. 2600–4, United Ex. 23). Armando Valdez pledges to contribute ten hours per week to the station. He proposes to work in the community and access outreach, promotions, publicity, and market research and analysis areas. According to Valdez, his pledge is valid for five years from the date of the hearing. Although he works 40 hours a week, Valdez stated that his job is flexible. He lives 45 minutes from the proposed station location. Valdez stated that he has only generally discussed his duties at the station with the PCI Board of Directors (PCI Ex. 23; Tr. 2669–71, 77–78).

87. Mary Jo Foote has pledged to devote two hours per week to the operation of PCI's proposed station. She would like to work in the areas of public relations and news (PCI Ex. 23). The commitment is valid for an indefinite period (Tr. 2234). Ms. Foote is a sailing instructor and she claims that her working hours are flexible. She lives approximately an hour away from San Jose (Tr. 2235–36). Similarly, Florene M. Poyadue has pledged five hours toward the operation of the proposed station. She intends to do secretarial work for PCI. She will also participate in the program production and community and access outreach areas. Poyadue has expressed

interest in becoming a station announcer (PCI Ex. 23). According to Poyadue, her pledge is valid for at least two years from the date of the hearing (Tr. 2278). She lives in San Jose and works approximately 20 hours per week as a nurse-educator (Tr. 2279). Poyadue has several small children and although she is vice-president of PCI, her commitments did not allow her to participate extensively in the hearing proceeding[28] (Tr. 2281).

88. In a letter of February 1, 1977, Bill Hartman states that he is prepared to devote as much as ten hours per week to news and/or public affairs programming at the PCI station (PCI Ex. 22; Tr. 2240–41). He is the business manager for Zodiak News Service (Tr. 2241). Hartman said that he would work in the San Francisco-Oakland area writing news and sending PCI news copy (Tr. 2243–44). However, Hartman's prior experience in news reporting is limited to covering a few stories on a volunteer basis for radio station KPFA and infrequently writing news copy (Tr. 2244).

ISSUE (f): Ascertainment

89. The ascertainment issue designated against PCI by the Review Board inquires into whether PCI interviewed community leaders in areas beyond the city of license; whether PCI's demographic data is sufficient with respect to governmental organizations, public service organizations, and civic and educational activities in San Jose and whether PCI adequately interviewed representatives of these organizations; whether PCI properly listed the ascertained community problems in San Jose; and whether PCI's survey of the general public included consultations with a random sample of members of the general public. 58 FCC 2d 1365.

90. PCI states in its application that its primary service areas are the city of San Jose and Santa Clara County and that its secondary coverage areas include the cities of Berkeley, Monterey, Oakland and San Francisco, and the counties of Alameda, Contra Costa, Marin, Merced, Monterey, Napa, San Francisco, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. 58 FCC 2d at 1361, n. 42. (Tr. 2323–24, United Ex. C). The instant issue was designated, in part, by the Review Board because it was not apparent from PCI's application that it had interviewed leaders from Alameda, Contra Costa, Marin, Merced, Napa, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. 58 FCC 2d at 1362. The ascertainment portion of PCI's application was not amended after addition of this issue. Len Krimerman, PCI Board member responsible for ascertainment, testified that the community of license was emphasized in the applicant's ascertainment. In addition, it was expanded to include Santa Clara County, San Mateo and large cities as San Francisco and Oakland (Tr. 2319–20). According to Krimerman, PCI did not mean

[28] Leonard Krimerman was acting vice-president during the hearing (Tr. 2281).

to claim that it would serve *all* the communities specifically referred to by it in its application[29] but only meant to indicate that the proposed station's signal would reach those areas (Tr. 2324). Krimerman testified that PCI desired to serve San Jose, Santa Clara County, and the large cities within the signal area, namely, San Francisco, Oakland and Berkeley (Tr. 2430). Krimerman claimed that PCI determined that many of the needs and problems of the areas noted by the Review Board are to a large extent connected to or dependent upon the areas in which the ascertainment surveys were conducted (Tr. 24[illegible]). No community leaders were interviewed by PCI from the outlying areas noted by the Review Board with the exception of a few leaders from Alameda (Tr. 2320–21). Bill Hartman, a former PCI board member, interviewed Ono Solon, the director of Baria household technicians (agency to improve working conditions of domestics), Berkeley; Lorna Jones, a former member of the City Planning Commission and past president of the Victorian Preservation Society, Oakland; Les Sauer of the Senior Action Project of the Social Service Bureau of the East Bay; Councilman (City of Oakland) Joe Coto; and Jackie Jaramillo, Oakland Urban Outreach program[30] (Tr. 2248–2250). Krimerman and McNeil stated that they believed Napa, Merced, parts of Contra Costa, San Joaquin, Solano and Stanislaus were more than 75 miles from San Jose and that therefore persons from those localities did not have to be consulted (Tr. 2325, 2538).[31]

91. Question and Answer 9 of the *Primer on Ascertainment of Community Problems by Broadcast Applicants* (hereinafter *Primer*), 27 FCC 2d 650 (1971), requires such data as is necessary to indicate, *inter alia*, the governmental activities and public service organizations in the community. The Review Board determined that PCI's application reflects an absence of adequate data in this respect. Although PCI's application reflects interviews with leaders from certain public service organizations, civic groups and governmental

[29] The PCI application states that: "The broadcast frequency sought by Public Communicators serves primarily the city of San Jose and the county of Santa Clara. Its signal, however, spans the entire Bay area, and reaches south to Monterey and north into Marin and Napa counties." Thereafter the application lists five cities (San Jose, Berkeley, Monterey, Oakland, and San Francisco) and 13 counties (Santa Clara, Alameda, Contra Costa, Marin, Merced, Monterey, Napa, San Francisco, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus) and their respective population. The population figures are added and PCI concludes: " . . . the total population in those counties into which our signal would reach is 5,405,343." (PCI application, Ex. 8; Tr. 2644).

[30] According to Hartman, the interviewees all worked and lived in Alameda County (Tr. 2248).

[31] San Joaquin is 106.6 miles from San Jose, and Merced is 77.4 miles from San Jose. These distances were calculated in accordance with Section 73.208 and 73.611 of the Commission's Rules. City reference points used were those listed in the index to *The National Atlas of the United States of America*, United States Department of the Interior Geological Survey, Washington, D.C.

bodies, the Board stated that this was not sufficient to overcome PCI's failure to specify the groups comprising the community of license. 58 FCC 2d at 1362.

92. PCI failed to amend its application to include information setting forth the community's public service organizations, civic groups, and governmental bodies (United Exhibit C). The Review Board noted that the Directory of Health, Welfare and Recreation Agencies and Services for Santa Clara County 1975–1976 (United Ex. D) contains sufficient indication that there are numerous educational and civic organizations to warrant further inquiry at hearing. 58 FCC 2d at 1362[32].

93. Krimerman, who coordinated and supervised PCI's ascertainment, conceded that the demographic data relied upon by PCI and included in its application did not set forth any governmental organizations, public service organizations or civic and educational activities (Tr. 2339–2343). Nevertheless, Krimerman stated that PCI had interviewed leaders from governmental, public service, civic and educational organizations. Among those interviewed by PCI were Gloria Broadnex, parent coordinator, head start program, San Jose; Steve Brooks, president of the citizens advocate union, Oakland; Vito Cahgemi, Chief Health Educator, Santa Clara County; Norman Mineta, former mayor of San Jose and candidate for Congress; Edward Millson, manager of the Sunnyvale Chamber of Commerce; Madge Overhouse, coordinator of the Santa Clara County Democratic Party; Norman Paul, mayor of Campbell; Harold Johnson, chief of police, Los Gatos; and George Milias, state assemblyman and former deputy assistant secretary of defense (Tr. 2340–2). Educational leaders interviewed were Gerald Brock, principal, Baywood Schools, San Mateo; Jesse Fajardo, Instructional Coordinator, County Office of Education, Santa Clara County; Gene Goldberg, Superintendent of Recreation, Department of the Town of Los Gatos; Ren Gonzales, Administrator, Santa Clara County migrant education; John Groh, student body president, Santa Clara high school; John Hanson, mental health educator, Santa Clara; Douglas Hardy, sociology professor, San Jose State University; Ruth Jones, Director, Montes-

[32] PCI's ascertainment exhibit (PCI Ex. 25) contained a list of ascertained problems and interview forms. The forms indicate that the following community leaders were interviewed: Jerry Adams, manager, Central Bank, Alameda; Steve Brooks, President, Citizens Advocate Union, Oakland; John Christensen, Oakland Chamber of Commerce; Joe Coto, City Council, Oakland; Jackie Jaramillo, Center Manager for Urban Outreach Program, Oakland; Lorna Jones, Victorian Preservation Society, Alameda County; Andrew Mazer, People Energy, National Counselling Group, Oakland; Margueritte Stinnett, School Board Director, Oakland Board of Education; Leslie L. Sauer, Director, Senior Action Project, Social Service Bureau of the East Bay, Alameda; Ona Solon, Director, Bay Area Association of Household Technicians, Berkeley; Frank Yoon, Bay Area Coalition of Koreans/East Bay (Alameda); John Denton, Lecturer, University of California, attorney, urban economist, Alameda (PCI Ex. 25, pp. 13–32).

sori Schools; and A. H. Kopp, principal, Hover Elementary School, Cupertino school district (Tr. 2344–45).

94. Question and Answer 22 of the *Primer* provides that an applicant must list *all* ascertained community problems in its application. Krimerman admitted that PCI did not comply with this provision (Tr. 2316). However, Krimerman testified that he prepared a list of all the ascertained problems[33]. The list includes 260 problems (PCI Ex. 25, pp. 1–11). Not all of the problems included in the list are stated in PCI's application[34]. For example, three of the problems included in the list compiled by Krimerman were as follows (PCI Ex. 25, pp. 6):

99. Sensationalism directed against unions—not a balanced picture of unions presented by media.

102. Hospital resistance to unionization and union demands.

105. Lack of union organization and under-representation of laborers' needs. Neither union nor labor problems are referred to in the ascertainment portion of PCI's application (PCI application, Exhibit 8; Tr. 2644, 2418–19). In addition, an interview sheet for John A. Woodworth, Secretary-Treasurer, San Mateo County Central Labor Council, AFL-CIO, included the following ascertained community problems:

1. Need for programming adapted to labor interests, news of labor, local and national.
2. Union contracts—pension and welfare provisions.
3. Unemployment—such as building trades (United Ex. I, p. 12).

95. According to Krimerman, PCI Board members had meetings approximately once a week during the period September through October 1974 in which the requirements of the Commission's ascertainment process were discussed. At those meetings, copies of the *Primer* were distributed to the PCI Board members and discussed (Tr. 2327–8, 2331). The PCI Board members conducted the survey of the general public. In addition, persons who attended meetings held by PCI also participated in the general public survey under the supervision of the Board members (Tr. 2331). Written instructions were given to each participant. The instructions explained how to relate the purpose of the survey to the interviewee:

"Hello, I am calling for PCI, trying to get an idea of what people in this area feel are the primary problems and needs of the

[33] During the admissions hearing in this proceeding, Krimerman represented that PCI members other than himself prepared the list of problems (Tr. 526). During the hearing he stated that his comments during that session had been in error; that he had only given the exhibit a superficial inspection prior to the hearing (Tr. 2414).

[34] PCI's application has never been amended to include the list of problems ascertained.

community. We have chosen you at random and would like to ask a few questions" (Tr. 2332).

96. Two methods of selection were used by PCI in its survey of the general public. In 25 percent of the interviews, persons were selected at random from the Oakland and Berkeley (but not San Jose) telephone directories. A name was selected from the middle of the page or the first name on a page was called (Tr. 2332–4). The remainder of the interviews were allegedly conducted in person at various street corners in San Jose. PCI sought to get a "more honest" response from the interviewees through personal interviews. They feared that telephone calls could result in hasty, inaccurate responses by those in a hurry to get off the telephone (Tr. 2334). No PCI director maintained a record of the street corners used for the general public surveys and no director could provide this information at the hearing. However, according to Krimerman, the interviewers did report back to him as to the length of time spent at a particular corner and the number of people interviewed there (Tr. 2336, 2542–47). To insure that a random selection was made, every tenth person who passed a particular corner was interviewed (Tr. 2334–6; 2590). According to Krimerman, the PCI board of directors selected street corners where a cross-section of the San Jose area population would be expected to come. For example, a county bus corner would be selected near city hall where major banks and shopping centers were located (Tr. 2434). However, testimony by McNeil disclosed that at least three of the corners selected (Second and San Carlos; First and San Antonio; and Third and San Carlos) were in close proximity to San Jose State University, the institution with which many of the PCI Board members are associated (Tr. 2590–91).

ISSUE (g): Certification Issue

97. The Review Board determined that a serious question had been raised as to whether PCI had complied with the signature certification requirements of Commission Form 301. David McNeil, president of PCI, signed the application on October 28, 1974, thereby acknowledging that he had familiarized himself with the instructions concerning signature requirements and certifying that the statements contained in the application were true, complete and correct. The typed date in Exhibit 5, PCI's balance sheet, however, is October 31, 1974. 58 FCC 2d 1363.

98. David McNeil testified that he read the entire PCI application before he signed it. He explained that Jeremy Milan (the engineer used by PCI) had previously typed the date October 31, 1974 on the balance sheet. However, McNeil did not recall the October 31 date when he signed the application. McNeil stated that he made a trip to Los Gatos specifically to sign and certify the PCI application. On that same date, the entire document was flown to Washington,

D.C. According to McNeil, nothing was added or removed from the application from the time it was signed by him and the time it was filed on November 1, 1974. (Tr. 2498, 2500–2503; United Ex. C, p. 321).

CONCLUSIONS OF LAW

United Broadcasting Company (KBAY)

ISSUE (1): Public Affairs Programming

99. *In the matter of Formulation of Policies Relating to the Broadcast Renewal Applicant (Docket No. 19154)*, 66 FCC 2d 419 (1977) it was held that licensees must present a reasonable amount of local and informational programming to justify renewal, but that the government should not impose a national standard of performance in place of the independent programming decisions of the licensee attuned to the needs of the area served by said licensee. Further, in *RadiOhio*, 38 FCC 2d 721 (1973), the Commission set forth that a large amount of discretion is vested in the licensee as regards his programming and that the Commission will not interfere with this discretion in determining the amount, kind and time periods during which public affairs and other informational programming should be presented to serve the community needs and interests as long as there is absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its discretion in its overall programming. As for the timing of public affairs programming, the Commission rejects charges that the scheduling of public affairs programming at particular times of the day or on certain days is not responsive to the ascertained community needs. *SRD Broadcasting, Inc.*, 57 FCC 2d 354 (1975); *Storz Broadcasting Company (KXOK)*, 58 FCC 2d 1333 (1975); *KSAY Broadcasting Company*, 47 FCC 2d 584 (1974); *Chicago Federation of Labor and Industrial Union Council*, 48 FCC 2d 1174 (1974).

100. United's station KBAY has adequately served the community's needs with respect to public affairs programming during the 1971–74 license term. Both "You and Your Community" and "San Jose Yesterday and Today" can be classified as public affairs programming. "You and Your Community" is described by its interviewer, Pasqualina di Lonardo Rossetti, as being composed of discussions of community events relating to drama and music, special community events, university problems and other informative and educational matters. "San Jose Yesterday and Today" conducted by Ray Blackmore, San Jose's Police Chief for over 24 years being one of his many outstanding positions, consisted mainly of Blackmore addressing various community problems based on his personal experience in the community which were varied and

numerous and touched on all types of people and interests. Occasionally guest speakers were presented.

101. In addition, KBAY station editorials discussed topics of local significance such as school violence, local airport improvements, mass transit system, local taxation and many more numerous public service announcements were broadcast as was local newscasts and, between August through October 1974, free speech messages were placed on the air addressing such subjects as drugs, minorities, health and environment. Programs such as "Washington Window", "Perspective", "UN Week in Review" and "Overseas Assignment" addressed national matters and ascertained needs relating primarily to government. "Community Focus" addressed local community needs and problems affecting San Jose. All of these broadcasts constituted public affairs programming.

102. It must therefore be concluded that United's 1971–74 license term public affairs programming was reasonable and sufficient to justify renewal of its license. There is no evidence whatsoever that United has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its discretion in its overall programming. Both national and local matters were adequately broadcast. The fact that all of the programs were not broadcast throughout the entire 1971–74 license term is no basis for denial of the license renewal and there is absolutely no evidence of an intent to mislead the Commission.

103. As for the times of broadcast, the Commission's policy of repeated rejections of allegations that programming broadcast at particular times of the day or on certain days of the week were not responsive to the ascertained needs of the community speaks for itself. Furthermore, United has demonstrated at hearing that programming scheduled in the early morning was reasonably effective in meeting public interest obligations.

103(a). Based on the foregoing, it is concluded that United adequately served the community's needs with respect to public affairs programming in the 1971–74 license term.

ISSUE (2): Fairness Doctrine

104. United's KBAY, as discussed under Issue (1), *supra*, has broadcast a good many topics constituting local controversial issues. "San Jose Yesterday and Today" is a fine example of local controversial issues as well as "Community Focus". While United did not employ a local news staff, local news was broadcast by KBAY having been obtained from UPI audio line.

105. PCI contends that United has violated the fairness doctrine in failing to provide access for local voices to be heard. However, KBAY has used several local voices such as Mr. Blackmore on "San Jose Yesterday and Today". In *American Broadcasting Companies, Inc.*, 56 FCC 2d 275 (1975), the Commission states as follows:

> Similarly, we find no merit to petitioners claim of lack of access for community views and voices. No showing is made by COM (the petitioners) of a specific controversial issue of public importance which ABC has failed to cover, nor do we find evidence that any specific viewpoint has not been adequately presented by the station.

Thus the Commission is not concerned with the broadcasting of specific voices but with the providing of coverage of controversial issues of local importance which United has obviously done. Also of importance is the fact that PCI was designated the burden of proceeding on this issue and has failed to do so by making no showing of a specific controversial issue of public importance which United failed to cover nor that any specific viewpoint has not been adequately presented by KBAY.

106. Therefore, it is concluded that United did not violate the fairness doctrine during the 1971–74 license term.

ISSUE (3): Promise vs. Performance

107. In the cases of *Hubbard Broadcasting, Inc.*, FCC 77–674, 41 RR 2d 979, 988 (1977); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975); and *Leflore Broadcasting, Inc.*, 46 FCC 2d 980 (1974), the Commission acted to show its intent that it would not lock a station into its program proposal during a license term but that where the licensee's composite week performance reflects a substantial reduction in the amount of non-entertainment programming previously proposed by the licensee, the latter must explain the deviation and in evaluating said explanation, the Commission considers the licensee's overall programming responses to ascertained community problems.

108. Therefore, in applying the appropriate facts to the Commission's precedent, United has complied with this standard. As discussed, *supra*, United's KBAY addressed ascertained community problems in its programming during the 1971–74 license term. While this issue was added against United because its composite week log reflected only one hour and forty-five minutes per week of the two hours and forty-five minutes of public affairs programming promised in its renewal application, United has explained satisfactorily that there was no intent by United not to present all of the public affairs programming promised in its renewal application and that said promises were, in fact, substantially performed with the exception of several deviations which were beyond United's control. United even broadcast an editorial during the 1971–74 term setting forth that it was unable to secure people to broadcast guest editorials, but to no avail. Therefore, considering United's overall programming responses to ascertained community needs and problems, United's plausible explanation as regards the deviations must be given much weight and the problem resolved in United's favor.

109. Therefore, it is concluded that United's KBAY public affairs

programming reasonably conformed during the 1971–74 license term to its proposal as set forth in its 1971 renewal application.

ISSUE (4): Equal Employment Opportunity

110. In citing this issue against United, the Review Board stated that since United has given no explanation as to why KBAY does not employ any Chicanos (as shown in KBAY's 1975 annual employment report and since Chicanos make up the largest group of minority population in San Jose and Santa Clara County), the crucial question to be resolved is whether United has made reasonable and good faith effort to recruit and hire minority members. 59 FCC 2d at 1424–25.

111. The evidentiary record makes clear that United's KBAY hired, during the 1971–75 period, six Chicanos of which four were clerical, one was a custodian and one was an announcer. In 1977, four Chicanos were hired of which one was an announcer-trainee, two were bookkeepers and one was a receptionist. Total employees, including Chicanos and others hired by the station during 1971–1976 amounted to fifty two.

112. KBAY solicited qualified applicants from quite a few educational and governmental agencies throughout 1971 to 1977, as will reflect from the record. Furthermore, throughout 1973 to 1977, it attempted to encourage minorities to become proficient in broadcast skills through its involvement with Santa Clara County Skills Bank and a scholarship program was established for this purpose. KBAY had its own affirmative action program and also advertised in the California Affirmative Action Bulletin for employment.

113. In support of United's good faith efforts of attempting to but not being able to hire a larger number of Chicanos employees, two managers of other San Jose stations vouched as to the difficulties encountered in obtaining Chicano employees.

114. It is true that United upgraded the number of Chicanos after this issue was designated against it. However, the Commission has examined post-license term employment statistics to determine whether appropriate action is being undertaken. *NBC, Inc. (WRC-TV)*, 58 FCC 2d 419 (1976); *Columbus Broadcasting Coalition* vs. *FCC*, 164 U.S. App. D.C. 213, 222 (1974). Therefore, this action by United shows its attempt to insure future compliance with the Commission's policies.

115. It is thus concluded that United provided equal employment opportunity at KBAY to Spanish-surnamed persons through its reasonable and good faith efforts to recruit and hire same.

ISSUE (5): Basic Qualifications

116. This issue is a conclusory issue and rests on the conclusions of Issues (1), (2), (3) and (4), *supra*. Consequently, as a result of these

conclusions, it is determined that United has the requisite qualifications to be a Commission licensee.

Public Communicators, Inc.

ISSUE (a): Financial Issue

117. As the findings clearly show, PCI is not financially qualified to be a licensee. PCI's argument, regarding this issue as well as several of the other issues designed against it, that the future can only be reasonably anticipated and not known, is contrary to Commission's policy and therefore cannot be considered. The Commission requires that financial statements of those lending money to an applicant reflect sufficient liquidity to support the promised loan. See *Viking Television, Inc.*, 16 FCC 2d 1018 (1969); *cf. La Fourche Valley Enterprises, Inc.*, 30 FCC 2d 539 (1971); and *Rocket Radio, Inc.*, 65 FCC 2d 589 (1977).

118. PCI's estimated cost for construction and the first three months' operation is $26,050. The total funds allocated for the first three months' operating expenses is $13,350 and $12,700 for construction. PCI did not take into consideration such items as program origination equipment, the six-bay antenna proposed, acquisition of a transmitter site or possible legal fees as well as relying on a proposed studio location for the unrealistic amount of $30 per month rent with no reasonable expectation of availability of the location or that the rent will be $30 per month at the time of a grant. PCI further made no showing that the used equipment, on which its estimates are based, is available and it has presented no alternate financial plan if the proposed used equipment is unavailable at the time of construction. PCI admitted at the hearing that sufficient funds were not allocated for anticipated operating expenses.

119. PCI relies on funds from nine individuals in the amount of $39,000, as personal loans, to meet the three months operating costs and the construction costs. However the financial statements of these individuals reflect sufficient liquid assets of only $21,200 which is insufficient to support the promised loan of $39,000 and is therefore insufficient to meet even the underestimated construction costs and the first three months' operating costs.

120. Therefore, it is concluded that PCI is not financially qualified to construct and operate its proposed station.

ISSUE (b) Transmitter Site Availability

121. When an applicant proposes a site, it must do so with reasonable assurance in good faith that the site will be available. *Ken Stephens*, 53 FCC 2d 383 (1975). An applicant, challenging a licensee, can reasonably assume that a renewal applicant, whose application has been denied, would be receptive of an offer to

purchase its transmitter and antenna sites, "absent some contrary indication or unusual circumstances". *Belo Broadcasting Corp.*, 42 FCC 2d 1011 (1973) and *Alabama Citizens for Responsive Public TV, Inc., et al*, 62 FCC 2d 755 (1977).

122. PCI proposes to use the transmitter site of KBAY on the tower of Station KNTV which is located on the summit of Mount Loma Prieta or, in the alternative, to add an additional antenna to this tower or maybe use an alternate site on Mount Loma Prieta's summit. However, Gill Industries, licensee of KNTV, owns the tower and leases to United, the lease extending to 1985. The vice-president and general manager of KNTV testified that he would not accept PCI's application for space on the KNTV tower since the tower has used up its maximum wind loading capacity. Snell of United testified that, if unsuccessful in this case, would still be in the communications business and would therefore keep its leasehold on the tower and lease the space to another communications company, but not to PCI because of a credit risk.

123. Therefore, PCI has no reasonable assurance of the availability of its proposed antenna site used by KBAY and its application does not reflect an alternate site on Mount Loma Prieta or elsewhere.

ISSUE (c): Technical Qualifications

124. PCI stipulated that the proposed Hilsabeck-Droese studio equipment specified in its application was no longer available and PCI did not amend its application to show any other such equipment.

125. Therefore, it must be concluded that PCI does not possess sufficient and suitable technical equipment to operate its proposed station, and therefore does not possess the requisite technical qualifications to be a Commission licensee.

ISSUE (d): Staffing

126. While there is no precise formula as to the number of personnel which is adequate for a given broadcast facility, *United Broadcast Industries, Inc.*, 49 FCC 2d 313 (1974), a proposal would have to be minimal indeed to be termed "inherently incapable of effectuation". *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291 (1974).

127. PCI, in its 168 hours of station operation per week, proposes many locally produced weekly programs, two of which will require hundreds of volunteers. PCI relies on pledges from 13 individuals which total 143 hours per week but many of these volunteers either qualified their possible participation (including the proposed general manager) or limited their pledged time, as the findings clearly show. Here again, PCI is not able to demonstrate that it has met its requirements as of the present but that "the complete list of volunteers . . . will have to wait until the awarding of the license." This is but conjecture no matter how convinced PCI is that it will so

be, and conjecture is not enough. PCI must demonstrate that its staffing proposal woulc not be minimal in being able to operate the station 168 hours per week and to produce the proposed programming, and it has failed to do so.

128. Therefore, it must be concluded that the staff proposed by PCI is not adequate to effectuate its proposed operation.

ISSUE (f): Ascertainment

129. A four-part ascertainment issue was added by the Review Board against PCI. The first part of the issue seeks to determine whether PCI interviewed community leaders beyond the city of license. In particular, questions were raised as to whether the applicant interviewed community leaders from Alameda, Contra Costa, Marin, Merced, Napa, Santa Cruz, San Benito, San Joaquin, Solano and Stanislaus. These communities were identified by PCI as being within its proposed service area. Yet, PCI failed to amend its application after the addition of this issue to show additional community leader interviews outside the city of license. The findings demonstrate that community leaders from Alameda were interviewed. In addition, the findings show that San Joaquin and Merced are more than 75 miles from the city of license. Therefore, PCI was not required to interview leaders from those areas. Question and Answer 6 of the *Primer*. However, the findings demonstrate, based on the testimony of PCI principals, that no community leaders from Contra Costa, Marin, Napa, Santa Cruz, San Benito, Solano or Stanislaus were interviewed by the applicant. They also reflect that PCI does not intend to serve these communities. Question and Answer 6 of the *Primer* requires an applicant to explain why he does not undertake to serve a particular major city that falls within his service contours. PCI did not set forth such an explanation either at hearing or in its application. Therefore, it must be concluded that PCI did not consider its secondary service area with respect to proposed programming; nor did it interview leaders from these outlying areas as required by the *Primer*. See *Pleasant Broadcasting Company*, 40 FCC 2d 582 (1973); *Azalee Corp.*, 47 FCC 2d 151 (1974).

130. The second part of the ascertainment issue seeks to determine whether PCI's demographic data is adequate with respect to governmental and public service organizations and civic and educational activites in San Jose and whether PCI interviewed representatives in these areas. After designation of the issue, PCI failed to amend its application with supplemental demographic data or with community leader interviews representing those areas omitted in the demographics submitted by PCI. The findings demonstrate that a number of community leaders were interviewed by PCI representing various governmental, public service, civic and educational groups. Despite these interviews, there are gross deficiencies in the demographic data relied upon by PCI. Therefore, it

cannot be determined whether PCI interviewed representatives of the significant educational, public service, civic and governmental organizations in the community.

131. The third part of the ascertainment issue is whether PCI complied with Question and Answer 22 of the *Primer*, *i.e.*, whether PCI listed all ascertained community problems. The PCI principal responsible for ascertainment, Leonard Krimerman, admitted that PCI did not comply with the Commission requirement that an applicant list all ascertained community needs. The findings reflect that a list of all community needs was maintained by PCI. However, it was not made part of the PCI application. PCI's application thus fails to reflect all the ascertained needs and problems. For example, while problems relating to unions were ascertained, they were not listed in PCI's application. Therefore, it must be concluded that PCI did not comply with the *Primer* in this respect.

132. The Review Board noted in adding the fourth part of the ascertainment issue against PCI that there was no assurance that PCI's survey of the general public resulted in a genuine random sample as required by the *Primer*, Question and Answer 13(b). PCI's statement in its application that 96 persons "were interviewed in person in public areas, using a random choice procedure" did not demonstrate that the public places were selected to achieve a random sample or that such a sample was obtained.

133. The findings reflect that, for a portion of the interviews, a telephone random-selection method was used. That method would usually comply with Commission procedures. See *Midwest St. Louis, Inc.*, 62 FCC 2d 889, 892 (1977), and cases cited therein. However, in the instant case no San Jose telephone books were used. Krimerman testified that Berkeley and Oakland telephone books were used for the general public survey. Thus, the telephone surveys were not used to ascertain the needs of the city of license. In search of a "more honest" response from interviewees, PCI sought personal interviews. PCI's president, David McNeil, testified that every tenth person who passed certain selected street corners was interviewed. He stated that the street corners were selected where a cross-section of the San Jose area population would be expected to pass. However, it was disclosed that at least three corners were located near San Jose State University.

134. PCI failed to maintain any records of the street corners selected and the persons responsible for a given corner. If the survey was, in fact, conducted in the manner claimed by the PCI principal, it could be concluded that a random sample had been achieved. However, since PCI was not able to identify with specificity the location of the street corners used or identify the persons responsible for interviewing at the corners, it is not possible to determine whether in practice the survey was conducted according to the plan

set forth by the PCI principal. PCI had the burden of proof on the issue.

135. Consequently, it is concluded that PCI has not demonstrated that it has complied with the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*.

ISSUE (g): Application Certification

136. David McNeil, president of PCI, signed the PCI application on October 28, 1974, thereby acknowledging that he had familiarized himself with the application and that the statements therein were true and correct. However, a balance sheet in the application was dated October 31, 1974—three days after the date of certification. At the hearing, McNeil explained the process which lead up to and culminated with his signature on the application. He testified that he believed that the October 31 date had been typed on the balance sheet because the 31st was the end of the applicable month. McNeil stated that nothing was added to or removed from the application after he read it and certified its correctness. There is no evidence indicating anything to the contrary. Therefore this issue is resolved in favor of PCI. *Broadcast Enterprises, Inc.* v. *FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968); *Home Service Broadcasting Corp.*, 24 FCC 2d 192 (Rev. Bd. 1970); *Sioux Empire Broadcasting Co.*, 9 FCC 2d 850 (Rev. Bd. 1967); *DuPage County Broadcasting Inc.*, 9 FCC 2d 210 (Rev. Bd. 1967).

ISSUES 1, 2, e, (6) and (7): Comparative

137. Since PCI, one of the two applicants of this proceeding has been found not qualified under the basic qualifying Issues (a), (b), (c), (d) and (f) designated against it, see paragraphs 120, 123, 125, 128 and 135, *supra*, and paragraph 138, *infra*, the comparative issues are moot for conclusionary discussion.

Ultimate Conclusions

138. In summary, it is concluded that United has met its burden of proof on the issues designated against it and that the programming responsiveness, the fairness doctrine, the promise versus performance and the equal employment opportunity issues should be resolved in favor of the renewal applicant. However, PCI has failed to demonstrate the financial or technical qualifications to be a licensee. In addition, PCI has not demonstrated the reasonable assurance of the availability of an antenna site. Nor has PCI shown that the proposed staff is capable of effectuating the program proposal. Furthermore, PCI's ascertainment survey does not comply in all respects with Commission requirements. Therefore, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of United's renewal application and a denial of PCI's application for a construction permit.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276,[35] the renewal application of United Broadcasting Company (KBAY) to operate in San Jose, California, IS GRANTED[36], and the application of Public Communicators, Inc. for a construction permit IS DENIED.

JAMES K. CULLEN, JR.
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

[35] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision will become effective fifty (50) days after its public release as prescribed by Rule 1.276(d).

[36] It is understood, however, that a grant of United's renewal application to operate Station KBAY would be without prejudice to whatever action, if any, the Commission deemed appropriate upon conclusion of the proceeding before the U.S. District Court (see p. 4, *supra*) which has now taken place as evidenced by the accepted amendment to United's application (see Order FCC 78M-1049, released July 10, 1978).

Sunshine Act
Sunshine Act, Grounds for Open Meeting

Commission adopted amendments to rules concerning meeting procedures. One amendment makes clear that seven days notice requirement does not apply to meetings held to decide whether to call a future meeting with short notice. The other amendment eliminates inconsistencies in rule concerning announcements of meetings with short notice.
–Amendment of Part O

FCC 83-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 0.601(b) and Section 0.605(e) of the Commission's Rules and Regulations

ORDER

(Adopted: March 7, 1983 Released: March 11, 1983)

BY THE COMMISSION:

1. The Commission, *sua sponte*, has reexamined its Rule and Regulations relating to meeting procedures, particularly Section 0.601(b), 47 C.F.R. §0.601(b), which defines the term "meeting," and Section 0.605(e), 47 C.F.R. §0.605(e), which delineates the procedure to be followed in announcing meetings on short notice.

2. *Section 0.601(b).* The current definition of the term "meeting" includes deliberations concerning whether to schedule a future meeting with shorter notice than the seven days notice period generally required by the Sunshine Act, 5 U.S.C. §552b(3) and Section 0.605 of the Commission's Rules.[1] Consequently, those deliberations are subject to the statutory notice provisions and, therefore, the Commission is required to give seven days notice of meetings whose only purpose is to determine whether to call a future meeting with shorter notice. In *Washington Association for Television and Children v. FCC* (WATCH), 665 F.2d 1264 (D.C. Cir. 1981), the court noted that the Sunshine Act specifically exempts those deliberations from the statutory definition of "meeting." Thus, the

[1] The Sunshine Act provides for the scheduling of meetings on shorter notice when agency business so requires. 5 U.S.C. §552b(e)(1).

court characterized the Commission's rule as impermissibly broad, explaining that:

> The FCC's regulations implementing the [Sunshine Act] are stricter than the statute demands. The Commission's own definition of "meeting" does not contain an exception regarding deliberations about short notice like that found in §552b(a)(2) of the statute.
>
> . . . .
>
> The Commission's regulation requires it to give seven days' notice of meetings whose only order of business is to decide whether to call a future meeting with shorter notice . . . . The regulation increases the agency's administrative burden significantly with no conceivable corresponding public benefits.

WATCH, 665 F.2d at 1272–73. In light of that analysis, the court concluded that, in adopting Section 0.601(b), the Commission exceeded its rulemaking discretion under 47 U.S.C. §154(i).

3. Consistent with the court's decision in the *WATCH* case, the Commission is amending Section 0.601(b) of its rules to provide that the term "meeting" does not include deliberations which concern whether to schedule a future meeting with less than seven days notice.

4. *Section 0.605(e).* In formulating its rules concerning meeting procedures, the Commission recognized that the orderly conduct of the agency's business sometimes requires that a meeting be held within less than one week before its announcement, or even before an announcement. Section 0.605(e) describes the procedure to be followed in announcing meetings under those circumstances. That rule provides that announcements issued in those instances should specify "the nature of the emergency situation if it is not clear from the subject matter." Section 0.605(e).

5. In the *WATCH* case, the court briefly addressed the terms of Section 0.605(e) as follows:

> We pause to note, for the sake of clarity, that we are not questioning the specification of an emergency situation as justification for calling meetings on short notice. It must be remarked, however, that 47 C.F.R. §0.605(e) (1980) contains an apparent inconsistency: it begins with a calm reference to the prompt and orderly conduct of agency business as grounds for calling meetings on less than a week's notice, but ends with talk of emergencies. *WATCH*, 665 F.2d 1273 n.23. Thus, in order to eliminate any inconsistency in the text of Section 0.605(e), the Commission is amending that rule to strike the reference to emergency situations. This amendment will also obviate any debate about whether, in fact, the circumstances warranting that a meeting be scheduled with less than seven days notice present an emergency situation.

6. The Commission has formulated the amendments described herein to eliminate that part of Section 0.601 of the Commission's Rules which the court found impermissibly broad in *Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981), and to remove an inconsistency in the text of Section 0.605, also noted by the court. Therefore, compliance with the notice and comment provisions of the Administrative Procedure Act is

unnecessary. 5 U.S.C. §553(b)(B). Further, since these are amendments to rules of agency procedure, compliance with the notice and comment and effective date provisions is not required. 5 U.S.C. §§553(b)(A), 553(d).

7. Authority for the action taken herein is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 303(r). Accordingly, IT IS ORDERED that, effective immediately, Sections 0.601(b) and 0.605(e) of the Commission's rules, 47 C.F.R. §§0.601(b), 0.605(e), are amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

47 C.F.R. Part O is amended as indicated below.

1. The first sentence of §0.601(b) is revised to read as follows:

"(b) The term "meeting" means the deliberations among a quorum of the Commission, a Board of Commissioners, or a quorum of a committee of Commissioners, where such deliberations determine or result in the joint conduct or disposition of official agency business, except that the term does not include deliberations to decide whether to announce a meeting with less than seven days notice, or whether a meeting should be open or closed."

2. The last sentence of §0.605(e) is revised to read as follows:

"In addition to other information, the announcement will contain the vote of each member of the agency who participated in the decision to give less than seven days notice, and the particular reason for that decision."

Forfeiture Procedures

Commission amended rules to bring the forfeiture procedures in agreement with a recently enacted amendment to the communications Act, which dispenses with the need to give cable system operators notice and opportunity to respond before Commission issues notice of apparent liability imposing forfeiture penalty. *-Amendment of Part 1*

FCC 83-108

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Implementation of P.L. 97-257; Amendment of Section 1.80(d) of the Commission's Rules and Regulations

ORDER

(Adopted: March 28, 1983 Released: March 30, 1983)

BY THE COMMISSION:

1. The provisions of Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), authorize the Commission to impose forfeitures on licensees and other holders of Commission authorizations without first, among other measures, issuing a warning and providing the opportunity for comment. Cable system operators are not licensed or authorized by the Commission in the traditional sense.[1] For purposes of Section 503(b), however, the Commission consistently has treated cable system operators in the same manner as licensees and other holders of Commission authorizations.[2]

2. By Public Law 97-257, September 13, 1982, the Congress revised Section 503(b)(5) to provide specifically that the Commission may impose forfeitures on cable system operators without first, *inter alia*, issuing a warning and providing the opportunity for comment. Thus, this statute was designed to ratify current Commission practice.

3. *Procedure, Section 1.80.* The forfeiture provisions of Section 503(b) of the Act are implemented through Section 1.80 of the

[1] Cable system operators are required to separately register each system community unit with the Commission.

[2] *See, e.g., Western Arizona CATV*, 49 RR 2d 646 (Cable TV Bureau, 1981.)

Commission's Rules, which closely follows the statutory language. Therefore, pursuant to the new statutory provisions, Section 1.80 will be amended to make clear that the Commission may impose forfeiture penalties on cable system operators without first, among other measures, issuing a warning and providing the opportunity for comment.

4. The Commission has formulated the amendment described herein to implement, in part, the provisions of P.L. 97-257. Therefore, compliance with the notice and comment requirements of the Administrative Procedure Act is unnecessary. 5 U.S.C. §553(b)(B). Further, because this is an amendment of rules relating to agency procedure, compliance with the notice and comment and effective date provisions is not required. 5 U.S.C. §§553(b)(B), 553(d).

5. Authority for the action taken herein is contained in Sections 503(b)(5), 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§503(b)(5), 154, 303(r). Accordingly, IT IS ORDERED that, effective immediately, Section 1.80(d) of the Commission's Rules, 47 C.F.R. §1.80(d), is amended, as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

47 C.F.R. Part 1 is amended by revising the second sentence of §1.80(d) to read as follows:

> However, a forfeiture penalty may be imposed, if such person is engaged in (and the violation relates to) activities for which a license, permit, certificate, or other authorization is required, or if such person is a cable television system operator.

Auxiliary Service
Rules, Amendment of
Television Auxiliary Broadcast Service

Report and Order adopted terminating proceeding which amended Part 74, Subpart F of rules to permit shared use of b/c auxiliary facilities with other b/c and non-b/c entities. New licensing policies established for TV b/c auxiliary stations.
–Amendment of Part 74
BC Docket No. 81–794

FCC 83–153

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 74, Subpart F of the Commission's Rules to Permit Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-broadcast Entities and to Establish New Licensing Policies for Television Broadcast Auxiliary Stations.	BC Docket No. 81–794 RM-3893

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: April 7, 1983 Released: April 15, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

I. *Introduction*

1. Before the Commission is a *Notice of Proposed Rule Making*, 46 Fed. Reg. 60024 (1981), in which we solicited comment on a number of proposed amendments to Part 74, Subpart F of our Rules dealing with television broadcast auxiliary stations. The *Notice* was divided into three major sections. The first section, prompted by a petition for rule making filed by the Public Broadcasting Service and a request for waiver submitted by Westinghouse Broadcasting Company, proposed to amend the auxiliary station rules to permit licensees to share their facilities with other entities. The second section proposed to expand the permissible uses of multiplexed audio signals transmitted on broadcast auxiliary stations. The third section of the *Notice* proposed various changes in our auxiliary station licensing policies. We concluded that the proposed amend-

ments, if adopted, would represent a substantial deregulation of the television broadcast auxiliary service.

2. A total of 23 comments representing 42 parties was received. Four parties filed reply comments. A list of those parties submitting comments is included as Appendix C.[1] Not all parties addressed every proposal set forth in the *Notice*. Rather than presenting an initial detailed comment summary, we will summarize the comments pertaining to each issue as we address that issue in this *Report and Order*.

II. *The PBS and Westinghouse Proposals to Permit Shared Use of Television Auxiliary Facilities*

3. *Channel Sharing—The Proposal*. Current Commission rules provide that television auxiliary stations are intended primarily for the transmission of program material to be broadcast by television stations owned by or under common control of the licensee of the auxiliary station. When the material transmitted is so used by the licensee, the programming also may be broadcast by any other television station. With limited exceptions, additional uses of auxiliary stations are forbidden. In the *Notice*, we proposed to broaden significantly the permissible use of broadcast auxiliary facilities yet retain the primary broadcast-related purpose of the service. Under the proposed rule, licensees of television auxiliary stations would be permitted to transmit any material—broadcast or non-broadcast—to any other entity whenever the auxiliary station is not being used to feed the licensee's broadcast station. The proposed rule contained no limitations on the amount of time that a facility could be used for alternative purposes. We sought comment on whether such unrestricted shared use ultimately might subvert the nature of the broadcast auxiliary service.

4. *The Comments*. The proposal to permit shared use of auxiliary facilities resulted in nearly unanimous support from the commenters. Of the parties commenting on this issue, only NBC asserts that auxiliary frequencies should be reserved exclusively for broadcast use. The commenters generally express the opinion that permitting shared use of existing facilities would promote the more efficient use of the spectrum and would obviate the need to construct costly parallel facilities. Because some auxiliary stations are used to transmit material to and from satellite earth facilities, Group W states that unlimited shared use will help develop a nationwide domestic satellite network and promote competitive sources of television programming. Educational broadcasters in particular express strong support for the time-sharing proposal. A group of noncommercial licensees filing jointly ("noncommercial licensees")

[1] The text of the rules amended as a result of this proceeding is included as Appendix A. Appendix B contains amendments to FCC Form 313, the application form for auxiliary stations.

states that by permitting the collection of additional revenues, the proposed amendments could aid in the formation of new statewide educational television networks and the strengthening of existing networks. PBS adds that facility sharing will further Congressional objectives by allowing public broadcasters to enhance their revenue-generating activities.

5. NBC, however, claims that the proposals will have an adverse effect on already crowded microwave frequencies in larger urban areas. NBC opines that where excess capacity is exhausted or unavailable, intense demand for additional spectrum could siphon frequencies from their primary intended use. According to NBC, the time-sharing proposals could exacerbate congestion in many markets to the point where use of frequencies for broadcast purposes may become impossible "... such as when a news emergency creates peak load pressure." If non-broadcast use of auxiliary facilities is allowed, NBC urges that the Commission take necessary precautions to preserve the essential character of the service.

6. Although arguing in favor of shared use arrangements, many commenters express some concern that excessive shared use may subvert the primary function of the broadcast auxiliary service. The Commission expressed similar concerns in the *Notice* and asked for suggestions on how to prevent misuse of auxiliary frequencies. We specifically sought comment on whether a particular limitation should be placed on alternate uses of facilities, such as a 50 percent limit on the total time that a facility could be used for non-broadcast purposes. Cox, Fetzer, and Multimedia, filing jointly ("Cox"), support a 50 percent use limitation. They contend that such a limit represents the minimum protection necessary to prevent a *de facto* reallocation of frequencies. They also assert that a limitation would deter broadcasters from acquiring "or even stockpiling" auxiliary licenses. Cox would enforce the 50 percent limitation by adding a "yes/no" box to the broadcast renewal form asking whether a licensee had complied with the policy. NAB supports a 50 percent limitation on the secondary use of mobile stations licensed in the broadcast auxiliary service. NAB claims that without some limit, unused mobile facilities might be turned into *de facto* fixed links used exclusively for non-broadcast purposes. NAB states that such exclusive non-broadcast use might create prolonged interference. NBC suggests that, if non-broadcast use of auxiliary stations is permitted, television pickup facilities should be restricted to broadcast use between the hours of 3:00 p.m. and 7:00 p.m. According to NBC, such a restriction would ensure the legitimate broadcast use of the service during peak news periods.

7. The other parties specifically addressing this issue argue against the adoption of any percentage limitations. The limitations are opposed as preventing the maximum efficient use of the spectrum. It is asserted that such artificial limitations would

encourage wasteful construction of parallel facilities or force the use of high-cost alternatives that would prevent experimentation and the development of specialized uses. Group W states that essential broadcast demands will ensure the integrity of the service. According to Group W, basic broadcast needs and growing scarcity will ensure that only truly excess capacity is utilized for non-broadcast purposes. The commenters representing noncommercial broadcasting interests argue most strenuously against any limitations. According to PBS, about one-half of all public stations use broadcast auxiliary stations to receive regional and national programming. Frequently, these stations are used less than nine hours per day. A 50 percent limitation would limit further use of the facilities for non-broadcast purposes to only 12 of the remaining 15 hours per day. The Ohio Educational Broadcasting Network Commission states that a 50 percent limitation on the use of auxiliary stations ". . . creates burdensome responsibilities on broadcasters in terms of record keeping and reporting without so much as a scintilla of evidence that there is any corresponding public benefit." In reply comments, PBS rebuts NAB's concerns about misuse of mobile facilities as a largely conjectural problem that should be dealt with on an *ad hoc* basis. PBS suggests that such a limitation would not reduce interference unless the total number of pick-up authorizations is reduced.

8. Several commenters indicate that concern over the misuse of broadcast auxiliary facilities could be addressed best through the licensing process. Bonneville International states that broadcasters must be prevented from obtaining auxiliary licenses for the sole purpose of transmitting non-licensee or non-broadcast materials. NAB adds that new authorizations should be granted only to those broadcasters needing a facility for broadcast-related uses. PBS agrees and would require all applicants for new facilities to demonstrate a legitimate broadcast need for the facility. The noncommercial licensees suggest that renewal applicants should be required to show that only excess capacity was leased.

9. *Discussion*. After careful review of the comments, we believe that broadcasters should be given the widest possible latitude in the use of excess capacity on licensed broadcast auxiliary facilities. We will therefore permit broadcasters to share their facilities with any other entity for the transmission of any material, broadcast or non-broadcast.[2] These measures are intended to promote the more efficient use of the increasingly crowded electromagnetic spectrum. Allowing such shared use, without limitation, should prevent any

[2] Facility sharing will not be permitted on the four Band B channels between 6,425 MHz and 6,525 MHz that were recently allocated to the Broadcast Auxiliary Service on a secondary basis. *Amendment of Part 2 of the Commission's Rules Governing Frequency Allocations*, 50 RR 2d 1106 (1982). The 6,425 MHz - 6,525 MHz band is still allocated primarily to the Local Television Transmission Service, and it would be inappropriate to allow broadcast licensees to share those frequencies to which they have only secondary rights.

READEX FICHE best copy available

necessity to construct costly parallel facilities where existing facilities can handle an increased load. These measures also will make the construction of new facilities more cost-effective because the expenses incurred to build and operate new facilities can be partially recouped through shared use.[3]

10. In order to take the fullest advantage of the spectrum efficiencies that shared use will provide, and to afford broadcast licensees maximum flexibility in offering excess capacity to other entities, we will adopt no time limitations on the shared use of television auxiliary facilities. So long as a licensee utilizes its auxiliary stations primarily for legitimate and essential broadcast use, we see no reason to restrict the licensee's station-sharing activities. Forcing auxiliary stations to remain idle when legitimate demands for frequencies exist is precisely the situation that we are attempting to avoid. In the context of this proceeding, we believe shared use limitations would be inefficient and counterproductive to the attainment of our objectives.

11. We have also decided to delete from proposed Section 74.631(f) the restriction limiting alternative uses to times when the station is not being used to transmit program material to its associated broadcast station. Technology is available that allows the simultaneous transmission of two video channels on one microwave link. Thus, one channel could feed the licensee's associated broadcast station while the second could be used for alternative purposes. The above-noted restriction, however, would preclude such simultaneous transmissions. We wish to encourage the development of these spectrum-efficient technologies, and the deletion of the proposed restriction clearly facilitates this policy.[4]

12. As indicated in the comment summary, several parties suggest that use limitations are necessary to preserve the primary purpose and continued utility of the television auxiliary service. Although we share some of the concerns voiced by the proponents of such limitations, we believe other, less obtrusive, means should be implemented to assure that the primary function of the service is maintained. To this end we are establishing several safeguards designed to ensure the integrity of the auxiliary service. First and

[3] In the Notice, we solicited comments concerning the degree to which the instant proposal could satisfy several requests for additional spectrum for aural broadcast STL and intercity relay stations. Although no comment was received in this issue, we encourage aural broadcasters, wherever possible, to use channels that may become available as a result of our action in this docket.

[4] At their current state of development, these channel compression techniques decrease picture quality somewhat. Although we doubt that such operations will become widespread due to this decrease in quality, in particular situations a licensee may deem the quality loss acceptible. So long as the use of these techniques does not interfere with the licensee's primary broadcast-related transmissions or other licensees' uses of the spectrum, we see no reason to prohibit the utilization of these new technologies.

foremost, we will not change our policy of granting broadcast auxiliary authorizations only to licensed television broadcasters. Thus, we will not allow non-broadcast entities to receive licenses in the television auxiliary service.[5] As a result, the television broadcast industry itself will retain complete control over, and responsibility for, the proper use of television auxiliary facilities. Individual television licensees will specify the conditions under which they will share their equipment. If use of a licensee's equipment by another party causes harmful interference, it is the responsibility of the sharing licensee to correct the problem expeditiously. The Commission will hold the broadcast licensee responsible for any interference or misuse of the facilities that occurs during operation by the non-licensed user. We fully expect that television licensees will take these responsibilities seriously since the willful or repeated misuse of auxiliary facilities would certainly impact upon a licensee's qualifications to hold a broadcast authorization.

13. Second, it is important to keep in mind the fact that we are authorizing only the shared use of an existing station's excess capacity. We will not grant new authorizations to licensees seeking only to provide secondary service. Also, we will not permit licensees to obtain additional authorizations in order to divide their primary transmissions between two or more facilities, thereby generating additional excess capacity. Such activity would not only tend to subvert the primary function of the broadcast auxiliary service, but it would also negate much of the spectrum efficiency we are seeking to promote. As suggested by several commenters, oversight of these licensing restrictions will be accomplished by the addition of three questions to the broadcast auxiliary station application, FCC Form 313. The first new question will request a brief statement regarding the primary purpose of the requested auxiliary link. The second question will seek information on the amount of sharing that the applicant anticipates for the new link. Third, we will ask the applicant to tell us the number of auxiliary authorizations already held and the approximate amount of time that these existing stations are being used by other entities. We readily admit that in most instances we are hesitant to add new reporting requirements. However, these new requirements represent a miniscule burden on the licensee while allowing the Commission to implement its important new facility-sharing policies.

14. We also wish to make it clear that the non-broadcast uses authorized in this proceeding are strictly secondary to the primary function of the broadcast auxiliary service. To emphasize this point, we are making two additions to the rules as proposed in the *Notice*. First, we are adding a "non-broadcast use" category to the newly established set of priorities found in Section 74.604(c). This addition

[5] See also paragraph 30, *infra*.

makes it clear that for the purpose of interference protection, any facility being used for non-broadcast purposes must give way to other facilities being used for *bona fide* transmissions to a licensee's associated broadcast station.[6] Second, we are adding language to new Section 74.631(f) that obligates licensees to coordinate their channel sharing activities with other broadcast licensees in the area. This requirement is similar to the provisions recently adopted in BC Docket 81–497, in which we authorized broadcasters to utilize auxiliary frequencies for up to 30 days per year without notifying the Commission.[7] With respect to fixed link services, this notification process should not pose any particular hardship on the licensee. The obligation to notify other area licensees is most crucial with respect to the shared use of mobile facilities, which have a greater potential for causing interference. We believe this process is more desirable than the restrictions on the use of mobile facilities urged by NAB and NBC. No absolute restrictions are placed on mobile facility sharing, but licensees offering excess capacity for shared use have an affirmative responsibility to inform other licensees of proposed uses. This should enable all area licensees to coordinate the use of their auxiliary facilities in order to prevent interference and disruption of service.[8]

15. The flexible facility-sharing activities that we are authorizing herein represent a significant deregulation of the broadcast auxiliary service. However, with this increased freedom comes increased responsibility. Licensees choosing to share their facilities must be willing to accept that responsibility and conduct their channel sharing affairs accordingly. Certainly we will not hesitate to revisit our actions if it appears that licensees are misusing their auxiliary facilities to the detriment of the broadcast auxiliary service.

16. *Profit Making vs. Nonprofit Sharing of Facilities—The Proposal.* At paragraph 10 of the *Notice*, we solicited comment on whether licensees should be able to sell their excess capacity to other entities for a profit or instead be limited to nonprofit, cost-sharing arrangements. We noted our concern that licensees operating on a for-profit basis may take on certain characteristics of communications common carriers, but that broadcast licensees had traditionally not been subject to common carrier regulation under Title II of the Communications Act. Before deciding this issue, we noted that "... a

[6] The priority system established in this *Report and Order* is discussed in detail in Section IV, *infra*.

[7] *Amendment of Part 74 of the Commission's Rules to Provide for Short-Term Operation Without Prior Approval*, 50 RR 2d 1492 (1982); Section 74.24.

[8] We also note that, although available to broadcasters only on a secondary basis, licensees may utilize the spectrum between 6,425 MHz and 6,525 MHz solely for television broadcast operations. Of course, use of those channels must be cleared first with the local LTTS operator. See n. 2, *supra*.

record should be developed that adequately addresses all the relevant legal and policy ramifications and associated common carrier implications . . ." of the proposal to sell excess capacity for a profit.

17. *The Comments.* With one exception, all parties commenting on this issue urge that licensees be free to make a profit on their shared use of broadcast auxiliary facilities.[9] As a matter of policy, Cox contends that allowing licensees to charge for their excess time is consistent with a marketplace approach. Cox also asserts that profit making will allow greater licensee flexibility while creating more incentives for efficiency, innovation and experimentation. The Christian Broadcasting Network states that in addition to encouraging new links and program services, permitting profit making will avoid economic distortions that might develop if cost-sharing were mandated. According to CBN, cost sharing may result in overdemand for broadcast auxiliary facilities. PBS adds that there is no compelling regulatory interest to justify a prohibition on profit making so long as auxiliary facilities are used and obtained primarily for broadcast purposes. Group W contends that the line between cost sharing and profit making is sufficiently blurred to preclude restrictions on profit making. Group W avers that the differences between costs saved and dollars earned are more semantic than real. According to Group W, the record keeping and accounting burdens on licensees plus the policing burden on the FCC are further reasons not to adopt the cost-sharing option. The noncommercial licensees filing jointly aver that making a profit on the sale of excess capacity is essential. They contend that the measure will provide sorely needed revenues at a time of diminishing federal support for noncommercial stations. Several other noncommercial entities suggest that the profit-making option is consistent with Commission attempts to promote the financial self-sufficiency of public broadcasters and is just what Congress had in mind when it passed Section 399B of the Communications Act which permits public broadcasters to engage in the offering of services for remuneration. The Ohio Educational Broadcasting Network Commission states that auxiliary facilities should join earth stations, studios, towers, and remote equipment among the facilities available for resale.

18. *Discussion.* We are of the opinion that broadcast licensees should be permitted to offer the excess capacity of their auxiliary facilities to others on a for-profit basis. Several factors lead us to this

[9] The California State Communications Division was the only commenter supporting nonprofit, cost-sharing use of auxiliary facilities. The Division, however, offered no reasons for its position. Bonneville International, while having no fundamental objection to profit making in this context, believes that guidelines should be established to prevent broadcasters from subverting public interest programming considerations to profit-making objectives. Bonneville, however, offered no suggestions as to the content of any such guidelines.

conclusion. First, it clearly reflects the intent of Congress in its recent decision to permit noncommercial broadcast stations to offer their facilities to others for remuneration.[10] The noncommercial broadcasters commenting on this issue indicate that the additional revenues gained through offering their auxiliary stations to others may prove crucial in their efforts to overcome reduced federal funding. By allowing profit making, we are continuing our efforts to develop a regulatory environment that permits public broadcasters to make the most efficient use of their facilities and thereby supplement their revenues in the face of dwindling federal financial support.

19. The argument of Group W, that the distinction between dollars earned and costs saved is often more semantic than real, also supports our decision. Group W intends to transmit a programming package to various buyers across the country via its interconnected auxiliary station/satellite earth station network. Consumers will be purchasing a delivered finished product. It makes little sense to require Group W, for example, to charge for the distribution of the package on a cost-sharing basis when the company can then charge a higher price for the programming component. The total price to the buyer would remain the same. Because it would be nearly impossible to allocate monies consistently to one function or the other, establishing a cost-sharing scheme for the distribution segment of such a service would be meaningless at best and possibly counterproductive due to increased administrative costs.

20. Finally, we do not anticipate that profit making will impede the proper functioning of the broadcast auxiliary service. Any broadcasters who may be tempted to subordinate the public interest to their own private pecuniary interests run the risk of jeopardizing their standing as licensees. Also, our resolve not to permit new authorizations for secondary uses forecloses the possibility of licensees seeking additional facilities solely to engage in profit making channel sharing activities. In short, profit making offers potential benefits to all licensees—particularly noncommercial broadcasters—without, we believe, adversely affecting the auxiliary service.

21. *Common Carrier Regulation—The Comments.* With nearly unanimous agreement, the commenters contend that offering broadcast facilities on a for-profit basis does not require the Commission to engage in common carrier regulation of such activity.[11] The parties

[10] Omnibus Budget Reconciliation Act of 1981, §1231, 47 U.S.C. §399B(b)(1). The Act further requires that such an offering "shall not interfere with the provision of public television services." Because we are enacting several safeguards to prevent the misuse of auxiliary frequencies, we do not believe that permitting channel sharing will in any way interfere with the provision of public television services.

[11] PBS suggests that even if common carrier regulation is imposed, broadcasters should have the option of filing tariffs and making a profit or offering their facilities on a nonprofit, cost-sharing basis.

claim that licensees will be highly selective in allowing use of auxiliary facilities by others so as not to disturb the facilities' principal broadcast use. Licensees must retain control of their facilities in order to make them available for essential broadcast purposes. Therefore, licensees will not hold out their facilities indiscriminately on a first come, first serve basis, but will make individualized decisions for each potential user. The parties argue that, under the rationale of *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) (*"NARUC I"*), entities that make individualized decisions whether and on what terms to deal are not common carriers subject to Title II regulations.

22. Individual commenters make several other arguments against the imposition of common carrier status. According to the Florida Public Broadcasting Service ("FPBS"), the intent of the Omnibus Budget Reconciliation Act and the Public Telecommunications Financing Act is to allow public stations to hold out facilities for hire without incurring common carrier status. FPBS also states that selling excess capacity on satellite earth stations is not a common carrier activity, and that selling excess capacity on broadcast auxiliary stations should be accorded similar treatment. Finally, Christian Broadcasting Network and Fisher suggest that any instances of common carrier activity arising from the sale of broadcast auxiliary capacity would be infrequent. Fisher adds that there is no danger of monopoly pricing practices because there will be an abundance of competition. CBN and Fisher conclude that if common carrier activity becomes substantial, the Commission can revisit the area and take appropriate action at that time.

23. *Discussion*. As most of the commenting parties stressed, the District of Columbia Circuit Court of Appeals in *NARUC I* specifically stated that a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F.2d at 641. The Court noted that a common carrier need not serve the whole public, and private carriers may serve a significant clientele. The Court then proceeded:

> Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. *Id.* at 642. The Court then stated that in determining whether a particular carrier should be accorded common carrier status, a finding must be made as to whether any legal compulsion to serve indifferently exists, or whether there are reasons implicit in the nature of the operation to expect an indifferent holding out.

24. Clearly there exists no legal compulsion for licensees to offer their facilities in an indifferent manner. Such a requirement would be directly contrary to the primary broadcast-related purpose of the broadcast auxiliary service, which is intended to serve the program distribution needs of the television industry. Thus, we can not

discern, nor would we establish, any legal requirement that broadcast licensees offer their broadcast auxiliary facilities on an indifferent basis.

25. With respect to the second test for classifying common carriers, whether there are reasons implicit in the nature of the operation to expect an indifferent holding out, we believe that such holding out is unlikely to occur. The demands of the licensee's broadcast transmission needs should preclude a general and indifferent holding out to all potential users. We suspect, and the commenters on this issue state, that licensees will negotiate with and select users on a highly selective basis due to licensees' own demands for the facilities. Because licensees must retain complete control of their facilities to ensure the integrity of their broadcast services, it does not appear that they will be in a position to offer indifferently their facilities to other users.[12] Moreover, with respect to the distribution services envisioned by Group W and PBS, it appears that they would be marketed on the basis of long-term syndication contracts with potential buyers. Both of these factors—the individualized selection of clients and the establishment of service through long-term contracts—were factors thought by the Court in *NARUC I* to be inconsistent with common carrier status. 525 F.2d at 643. We can find no basis for believing that anything inherent in the channel sharing activities of broadcast licensees will lead them to make indifferent offerings of excess channel capacity. Thus, we find the imposition of common carrier regulation inappropriate in this context.

26. The Court in *NARUC I* warned that, if common carrier activity did ensue, it would be incumbent on the Commission to determine the extent to which traditional Title II regulation should be applied. *Id.* at 644. Because of the essential nature of the broadcast services performed by auxiliary facilities, and because of the safeguards we are establishing to prevent licensees from obtaining new stations solely for nonbroadcast use, we do not anticipate that our initial analysis will be proven wrong. However, in the event that licensees do begin behaving like common carriers, by indiscriminately offering their facilities to all potential users, we can certainly revisit this issue and make appropriate changes in our

[12] We realize that it is technologically possible, using channel compression techniques, for a licensee to transmit two video signals simultaneously on a single microwave link. Thus, a licensee theoretically could use these techniques to generate a full-time video channel of excess capacity. We do not anticipate, however, that licensees will make widespread or routine use of these channel compression techniques because at this stage of their development they result in decreased picture quality. Nor do we expect, given broadcasters' continuing need for a high quality video signal pathway, that licensees will be any less selective in their offering of such compression-based capacity than they would if only a single video channel were available to them. Thus, we do not believe that our common carrier analysis will be significantly affected.

treatment of licensee channel sharing activities, either by treating the activity as a common carrier offering subject to Title II and state regulation, or by not permitting it to continue.

27. *Reporting Requirements/Oversight of Sharing Agreements—The Comments and Discussion.* In response to our queries regarding whether the Commission should institute any continuing reporting requirements or undertake to review any facilities-sharing agreements, the commenters universally state a lack of need for any such regulations. With respect to facility-sharing agreements, PBS notes that similar agreements concerning the use of satellite facilities are no longer submitted routinely to the Commission. PBS states that because many distribution systems utilize satellite earth stations and auxiliary stations, the Commission's treatment of both types of facilities should be the same. Aside from the minimal additions we are making to the auxiliary station application form discussed at paragraph 12, we will not initiate any continuing reporting requirements to monitor the use of auxiliary facilities. We do not expect any problems to arise from our rule amendments, and reporting requirements would constitute a needless and costly burden on licensees. Because we are imposing no restrictions on the shared use of licensee facilities, we see no valid purpose in requiring licensees to submit copies of their shared use agreements to the Commission. Again, such a requirement would exact a burden on licensees with no corresponding benefit to the Commission or the public. Therefore, user agreements need not be filed with the Commission.[13]

28. *Miscellaneous Issues.* Several commenters raise additional issues concerning shared use of auxiliary facilities. The California State Communication Division urges the Commission to allow broadcast auxiliary licensees to interconnect their facilities with terrestrial microwave stations in the Private Operational Fixed Microwave Service (POFMS) that are operated by public entities. To the extent that broadcast auxiliary licensees utilize only their excess capacity, nothing would prevent such interconnection. However, as stated previously, we will not license new broadcast auxiliary stations for non-broadcast purposes. Thus, we would not authorize a new auxiliary station merely for interconnection with, or extension of, a POFMS network.

29. Gill Industries and Hughes Aircraft Company, Microwave Communications Products ("Hughes"), ask that the time sharing proposals being implemented in this docket be extended to Community Antenna Relay Service (CARS) operators licensed under Part 78 of the Commission's Rules. They contend that the same reasons supporting shared use for broadcast facilities also apply to CARS facilities. We agree that the logic of our actions easily might be

[13] As suggested in the *Notice*, we will also delete the reporting requirements from Section 74.631(h) of the Commission's Rules.

extended to CARS. However, CARS facilities are utilized by an entirely different set of licensees, and we believe that it would be both unfair and unwise to extend our actions to CARS without first notifying those licensees of our intentions. Nothing in the instant *Notice* remotely suggested that we might extend our actions to CARS facilities, and, absent such prior notice, we will not do so.[14]

30. In the same vein, Entertainment and Sports Program Network (ESPN) asserts that non-broadcast entities should be permitted to obtain licenses in the broadcast auxiliary service. ESPN states that, because they are neither broadcasters nor cable system operators, certain entities such as ESPN which produce and distribute programming are not eligible to receive auxiliary licenses. However, because their material is intended for broadcast or cablecast purposes, they likewise are precluded from obtaining facilities in the private radio services. ESPN avers that the shared use proposals will not adequately remedy this problem, and that the only satisfactory answer is for such program producers to receive their own authorizations. We recognize ESPN's problem, but we do not believe that this proceeding is the proper forum for resolving it. As with the proposal to expand our actions to CARS, the *Notice* contained no reference to expansion of the entities eligible for broadcast auxiliary authorizations. Indeed, one of the principal safeguards against misuse of broadcast auxiliary facilities is our resolve to limit licensing to broadcast station licensees. Further, allowing non-broadcast entities to receive Part 74 licenses surely would constitute a reallocation of frequencies that must be preceded by public notice. For these reasons, we decline to act on ESPN's request in this docket.

III. *Expanded use of Multiplexed Audio Signals Transmitted Over Television Auxiliary Broadcast Stations.*

31. *The Proposal.* Under current Commission policy, the transmitter of a television broadcast auxiliary station may be multiplexed to provide additional communication channels for the transmission of aural program material and operational communications. However, multiplexed audio material may be used only by AM, FM, or TV broadcast stations owned by or under the common control of the licensee of the broadcast auxiliary station. Thus, broadcast or non-broadcast entities may not utilize the multiplexed audio material transmitted over another licensee's auxiliary facilities. By contrast, video programming transmitted over auxiliary facilities may be utilized by any other broadcaster if the subject programming is broadcast by the transmitting licensee. In the *Notice* we stated that the discrepancy in the permitted uses between audio and video

[14] We note that Westinghouse Broadcasting and Cable, Inc. recently filed a petition for rule making proposing, *inter alia*, that channel sharing be permitted for CARS licensees.

programming transmitted via television broadcast auxiliary stations made little sense, and we proposed to allow the greatest possible latitude in the use of audio signals transmitted over television broadcast auxiliary stations.

32. *The Comments*. Fourteen of the comments filed in this proceeding specifically addressed this topic. Most of those comments merely express support for the proposal for much the same reasons they supported the facility-sharing proposals discussed above. However, several parties offer more specific comments. National Public Radio supports the proposals as promoting spectrum efficiency and providing opportunities for licensees to recoup some of the cost of maintaining auxiliary facilities. NPR specifically favors the multiplexing proposal because facilities then could be made available to public radio which would aid in the production and distribution of radio programming. The Christian Broadcasting Network argues against placing any restrictions on the type of material transmitted over broadcast auxiliary stations or on the permissible receiver of multiplexed material. Such a nonrestrictive policy would have clear spectrum and cost efficiencies, according to CBN.

33. The National Association of Broadcasters considers parallel regulation of audio and video transmission essential. NAB notes that either the multiplexed audio channels or the primary video transmission (or both) may possess excess capacity, and it concurs in the Commission's proposal to permit the greatest possible latitude in the use of multiplexed audio signals. However, NAB points out that proposed Section 74.631(d) makes no specific reference to the number of audio channels or control signals that may be multiplexed, except for the general provision against causing harmful interference to stations transmitting television broadcast material. NAB contends that interference can be caused to facilities on adjacent channels by exceeding the allowable emission bandwidth and that the number of possible channels that can be multiplexed without exceeding that bandwidth is limited. NAB suggests that the Commission consider specific technical requirements "which do not preclude the number and nature of available multiplexed transmissions, yet provide a mechanism whereby a licensee can ensure that its auxiliary facility cannot reasonably be expected to cause adjacent channel interference to other television auxiliary facilities."

34. *Discussion*. The comments clearly demonstrate that greater discretion should be afforded broadcasters in their use of multiplexed audio signals transmitted over broadcast auxiliary stations. No commenter opposed expanding the permissible uses of such signals, and those commenters favoring the rule amendments argued for the widest possible latitude in the transmission of multiplexed material. In the *Notice* we proposed the unrestricted use of multiplexed audio material. However, at this time we see no need to limit multiplexed signals to audio material. We will therefore permit the

transmission of all multiplexed material, such as data, telemetry, or facsimile. Thus, aside from the prevention of harmful interference to other broadcast auxiliary station licensees, we will impose no restrictions on a broadcaster's use of multiplexed signals. To the extent that a licensee has excess capacity, that capacity may be utilized to transmit any type of material to any entity. Also, for the same reasons outlined in Section II, above, licensees will be permitted to sell their excess capacity to other users on whatever basis they choose. We also do not intend to institute any reporting or oversight regulations of these secondary uses of broadcast auxiliary stations. As with sharing of the primary video channel, licensees must retain complete control of their facilities and are wholly responsible for their proper use.

35. With respect to the suggestion of NAB that we adopt specific technical standards to prevent adjacent channel interference, we believe such standards are unnecessary. As NAB notes in its comments, there is a limited number of channels that can be multiplexed without exceeding the emission limitations set forth in Section 74.637 of the Rules. These emission limitations have proved adequate in the past and there is no evidence that they will be less so in the face of more intensive multiplexing. Accordingly, in view of the flexibility provided by the proposed rule, we believe that no additional action on this question is warranted at the present time.

IV. *Licensing Policy*

36. *The Proposals.* The final section of the *Notice* dealt with various aspects of our licensing policy and proposed to bring the Commission's rules in line with actual Commission licensing practice. First we noted that due to increased demand for auxiliary channels, exclusive channel assignments were no longer granted. We therefore sought comment on our proposals to eliminate any reference in our rules to exclusive assignments and to rescind all existing exclusive assignments. In order to further promote the more efficient use of the spectrum, we proposed to grant only single frequency authorizations for fixed link services. We also proposed to end current restrictions on the number of authorizations any one licensee could possess. In recognition of the fact that the Commission staff no longer conducts frequency coordination for every application for a new authorization that is submitted, we proposed relying on licensee assurances that the frequency selected for a proposed station was appropriate and calculated to avoid creating interference to existing services. Under the proposed rule, applicants for new stations would be free to conduct their own frequency coordination studies or rely on information provided them from local frequency coordination committees where they exist. We stated that whether the frequency coordination was done through a committee or individually, assuming the other aspects of the application were in

order, the application would be granted on the assumption that the frequency requested would not interfere with existing services.

37. Assuming that some interference complaints would be brought to the Commission, we proposed implementing a priority system as a mechanism for resolving interference disputes between existing licensees. The priority system would also be used to determine which channels would be withdrawn in case over-crowding resulted in a new licensee being unable to obtain a vital auxiliary link. Under the system proposed, STLs and CARS links were afforded highest priority. Intercity relay stations and television pickup stations tentatively were assigned the second and third priorities, respectively. Fourth priority was proposed for fixed links operating outside a licensee's local service area and translator relay stations. Lowest priority was proposed for normally unused alternate or backup facilities and television pickup stations operating outside a licensee's local service area. In the *Notice*, we anticipated utilizing the priority list for resolving interference disputes and for withdrawing existing authorizations in the unlikely event that overuse of the spectrum made additional channels unavailable.

38. *Exclusive Channels—The Comments.* The Commission's rules provide that licensees may request and obtain the right to operate exclusively on a particular frequency in a given market. In the *Notice* we sought comment on our proposal to eliminate these exclusive channel assignments. Comments in response to this proposal were mixed. CBS, Cox, Fisher, Gill, and Hughes support the elimination of exclusive assignments while NAB, two sets of noncommercial educational licensees, and NBC favor retaining at least some exclusive authorizations. Acknowledging that the Commission has not granted exclusive assignments in several years, CBS asserts that the rules should be amended to reflect the actual practice of the Commission. CBS further contends that exclusive assignments are not an efficient use of the spectrum. CBS argues that existing exclusive authorizations should be allowed to expire at the end of the licensee's current license term. Cox suggests that existing exclusive assignments could be terminated prior to expiration of the license term since the termination would be the result of a rule making of general applicability. Based on its experience in the use of Band D frequencies, Hughes states that the same frequencies can be reused extensively in the same geographic area on different azimuths. According to Hughes, exclusives preclude such reuse and are therefore wasteful.

39. NAB opposes the rescission of existing exclusive assignments and suggests that such assignments should be "grandfathered" subject to voluntary relinquishment by agreement of the licensee. NAB states that if existing exclusive authorizations are eliminated, licensees should be given advance notice of the rescissions. NBC avers that, at the very least, every licensee should be granted one

exclusive assignment for use as the licensee sees fit. The noncommercial licensees state that we should retain exclusive authorizations for STLs, but otherwise allow nonexclusive grants on a strict, noninterfering basis. A second group of noncommercial licensees, represented by Schwartz, Woods & Miller (hereinafter "Schwartz"), asserts that Commission policy must be founded on the protection of essential auxiliary services, and that elimination of exclusive authorizations would preclude these necessary protections. Schwartz contends that exclusive assignments must be maintained to guarantee a legitimate expectancy of continued uninterrupted use. According to Schwartz, severe economic costs will result from disruptions in service and instability if exclusive assignments are eliminated. Schwartz states that frequency coordination costs will increase and program disruptions will become more common and opines that these factors will offset any resulting gains in spectrum efficiency.

40. *Discussion.* As stated in the *Notice*, due to the increasing demand for channels in the bands allocated to the television broadcast auxiliary service, the Commission has not granted exclusive channels for the past several years. The commenters present no evidence that the absence of additional exclusive authorizations has jeopardized in any way the proper functioning of television broadcast stations. Further, as Hughes correctly points out, the same frequencies can be used within a market so long as the transmit and receive points are taken into consideration. For these reasons, we will formalize our recent practice and eliminate any reference in our rules to the issuance of new exclusive authorizations in the television broadcast auxiliary service. Further, nothing in the comments persuades us that existing exclusive assignments should be retained. Those existing exclusive assignments represent an inefficient use of increasingly crowded spectrum. We wish to emphasize that all licensees still will have the protected use of a particular frequency on a specific pathway. Proper frequency coordination in a given market effectively should preclude interference on those protected pathways. Thus, we do not foresee any change in circumstances for those licensees losing the "exclusive" status of their existing authorizations. At the expiration of a licensee's present license period, any exclusive authorization held by that licensee will lapse. Those auxiliary licenses will be renewed as usual, but not on an exclusive basis. This action should help alleviate the congestion arising in the use of auxiliary frequencies without making any perceptible change in the level of interference that licensees currently experience.[15]

41. *Frequency Coordination and Application Procedures—The Comments.* Section 74.604(a) of the current rules states that the

[15] It appears that most existing exclusive assignments are for fixed link services. As discussed below, such services retain the highest priority for purposes of interference protection.

Commission no longer conducts frequency coordination for the auxiliary service. We stated in the *Notice* that we grant licenses on an inference of noninterference to existing users and sought comment on whether our inferences were well-founded. We also asked interested parties to respond to our proposal to acknowledge formally the existence of local frequency coordination committees and rely on those committees to provide frequency selection information to applicants for new authorizations. Again, we received mixed reactions to our proposals and no consensus among the commenters exists. Most of the parties addressing this issue agree that frequency coordination at the local level makes sense, and they support the use of local frequency coordination committees as a reliable clearinghouse for area frequency use information. Fisher specifically endorses the use of local frequency coordination committees and adds that in Seattle and Portland local coordination is an ongoing process which to date has been quite successful. With respect to frequency selection, CBS would require applicants to make a reasonable search of other auxiliary licensees in an area and the frequencies assigned to those licensees. CBS states that the approval and recommendation of certain frequencies by a local coordinating committee should be considered *prima facie* evidence of reasonableness. In an effort to facilitate local frequency coordination, several parties suggest that the Commission establish and make available a nationwide auxiliary frequency data base, with users reimbursing the Commission for costs.

42. Although the noncommercial licensees filing jointly do not oppose local frequency studies by prospective licensees, they do object to giving local coordination committees any authority to assign frequencies or resolve disputes. According to these licensees, such committees are susceptible to local political pressures that could conceivably affect their impartiality. Another group of noncommercial licensees (Schwartz) opposes giving local committees any authority. Schwartz asserts that the Commission should not shirk its statutory responsibilities nor abdicate its essential licensing role. Cox argues that the FCC must retain an active role in frequency assignment and coordination. Citing Sections 303(a)-(d) of the Communications Act of 1934, as amended, Cox contends that the Commission is obligated to assign frequencies and locations in the public interest. Cox maintains that our proposals give local frequency coordination committees too much power. Instead, local committees should be limited to providing information. Cox suggests that any rule adopted should emphasize that the role of local coordination committees is advisory and that the Commission has ultimate authority to assign frequencies.

43. *Discussion.* After carefully reviewing the comments, we continue to believe that local frequency coordination remains the most efficient process for licensees to select appropriate television

auxiliary frequencies. The Commission simply does not have the resources to coordinate every auxiliary application submitted, and the comments contain no implications that this system of local frequency coordination has created any problems for licensees. However, in light of the fears expressed by some parties over the authority we proposed to give local coordination committees, we will modify slightly the rules which we initially proposed. First, we will not include in new Section 74.602(b) any reference to who may perform a frequency coordination study. Instead, we merely have added a requirement that applicants for auxiliary frequencies comply with the frequency selection provisions of Section 74.604 of the Rules. Applicants must also affirm that the requested frequency will cause no interference to existing users in the area. Section 74.604, which deals with frequency selection to avoid interference, indicates that frequency selection is the primary responsibility of the applicant. This section does permit an applicant to consult a local frequency coordination committee where one exists, but such consultation is at the option of the applicant. Section 74.602(b) makes it clear that the Commission has ultimate licensing authority and that frequencies other than those requested will be assigned if the Commission deems such action appropriate.

44. This system guarantees that area licensees will retain great flexibility in the way they handle their frequency coordination matters. In areas where committees exist and function effectively, coordination of additional auxiliary authorizations should be as simple as consulting a master file of those frequencies already in use in the area.[16] Where committees do not exist, or where a particular applicant chooses not to work with an existing committee, the licensee must take it upon himself to select a frequency that will cause no interference to other users. Whichever procedure is utilized, it is clear that the Commission retains the ultimate licensing authority and may reject the request for a particular frequency if such action is warranted.

45. With respect to the idea that a nationwide auxiliary frequency data base be established to facilitate frequency coordination, the Commission at this time does not have the resources to make such information widely available. We are in the process of expanding and updating our master frequency data base. Public access to this data base has been and will continue to be available. Concerning regional coordination, if broadcast auxiliary service coordination committees advise us as to the markets or areas they serve and provide us with information concerning their name, address, telephone number, principal staff members, geographic area, participat-

[16] We note that private frequency coordination has worked well in the private radio service for many years. Indeed, the authority given to frequency coordinating committees in the private radio service is at least as extensive as the advisory role contemplated for such committees in this proceeding.

ing broadcast stations, and spectrum coordinated, we will attempt to make this information available to other broadcasters or spectrum users.

46. *Interference Protection and Channel Priorities—The Comments.* Recognizing that no system of frequency coordination is foolproof, we stated that some mechanism should be established to settle those few cases in which existing stations cause interference to one another. In response to our proposals concerning the resolution of interference disputes, several commenters opine that such disputes are handled better at the local level. For example, NAB suggests that any interference dispute mechanism adopted by the Commission should be flexible enough to take account of local procedures instituted by area coordination committees. The Ohio Educational Broadcasting Network Commission agrees that local coordination committees are the proper forum for resolving interference problems and states that in the past interference has been resolved through a "limited number of telephone calls among television chief engineers."

47. With respect to our proposed priority scheme for interference protection, most parties support the priority concept and agree that STLs and CARS stations should be afforded highest priority in terms of protection from interference. However, virtually every noncommercial licensee addressing this issue urges that intercity relay stations receive a similar priority. They reason that ICRs perform the exact same function as STLs in that they provide a "life blood" link from a central production center to noncommercial stations throughout the state. CBS and Cox argue that, because STLs are essential to maintaining a reliable signal to the public, STL backup facilities should be given the same priority as the primary STL facility. CBS states that backup facilities must be free of interference when used and that a lower priority endangers a backup's reliability while increasing the risks of interruption. Cox submits that auxiliary facilities for low power television stations should receive a lower priority than backup facilities for full service stations. Cox avers that this is consistent with the secondary status of the low power service. NBC adds that at least some provision should be made for activating backup facilities on a first priority basis if the primary facilities fail.

48. Several other suggestions were offered with respect to our interference resolution procedures. Hughes would grant second priority to all other fixed links in regular use, third priority to mobile facilities of all kinds, and fourth priority to back-up facilities. PBS suggests giving priority to all existing services over new entrants. NBC states that when ICRs and television pickups operate together to produce news material, the pickup frequency should acquire the same priority as the ICR. The Ohio Educational Broadcasting Network Commission and a group of noncommercial licensees indicate that mobile facilities present the greatest potential

for interference. The noncommercial licensees urge that mobile facilities should not be authorized to operate on frequencies used by STLs within the STL's geographic area. The Ohio Commission asserts that the obligation to correct interference should rest with mobile users in disputes between mobile and fixed services. Finally, Cox and CBN state that a final priority should be added to the list indicating that non-broadcast uses of auxiliary facilities have the lowest priority with respect to interference disputes.

49. In addition to providing a mechanism for resolving interference disputes between existing stations, the priority list we proposed also was to be used as a guide for withdrawing channels in a given area. If no additional channels are available in a market, we stated that we would withdraw authorizations being utilized for low priority purposes in order to provide licensees with channels for a higher priority use. In deciding which channels to withdraw, we stated that we would take into consideration the number of channels authorized to individual licensees. Those licensees with the most channels would be more likely to lose an authorization. We also proposed to consider the recommendation of a local coordination committee as to which channel to withdraw in an area. These proposals came under sharp attack from two noncommercial commenters, Schwartz and the WGBH Educational Foundation ("WGBH"). Schwartz states that forcing existing licensees to terminate operations that conflict with proposed higher priority uses clearly is inefficient and patently unfair. Lower priority users then will be forced to seek alternative frequencies, leading to investment instability and uncertainty. This scenario will deter the operation of lower priority facilities which, Schwartz opines, is antithetical to the public interest. Schwartz suggests a requirement that higher priority users compensate and underwrite the continuation of any lower priority service forced to relinquish the use of its channel. WGBH states that existing microwave systems are fundamental to public broadcasting. WGBH asserts that deleting channels from the licensee holding the most channels ignores the reality that licensees covering the entire state are apt to have the most assignments. Further, elimination of existing microwave relays would damage WGBH by loss of capital investment and would leave it without an economically feasible alternative. As a result, WGBH claims that proven broadcast service would be traded for unproven new services such as STLs for low power television stations. WGBH concludes that the Commission should recognize the importance of microwave systems to educational broadcasting by preserving the priority of existing microwave networks.

50. *Discussion*. Based on the comments of the parties, we have decided to make a number of changes in the interference protection and channel withdrawal mechanisms proposed in the *Notice*. Briefly, the priority system we are adopting will apply only to those

complaints brought to the Commission for resolution. Individual licensees acting together either on an *ad hoc* basis or through a formal coordinating committee may adopt whatever interference resolution procedures they choose. Also, the actual priority listing we are adopting is more simplified than the proposed set of priorities. Finally, we have decided against adopting any formal channel withdrawal mechanism. The following paragraphs explain these decisions more fully.

51. In the *Notice*, we stated that local frequency coordination of new authorizations should eliminate the possibility of harmful interference. In the unlikely event that licensed stations did cause interference, we felt that some mechanism should be in place for resolving those disputes. To this end, we proposed a priority system for interference protection. In fashioning our proposed channel priorities, we asked for comment on the possibility of allowing local frequency coordination committees to set their own standards. We believe that resolving interference disputes at the local level should be encouraged. Those licensecs who addressed the issue indicate that local procedures are effective and that eliminating interference often can be as easy as making a few well-placed telephone calls. We therefore see no reason to impose on all licensees a rigid interference resolution mechanism that may be inappropriate for local needs and conditions. Accordingly, licensees who choose to act together to resolve interference disputes will be afforded the utmost discretion. This decision complements our determination to leave initial frequency coordination at the local level. With respect to resolving interference disputes, the interference resolution priority system described below will be utilized only when the affected parties cannot agree among themselves and petition the Commission.

52. While most parties support the creation of an interference protection priority system, there is some disagreement on the actual prioritizing of the various broadcast auxiliary services. In an effort to make our priority system more equitable and easier to administer, we have simplified the priority listing. First priority will be given to all fixed link stations that serve full service broadcast stations and cable systems. This includes STLs, CARS links, and intercity relays. We have taken this action primarily for the reasons expressed in the comments by the noncommercial entities. Regardless of the label placed on fixed links, if the practical use of the links essentially is the same, we see no reason to distinguish between the stations.[17] Second priority for the purpose of resolving interference disputes will be accorded television pickup stations utilized in a licensee's

[17] We recognize that by lumping all fixed links together, we may be including some links that do not perform "life blood" functions, but for administrative convenience we choose not to attempt to subcategorize every conceivable fixed link use. Should a dispute arise involving a non-essential fixed link station, we can certainly take that fact into account in resolving the dispute.

local service area. We will also include cable television relay service pickup stations because the services share the same frequencies and have similar purposes. Third priority belongs to translator relay stations and those links used to feed low power television stations. This priority is appropriate for translators and low power stations as it recognizes that these services are secondary to full service broadcast stations.[18] Fourth priority will be given to backup facilities and television pickup stations operating outside a licensee's local service area. Although several commenters argued strenuously that backup facilities should be given the same priority as primary facilities, we conclude that the present crowding of the spectrum does not allow us the luxury of providing each licensee with two or more high priority fixed link authorizations.[19] The final and lowest priority is given to the transmission of material during times when the station is not being used to transmit program material to its associated broadcast station. Thus, the expanded uses of auxiliary facilities, which we discussed in Section II of this decision, are accorded secondary status and must always give way to *bona fide* broadcast transmissions. Disputes involving stations in the same priority category will be resolved in favor of the licensee that has held its authorization on a particular path the longest.

53. The establishment of these priorities should address adequately many of the concerns advanced by the commenting parties. For example, several parties indicate that mobile facilities present the greatest interference threat. The noncommercial licensees filing jointly suggest that mobile facilities should not be authorized to operate on frequencies used by STLs within the STL's geographic area. The priority system we have devised makes it clear that mobile facilities must yield to fixed links when interference is present. Yet, this system retains the flexibility necessary for the efficient functioning of television pickup stations. Many television pickups are

[18] In some cases, translators may be providing a network service otherwise not available in an area. In those instances, it may be argued that the translator relay providing the network feed is a higher priority than, for example, a third or fourth TV pickup for a full service station in the area. We intend to remain flexible in our administration of the priority system so that such conflicts can be resolved equitably. Similarly, a fixed link providing a "life blood" service to a low power television station might also, in a given situation, be considered a higher priority than additional pickups for a full service television station. We are confident that most disputes concerning such conflicting uses will be resolved locally. However, if a situation does arise where a low power station is not able to function because of an inability to acquire an auxiliary link, we will give expedited treatment to any request for relief brought to our attention.

[19] Of course, backup facilities providing "hot standby" on the same frequency as the primary transmitter would assume the same priority by virtue of its operating on the same frequency. Also, we recognize that several areas of the country at times experience atmospheric inversions that necessitate using alternate frequencies. We encourage licensees in such areas to come to their own agreements regarding the priority that should be given to alternate facilities in those situations.

authorized on multiple frequencies to take advantage of frequency-agile transmission equipment. It would be impractical to force broadcasters to refrain from using those frequencies in situations where interference is not likely to occur as, for example, when a news crew operates outside the local market. Adopting the position of the noncommercial licensees would foreclose this flexibility.

54. After careful consideration, we have decided not to implement the channel withdrawal procedures proposed in the *Notice*. We believe that summarily withdrawing an existing authorization would have a destablizing effect on the industry and would create legal and practical problems that far outweigh any countervailing benefits. Accordingly, we will leave questions of possible channel withdrawal to local determination in the context of initial frequency coordination for new channels. As previously stated, we believe that frequency coordination matters are handled best at the local level, either by the individual applicant or through a local coordination committee. Should a case arise where existing usage in a market precludes additional uses on a particular frequency, we believe that the parties involved are well situated to come to a reasonable accommodation. If a new entrant desires the use of an unavailable frequency, the new user could negotiate with existing users for relief that could take a variety of forms, including channel sharing or offering to reimburse an existing licensee for the expenses necessary to move to another channel.[20] As we stated in the *Notice*, we do not anticipate the spectrum becoming so crowded that an existing authorization will have to be withdrawn permanently from one licensee to accommodate another licensee's use. Nonetheless, should such a situation arise, we prefer giving the parties directly involved in the matter the flexibility to fashion the most appropriate and reasonable solution possible. Our decision not to apply a rigid set of channel priorities to such disputes gives the affected licensees that necessary flexibility. Of course, in those instances when the parties cannot agree, the Commission retains the authority to take whatever action is necessary to resolve the situation.

55. *Miscellaneous Amendments*. Two proposed rule changes suggested in the *Notice* received little or no comment. The first involved our proposal to end our present limitations on the number of channels any one licensee may obtain. As a practical matter, the restrictions have not been followed in recent years, and in the absence of comments opposing this change, we will amend our rules to reflect our actual practice. A second change in the rules would limit fixed link services to single frequency authorizations. No party

[20] The Commission long has recognized the properity of one licensee reimbursing another for changes in operating frequency when such changes permit the initiation of additional services. This concept is particularly useful in the area of FM and television assignments. *See, e.g., Circleville, Ohio*, 8 F.C.C. 2d 159, 163–64 (1967).

commented on this amendment, and we will adopt it as proposed in order to maximize the efficient use of the spectrum. Finally, because the priority system adopted today has more to do with the avoidance of interference than frequency assignment, we are placing the interference resolution procedures in Section 74.604 rather than 74.602 as originally proposed. We are also making an editorial change in the title of Section 74.604 to conform the title to the new addition.

V. *Conclusion*

56. The actions taken today serve to deregulate substantially the television broadcast auxiliary service. By allowing licensees to utilize the excess capacity heretofore unused, we are promoting the efficient use of the increasingly crowded spectrum and giving licensees an additional revenue generating opportunity. This is important especially for noncommercial licensees faced with cutbacks in federal financial support. Our decision recognizes that in appropriate circumstances, the marketplace is an effective substitute for government regulation, and that market forces should be allowed to operate freely when possible. This concept also is evident in our revised licensing procedures, which acknowledge that individual licensees working together can act efficiently and expeditiously to assure their common interests. As broadcast operations become more efficient and the costs associated with government regulation are reduced, licensees can direct more resources to serving television consumers. Thus, the viewing public is the ultimate beneficiary of our actions.

57. *Regulatory Flexibility Act Final Analysis.* The action taken in this proceeding significantly deregulates the use of television broadcast auxiliary stations by expanding their permissible uses and allowing licensees to generate additional revenues by sharing excess capacity with other users. The amendments to our auxiliary station licensing policies for the most part conform the rules to existing Commission practice and do not constitute a substantive change in policy. Greater emphasis on local frequency coordination and interference resolution gives licensees greater flexibility in the conduct of their affairs and substantially reduces the government's presence in this area. These actions may benefit the approximately 900 Commission licensees currently holding broadcast auxiliary authorizations.

58. No party participating in this proceeding raised any regulatory flexibility issues. With minor exceptions, the rules are being adopted essentially as proposed. Those significant options not adopted are options which, in the judgment of the Commission, are more burdensome than necessary to meet our established objectives. Such options would either increase the burdens on licensees without

any corresponding public benefit or result in unnecessary Commission oversight of licensee conduct.

59. Accordingly, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED, That effective May 23, 1983, Part 74 of the Commission's Rules IS AMENDED as set forth in Appendix A.

60. IT IS FURTHER ORDERED, that subject to approval by the Office of Management and Budget, FCC Form 313 IS AMENDED as set forth in Appendix B.

61. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

62. For further information concerning this proceeding, contact Michael A. McGregor, Mass Media Bureau, (202) 632–7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Part 74 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 74.601(a), (b), (c), and (d) are amended as follows:

Section 74.601 Classes of TV broadcast auxiliary stations.

(a) *TV pickup station.* A land mobile station used for the transmission of TV program material and related communications from scenes of events occurring at points removed from TV broadcast station studios to TV broadcast or low power TV stations or other purposes as authorized in Section 74.631.

(b) *TV STL station (studio-transmitter link).* A fixed station used for the transmission of TV program material and related communications from the studio to the transmitter of a TV broadcast or low power TV station or other purposes as authorized in Section 74.631.

(c) *TV relay station.* A fixed station used for transmission of TV program material and related communications for use by TV broadcast and low power TV stations or other purposes as authorized in Section 74.631.

(d) *TV translator relay station.* A fixed station used for relaying programs and signals of TV broadcast stations to LPTV, TV translator, and to other communications facilities that the Commission may authorize or for other purposes as permitted by Section 74.631.

* * * * *

2. Section 74.602(b), (c), (d), (e), and (g) are amended as follows: Section 74.602 Frequency assignment.

* * * * *

(b) Subject to the conditions of paragraph (a) of this Section, frequency assignments will normally be made as requested, provided that the frequency selection provisions of Section 74.604 have been followed and that the frequency requested will cause no interference to existing users in the area. The Commission reserves the right to assign frequencies other than those requested if, in its opinion, such action is warranted.

(c) Fixed link stations will be authorized to operate on one channel only.

(d) (reserved)

(e) (reserved)

(f) * * *

(g) In the event that a TV broadcast station licensee engages a communications common carrier to provide TV pickup or TV STL service, the frequencies available to the licensee may be assigned to the communications common carrier for the purpose of providing such service to that licensee.

* * * * *

2. Section 74.604 is amended as follows:

Section 74.604 Interference avoidance.

(a) Because the Commission does not undertake frequency coordination, applicants for new TV broadcast auxiliary authorizations are responsible for selecting the frequency assignments that are least likely to result in mutual interference with other licensees in the same area. Applicants may consult local coordination committees, where they exist, for information on frequencies available in the area. In selecting frequencies, consideration should be given to the relative locations of receiving points, normal transmission paths, and the nature of the contemplated operation.

(b) Where two or more licensees are assigned a common channel for TV pickup, TV STL, or TV relay purposes in the same area and simultaneous operation is contemplated, they shall take such steps as may be necessary to avoid mutual interference, including consultation with the local coordination committee, if one exists. If a mutual agreement to this effect cannot be reached, the Commission must be notified and it will take such action as may be necessary, including time sharing arrangements, to assure an equitable distribution of available frequencies.

(c) For those interference disputes brought to the Commission for resolution, TV broadcast auxiliary channels will have the following priority for purposes of interference protection:

(1) All fixed links for full service broadcast stations and cable systems.

(2) TV and CARS pickup stations.

(3) Fixed or mobile stations serving translator or low power TV stations.

(4) Backup facilities; TV pickup stations used outside a licensee's local service area.

(5) Any transmission, pursuant to §74.631(f), that does not involve the delivery of program material to a licensee's associated TV broadcast station.

(d) Interference between two stations having the same priority shall be resolved in favor of the station licensed first on a particular path.

3. Section 73.631(d), (f), and (h) are amended as follows:

Section 74.631 Permissible service.

* * * * *

(d) The transmitter of an STL, TV relay station or TV translator relay station may be multiplexed to provide additional communication channels. A TV broadcast STL or TV relay station will be authorized only in those cases where the principal use is the transmission of television broadcast program material for use by its associated TV broadcast station. However, STL or TV relay stations so licensed may be operated at any time for the transmission of multiplexed communications whether or not visual program material is being transmitted, provided that such operation does not cause

harmful interference to TV broadcast pickup, STL or TV relay stations transmitting television broadcast program material.

* * * * *

(f) A TV broadcast pickup, STL, or TV relay station may be used for the transmission of material to be used by others, including but not limited to other broadcast stations, cable television systems, and educational institutions. This use shall not interfere with the use of these broadcast auxiliary facilities for the transmission of programs and associated material intended to be used by the television station or stations licensed to or under common control of the licensee of the TV pickup, STL, or TV relay station. This use of the broadcast auxiliary facilities must not cause harmful interference to broadcast auxiliary stations operating in accordance with the basic frequency allocation, and the licensee of the TV pickup, STL, or TV relay station must retain exclusive control over the operation of the facilities. Prior to operating pursuant to the provisions of this Section, the licensee shall, for the intended location or area-of-operation, notify the appropriate frequency coordination committee or any licensee(s) assigned the use of the proposed operating frequency, concerning the particulars of the intended operation and must provide the name and telephone number of a person who may be contacted in the event of interference.

* * * * *

(h) TV broadcast auxiliary stations authorized pursuant to this subpart may additionally be authorized to supply programs and signals of TV broadcast stations to cable television systems or CARS stations. Where the licensee of a TV broadcast auxiliary station supplies programs and signals to cable television systems or CARS stations, the TV auxiliary licensee must have exclusive control over the operation of the TV auxiliary stations licensed to it. Contributions to capital and operating expenses may be accepted only on a cost-sharing, non-profit basis, prorated on an equitable basis among all parties being supplied with program material.

4. Section 74.632(a) is amended as follows:

Section 74.632 Licensing requirements.

(a) A license for a TV pickup, TV STL, or TV relay station will be issued only to licensees of TV broadcast stations and, on a secondary basis, licensees of low power TV stations. A separate application is required for each fixed station and the application shall be specific with regard to the frequency requested. A mobile station license may be issued for any number of mobile transmitters to operate in a specific area or frequency band and the applicant shall be specific with regard to the frequencies requested. In lieu of specifying specific transmitter types, applicants shall certify that the transmitter used or to be used at the requested facility is type accepted, or was manufactured before October 1, 1981. Applications for consolidation of individual mobile station licenses into a system license will be accepted only at the time application is made for renewal of the main (Part 73) station license.

* * * * *

APPENDIX B

1. Form 313, Application for Authorization in the Auxiliary Radio Broadcast Service, is amended by adding the following three questions:

* * * * *

17. Describe briefly the primary broadcast-related purpose of the requested authorization.

18. For television auxiliary stations, state the anticipated percentage of time for which the station will be used for secondary uses. Secondary uses are transmissions of

material at times when the station is not being used to transmit program material to its associated broadcast station.

19. For television auxiliary licensees, list the total number of existing auxiliary authorizations and indicate the combined percentage of time for which these stations are presently used for secondary uses.

CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: *Report and Order* Authorizing Shared Use of Broadcast Auxiliary Facilities with Other Broadcast and Non-Broadcast Entities (BC Docket 81–794).

I concur in this *Report and Order* because it provides useful operational and licensing flexibility, and promotes spectrum efficiency. However, I am disturbed by our failure to adopt quantitative standards limiting the degree to which these substantial blocks of spectrum can be used for non-broadcast purposes. The Commission was also unwise not to acknowledge that restricting licensing eligibility to broadcasters only may be questionable policy.

With respect to the first point, I would have preferred a rule precisely limiting the extent to which broadcast auxiliary authorizations can be put to non-broadcast use. Although the application form adopted by the Commission[1] and associated discussion[2] are designed to prevent *de facto* spectrum reallocation, without clear standards that situation will be extremely hard to detect. This is unfortunate because it is a core function of this Commission to ensure adequate spectrum for existing and emerging communications needs.

As for the eligibity issue, if the Commission is going to allow mixed use in these bands, there is no apparent compelling public policy reason to limit licensing eligibility to broadcasters in all cases. Broadcasters should be able to count on designated spectrum to meet legitimate auxiliary needs, and should have the flexibility to sell excess capacity, but I am uncomfortable with the fact that in markets with substantial dormant spectrum, broadcasters alone will be able to control access to such spectrum by others. Without standards to assess multiple applications for auxiliary spectrum, it will be rather easy for broadcasters to reap a substantial and unwarranted windfall by selling fallow spectrum to parties not eligible to hold these authorizations themselves. The Commission should keep a watchful eye so that it can respond if these concerns are borne out in practice.[3]

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[1] *See* Appendix B.

[2] *See Report and Order* paras. 13–14.

[3] The Commission will be in a position to (and should) refine its approach to these matters in Docket 82-334, *In re Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services' Use of Certain Bands Between 947 MHz and 40 GHz*, released Jan. 13, 1983.

Common Carrier, Interconnection, Connecting Arrangements
Common Carrier, Operating Expenses
Subsidiary Company

Report and Order adopted concerning the operations of AT&T's separate subsidiary and the manner in which it relates to unseparated affiliates.
–AT&T Co.

FCC 83–123

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Matter of	
American Telephone and Telegraph Company	
Request for approval to supplement the capitalization of American Bell Inc. to provide new customer premises equipment	
Plan for reporting interim expenses pursuant to FCC Second Computer Inquiry order	
Computer and Business Equipment Manufacturers Association	
Petition to Amend Part 64 of the Rules to establish certain procedural requirements applicable to implementation of Second Computer Inquiry	RM 3894
Petition for Policy Ruling: AT&T revisions to Tariff FCC No. 260 to offer the ComStor* II communications storage unit	Transmittal No. 1367
Michigan Independent Communications Association	
North American Telephone Association	
Petition for Declaratory Ruling	

REPORT AND ORDER

(Adopted March 31, 1983; Released April 13, 1983)

BY THE COMMISSION:

I. *Introduction*

1. On November 4, 1982, the Commission adopted an order

approving the further capitalization of American Bell Inc. (ABI) by the American Telephone and Telegraph Company (AT&T) to enable it to provide new customer premises equipment (CPE) on an unregulated basis. *Request for Approval to Supplement the Capitalization of American Bell Inc. to Provide New Customer Premises Equipment*, FCC 82–496, released November 10, 1982 (*CPE Order*). In the *CPE Order*, the Commission addressed issues related to the entry of ABI in the competitive marketplace including its structural framework and its relationship to other AT&T entities. The Commission also ordered AT&T to revise the implementation of certain operating and accounting aspects of the CPE capitalization plan in a manner consistent with the Computer II rules and policies.[1] ABI began offering CPE to the public on January 1, 1983.

2. This order first adopts the findings and recommendations of the attached staff reports concerning AT&T's plans for compliance with structural separation conditions and AT&T's treatment of preoperational expenses. This order also reports on our review of AT&T's plans for the accounting and operation of the BOCs' provision of installation and maintenance services to ABI's business systems operations. We also reject AT&T's plan for allocating a portion of fundamental research costs to the subsidiary. *See* letter by AT&T to Chief, Common Carrier Bureau dated July 16, 1982. Finally, we dispose of various other pleadings and proceedings related to the entry of ABI into unregulated markets.

II. *Staff Reports*

3. The first of the attached reports prepared by the staff addresses AT&T's structuring of ABI and its interaction with affiliates. *See Report on Compliance with FCC Requirements for Structural Separation Between AT&T and American Bell Inc.* (Appendix A). The second staff report addresses AT&T's treatment of the amounts spent for preoperational subsidiary formation and CPE development efforts. *See Review of CPE Preoperational and Subsidiary Formation Expenses* (Appendix B). We note that as a result of the staff's audit, over $18,000,000 of additional preoperational expenses have been identified for potential reimbursement to ratepayers. *See Appendix B*, para. 69. We hereby adopt the findings and recommendations of both staff reports and require AT&T to complete the process of implementing Computer II separation requirements.

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981) *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

On June 10, 1982, the Commission had approved AT&T's unregulated offer of enhanced services. *See* Request for Approval to Capitalize a Separate Subsidiary to Provide Enhanced Services, 90 FCC 2d 404, 430 (1982) (*Enhanced Services Order*).

4. As demonstrated by the staff's report on AT&T's plans for the operation of ABI, areas requiring special attention include:

a) AT&T's revision of employee training to reflect Computer II limitations on joint software development (Appendix A, para. 19);

b) Completion of all Bell System Computer II training within 30 days of the release date of this order (Appendix A, para. 9);

c) Further review of information flow activities in Western (Appendix A, para. 19);

d) Maintenance of information disclosure records by BTL data base administrators (Appendix A, para. 31); and

e) Consolidation of ABI technical staff located in facilities housing BTL staff and a June 30, 1983 AT&T report to the Common Carrier Bureau on that consolidation. (Appendix A, para. 37).

As demonstrated by the staff's report on its review of AT&T's treatment of preoperational expenses, areas meriting further attention include:

a) Review of AT&T responses to BDPs selected by staff as at least partially reportable but previously unreported by AT&T (Appendix B, paras. 34–44);

b) Further examination of BDPs in departments with subsidiary formation responsibility to determine the extent of charges made to reportable formation BDPs (this would include the General Departments tax, legal and ASD departments at a minimum) (Appendix B, para. 26);

c) Analysis of Business Services and Business Marketing (General Departments 25 and 26) to separate administrative expenses (Appendix B, paras. 70–72);

d) Completion of staff review of non-license contract billings that appear to be related to CPE development or subsidiary formation (Appendix B, paras. 8 and 59)

e) Reconciliation of license contract billings through December 31, 1981 to AT&T general books, and development of the extent to which preoperational and formation expenses were excluded from license contract billings (Appendix B, para. 8)

f) Testing components of General Departments overhead pools for potential direct preoperational expenses, and verification of allocation algorithms used to distribute overheads (Appendix B, para. 8);

g) Examination of subsidiary formation expenses identified by BTL, but not yet included in para. 105 reports (Appendix B, para. 67);

h) Testing of New York Telephone Company for expenses reported and the extent of subsidiary formation efforts. (Appendix B, paras. 13 and 21); and

i) Review of 1982 expenses not yet reported by AT&T.

III. *Installation and Maintenance*

5. In the *Further Reconsideration* of Computer II, we provided for a limited waiver of Section 64.702 of the Commission's rules so that the BOCs could provide installation and maintenance services

for ABI business CPE until June 30, 1984. 88 FCC 2d 512, 532-33 (1981). At our direction, AT&T filed its January 13, 1982 plan for the accounting and operational changes which AT&T would institute to capture all direct and indirect costs associated with the provision of installation and maintenance support by the BOCs for ABI and to properly bill ABI for such costs. After a thorough review of that plan and additional information provided by AT&T at staff request, the Bureau, pursuant to delegated authority, approved the plan, subject to certain modifications. *See* letter from Chief, Common Carrier Bureau to Alfred A. Greene (July 26, 1982).

6. AT&T's plan identified accounting and operational changes and changes to existing computer programs that it would institute to ensure that all direct and indirect costs would be billed to ABI. AT&T's plan provided for charging indirect costs by establishing overall loading rates for overhead expenses and small-value repair parts. AT&T also outlined certain reports that would be filed and procedures that would be followed by BOC craftpersons so that sufficient information was entered into AT&T computers to properly bill ABI for work performed on its behalf.

7. A key factor which led the Bureau to approve AT&T's plan was the ability of the staff to audit the amounts billed to ABI. Staff audit plans include the use of computerized facilities to analyze data for both ABI and BOC jobs to determine whether ABI bears costs which are similar to those incurred by the BOCs with respect to the embedded equipment. In order to facilitate the staff's review of computer data concerning ABI and BOC installation and maintenance jobs, the Chief of the Common Carrier Bureau directed AT&T to ensure that similar information was collected for both ABI and BOC work. The Chief further directed AT&T to provide the Commission with specific information needed to monitor the billing process of ABI and to protect ratepayers from bearing costs associated with the provision of competitive equipment. *See* letter from Chief, Common Carrier Bureau to Alfred A. Greene (December 16, 1982); letter from Chief, Common Carrier Bureau to Daniel J. Culkin (February 18, 1983). In addition to the audit of the billing process, the staff will monitor the craftspersons' reporting of the data necessary to properly bill ABI, examine historic BOC installation and maintenance data as a benchmark from which to compare costs billed to ABI, and examine the appropriateness of the computations AT&T makes in determining overhead and repair parts loading rates. The staff is directed to continue its monitoring of cost allocations and the billing process during the transitional installation and maintenance waiver period.

IV. *Allocation of Fundamental Research*

8. In the *Enhanced Services Order* at 422-23, the Commission directed AT&T to file a plan for allocating a portion of fundamental

research to preoperational expenditures attributable to the subsidiary. On July 16, 1982, AT&T responded with a proposal calling for the use of a composite allocator to determine these expenses. The composite allocator proposed by AT&T is comprised of the average which the proportions of assets, revenues, expenses, and employees of the subsidiary bear to those of all AT&T affiliates sharing the expense. *See Memorandum Opinion and Order*, 90 FCC 2d 184, para. 50 (1982). In addition, AT&T proposed to use the composite allocator to detemine what portion of the costs of fundamental research should properly be attributed to ABI in the future. *Enhanced Services Order*, para. 57. It proposed to begin to allocate fundamental research during the first six months of ABI operations.

9. We are very much aware of the substantial contributions to scientific development, and to telecommunications technology in particular, which Bell Telephone Laboratories has made over the years. The Commission is concerned that fundamental research remain healthy through this period of transition in AT&T's structure. The Commission is not willing, however, to permit a disproportionate share of the cost of that research to be assigned to the rate regulated portion of AT&T's business.

10. AT&T's approach to allocating a portion of the cost of fundamental research to ABI is inappropriate. During ABI's early period of operation, it will be very much smaller than the other AT&T affiliates in size of investment, number of employees and amount of revenues. It could be expected that ABI, created in part to permit AT&T to enter new markets with new products and services, would gain a benefit from current research activities disproportionate to its payment for those activities if the composite allocator were used. A composite allocator based on figures generated in ABI's start-up phase would be unlikely to allocate to ABI its fair share of fundamental research expenditures. A disproportionate share would fall on the ratepayers if this method were to be used.

11. A better method of ensuring a proper allocation of BTL fundamental research would be to follow the approach which AT&T has used to allocate fundamental research costs to the BOCs and Long Lines. Fundamental research is currently allocated to the BOCs and Long Lines on the basis of each entity's share of BTL billings for non-fundamental Research and Systems Engineering (R&SE) work.

12. As the Commission noted in the *Enhanced Services Order*, the benefits of fundamental research are often untraceable and unquantifiable. Fundamental research, however, clearly benefits the whole corporate enterprise. We shall assume, therefore, for purposes of allocating the cost of fundamental research, that research produces definite future benefits in knowledge gained as well as in the development of new or improved services and products. We shall also assume that each of the classes of specific R&SE work done at

BTL shares proportionately in the benefits of BTL's fundamental research.

13. Data compiled from the AT&T Annual Report of License Contract Services and Costs, prepared at the request of the NARUC Staff Committee on Accounting (Grey Book), can be used to compute an appropriate share of fundamental research for ABI. Two of the BTL billing categories in the Grey Book, Business Communications Systems (PBXs) and Station Research and Systems Engineering (Station Apparatus), clearly involve work for CPE which will only be sold by ABI. ABI's share of fundamental research ("General Research and Systems Engineering" in the Grey Book), therefore, should bear the same relationship to total fundamental research as the two CPE-related categories bear to the total BTL R&SE expenditures other than fundamental research. The Commission staff computed a four year average (1978-81) for each of the BTL billing categories in the Grey Book. Adding the PBX and Station Apparatus categories and taking them as a percentage of total BTL R&SE expenditures other than fundamental research, we find that ABI's share of fundamental research should be approximately 16.6% for 1981. A similar calculation can be made for that portion of 1980 subject to preoperational expense reporting and for 1982. For 1980, the average should be computed for the years 1977-80. For 1982 the average should be computed for the years 1979-82.[2]

14. This computation is based on two conservative assumptions. First, the percentage was calculated using the two categories of work most clearly attributable to ABI. The actual amount of work done at BTL for ABI's benefit was, in fact, larger than just those two categories.[3] If the percentage were based on all actual work performed rather than just these two major categories, the percentage attributable to ABI would be higher. Second, the percentage was calculated using average numbers for a four year period. Over that four year period, however, the amounts attributable to PBXs and Station Apparatus have been steadily increasing relative to the total.

[2] The Grey Book for any one year is usually available by April or May of the following year. The 1982 Grey Book figures should be available by April or May of 1983. Due to AT&T's restructuring as a result of Computer II and divestiture, it is not known whether or in what form the license contract may continue after 1983. The Commission has under consideration the license contract and other similar intrasystem arrangements in CC Docket 80-742, In the Matter of License Contract Arangements and Other Intrasystem Arrangements of the Major Telephone Systems.

[3] Moreover, these two categories include only CPE. This calculation includes no amount for enhanced services research and systems engineering. Enhanced services development in the preoperational period constituted only a very small part of the total research and systems engineering effort. Omitting it from the calculation of ABI's share of fundamental research will not result in any significant understatement of that share. For 1984 and beyond, however, any calculation of ABI's share of fundamental research should consider enhanced services as well as CPE developmental efforts.

In 1981, these categories accounted for approximately 20% of total BTL billings exclusive of fundamental research. By using average figures for a four year period, ABI's allocated share of fundamental research will be somewhat smaller than if the calculation were based on only the most recent year.

15. We believe, however, that these assumptions are justifiable. As to the first assumption, although the PBX and Station Apparatus categories do not include all work benefitting ABI in the preoperational period, they encompass a very large part of it. Limiting the computation to these two categories greatly simplifies the calculation.

16. As to the second assumption, the appropriateness of basing the computation on a four year average rather than using current year figures alone, we have already noted that the results of basic research are often unquantifiable and untraceable. An average based on several years, we believe, is more likely to be a fair reflection of future benefits of fundamental research than would be a computation based on a single year.

17. We, therefore, direct AT&T to attribute a portion of fundamental research to ABI for each of the years subject to preoperational expense reporting according to the method described above. We also direct AT&T to use the same method to allocate a portion of fundamental research to ABI for 1983.

18. We stress that this method for allocating a portion of BTL fundamental research costs to ABI is transitional only. The restructuring of the Bell System expected to take place early in 1984 will require modification of that method or the adoption of an entirely different method. In particular, the license contract billings, summarized in the Grey Book, will be phased out. The method of allocating fundamental research costs to ABI, therefore, will need to be revised. The Commission will consider this issue during 1983. AT&T should file with the Commission staff no later than May 31, 1983 any proposals it wishes the Commission to consider as to how those costs should be allocated in the future. Furthermore, we direct AT&T to continue to make available to the Commission the types of information, presently summarized in the Grey Book, on which any future allocation of fundamental research might be based.

V. *Additional Matters*

19. On March 25, 1981 a Public Notice invited public comment on the preoperational expense reporting plan which AT&T had attached to its January 29, 1981 Paragraph 105 Report. This order's adoption of the findings and recommendations of Appendix B, along with the *Enhanced Services Order* and the *CPE Order* dispose of all the issues raised by the comments filed in response to that public notice. Accordingly, we terminate that proceeding.

20. On April 24, 1981, the Computer and Business Equipment

Manufacturers Association (CBEMA) filed a pleading entitled Petition for Policy Ruling: AT&T Revisions to Tariff FCC No. 260 to Offer Comm-Stor* II Communications Storage Unit (Transmittal No. 1367). CBEMA's petition urged the Commission to require, during the transition period preceding the establishment of AT&T's separate subsidiary, that AT&T unbundle all charges and costs related to offerings of new CPE filed under federal tariff after the Computer II *Final Decision*. In both the *Final Decision* and the *Reconsideration*, the Commission determined that it would not require the separation of any of the terms or costs of a carrier's offer of CPE prior to the Computer II implementation date. Paragraph 105 of the *Reconsideration* defined the full extent of Computer II requirements concerning the manner in which AT&T was to have conducted CPE-related activities prior to implementation. In any event, CBEMA's petition has been mooted by events. Therefore, we dismiss it.

21. On April 24, 1981, the Computer and Business Equipment Manufacturers Association (CBEMA) petitioned the Commission to amend Part 64 of the Commission's Rules. CBEMA sought promulgation of rules requiring that any petition or request for interpretation, clarification, modification or waiver or any complaint concerning Computer II rules or policies be published in the Federal Register and that interested parties be afforded 30 days for comment from the date of that publication. The Association for Data Processing Service Organizations, Inc., Satellite Business Systems and SPC Communications filed comments supporting CBEMA's petition, and AT&T opposed it.

22. Part One of the Commission's Rules provides procedures applicable to all the forms of Commission action for which CBEMA would impose special procedural rules. Our recent treatment of the numerous Computer II implementation filings demonstrates the Rules' adequacy for according the public appropriate opportunity for comments. At the same time, the current Rules, unlike CBEMA's proposed rules, grant the Commission the flexibility to avoid, through prompt action, disruption to essential communications services. *See, e.g.* letter from Chief, Common Carrier Bureau to Alfred A. Green (December 30, 1982) (E911 Service waiver); letter from Chief, Common Carrier Bureau to Thomas J. Reiman (December 24, 1982) (Data Communications Management Service waiver); letter from Chief, Common Carrier Bureau to Vico E. Henriques (February 18, 1983) (Computer II waiver procedures). Accordingly, we deny CBEMA's petition to amend Part 64 of the Rules.

23. By Petition filed November 9, 1982, North American Telephone Association (NATA) and Michigan Independent Communications Association (MICA) requested the Commission to issue a declaratory ruling that Computer II is violated by the assignment provision stated in an "Agreement for Telecommunications Service" (Agreement) distributed by AT&T for use by the BOCs. That

provision allows a BOC to assign the Agreement to provide terminal equipment to an affiliate. Petitioners assert that the Agreement allows the BOCs to use their dominant position to promote ABI CPE. AT&T argues, in Comments filed December 3, 1982 that the Agreement is necessary to ensure a smooth transition in the provision of complex CPE systems whose installation normally requires long lead times from the date an order is placed. Petitioners reply that AT&T has not explained how or why the assignment provision helps minimize transitional difficulties. In the *CPE Order* at para. 55, we recognized that complex CPE systems may require long lead times between order and installation, and we provided an accounting mechanism which will facilitate reimbursement of the BOCs for certain sales expense associated with equipment which would be installed by ABI in 1983. Accordingly, the Petition filed by NATA and MICA is denied.

VI. *Conclusions and Ordering Clauses*

24. AT&T's plans for the financing and structuring of ABI, modified as we have directed above, provide for the subsidiary's operation in a manner consistent with Computer II. Some of those plans are yet to be fully implemented and others may look quite different in operation. We require that the staff continue its review of AT&T's execution of its plans for the launching of ABI's operations.

25. The Commission's review of AT&T's start-up plans does not end our responsibility in Computer II oversight. We will continue to monitor the manner in which affiliates interact with ABI and how AT&T accounts for transactions between ABI and other affiliates. Further analysis is required of AT&T's use of its information flow controls and, in particular, of its computer security system. Thus, we will require that staffs monitoring efforts assure that not only will ABI be initially structured and financed in accordance with Computer II, but that its ongoing relations with the remainder of AT&T are conducted in a manner consistent with the requirements of Computer II.

26. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), (j) and 416(c) of the Communications Act, That the American Telephone and Telegraph Company SHALL COMPLY with the determinations set forth herein and Appendices A and B attached to this Order.

27. IT IS FURTHER ORDERED That the Chief, Common Carrier Bureau, shall report to the Commission concerning the matters discussed in this order.

28. IT IS FURTHER ORDERED That proceedings concerning the matters raised in the Commission's March 25, 1981 Public Notice, as described in this Report and Order, ARE TERMINATED.

29. IT IS FURTHER ORDERED That the Petition for Policy

Ruling filed April 24, 1981 by the Computer and Business Equipment Manufacturers Association IS DISMISSED.

30. IT IS FURTHER ORDERED That the Petition to amend Part 64 of the Commission's Rules, filed April 24, 1981 by the Computer and Business Equipment Manufacturers Association IS DISMISSED.

31. IT IS FURTHER ORDERED That the Petition for Declaratory Ruling filed November 9, 1982 by the North American Telephone Association and the Michigan Independent Communications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

REPORT ON COMPLIANCE WITH FCC REQUIREMENTS FOR STRUCTURAL SEPARATION BETWEEN AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND AMERICAN BELL INC.

1. *Introduction*

1. On November 4, 1982 the Commission adopted an order approving AT&T's customer premises equipment (CPE) capitalization plan. *Request for Approval to Supplement the Capitalization of American Bell Inc. to Provide New Customer Premises Equipment*, FCC 82-496, released November 10, 1982 (*CPE Order*). In that order, the Commission found that, based on the information then available, AT&T's plans for the structure and operations of ABI generally appeared consistent with Computer II policies. The Commission, however, withheld judgment on the specifics of such mechanisms as AT&T's information flow controls, employee education programs and employee transfer monitoring programs. Instead, the Commission required the staff to review the details of AT&T's plans for the implementation of its structural separation plans. *CPE Order* at paras. 89-90. This report is provided in response to that requirement.

2. In order to assess the manner in which AT&T is meeting the Computer II requirements, the staff has reviewed AT&T's Capitalization Plan, Report on Services to be Shared, corporate implementation guidelines, employee training, computer security safeguards and other proprietary information protection procedures. The staff then directed to AT&T a series of written questions concerning various aspects of AT&T's implementation plans. The staff has also met with BTL managers responsible for computer security, information flow control and engineering and management support software. Finally, the staff has attended Computer II training programs for Bell system employees.

3. After a comprehensive review of AT&T's efforts to comply with each of the several types of structural separation requirements, the staff narrowed the focus of its review to Computer II provisions concerning information flow controls. Improper transfer of information would be much less susceptible to subsequent detection than would, for example, an improper billing or accounting entry. Effective prophylactic measures are thus important. Accordingly, the staff focused on whether employees will be sufficiently informed about AT&T's obligations under Computer II provisions. Further, the staff sought to assure that opportunities for improper transfer of information were minimized. In sum, the staff has focused on the following concerns.

A. Whether AT&T has developed training programs for its employees adequate to assure compliance with Computer II's limitations on the transfer of certain

information including customer proprietary information, network interface information, and software development information;

B. Whether AT&T has developed protections against misuse of both shared and dedicated computer systems adequate to assure compliance with Computer II prohibitions of information transfer;

C. Whether AT&T's plans to locate ABI employees with Bell Telephone Laboratories (BTL) and Western Electric (Western) employees are consistent with the Computer II rules; and

D. Whether AT&T's marketing plans for ABI result in any joint marketing or the transfer of customer proprietary information.

II. *Training Programs*

Facts

4. AT&T has planned, and is implementing, an employee training program regarding the separation requirements of Computer II. The nature of the training received by an employee will vary depending on whether that employee is: (1) an AT&T supervisory manager, (2) a transferee to ABI, (3) an installation and maintenance (I&M) manager or technician or (4) an AT&T employee who does not fall into any of the above categories.

5. The training program for AT&T supervisory managers relies on a classroom presentation of a videotape followed by a question and answer session, distribution of informational literature and a signed employee acknowledgment. The videotape outlines the Computer II separation requirements and Bell System policy on joint marketing and sharing of customer and network proprietary information. Attorneys either lead the discussion sessions or are available by telephone to answer employee questions. Outlines have been prepared to assist session leaders. The supervisory managers receive two types of informational literature. The first contains frequently asked questions concerning separation requirements and AT&T's answers. The second explains the FCC's Computer II decisions and includes definitions of customer and network proprietary information as well as descriptions of the prohibitions of joint marketing. The latter pamphlet contains an acknowledgement sheet that every supervisory manager, except Western Electric's, is directed to sign to indicate that he or she has read the pamphlet and agrees to comply with the practices which it outlines. The acknowledgement sheet contains a clause stating that the employee who fails to comply with the practices outlined in the booklet will be subject to disciplinary action, including dismissal. AT&T has stated that it expected to have completed this training by January, 1983 for all supervisory managers except for those in the BOCs. The training of BOC managers will be completed in the first quarter of 1983. Bell System supervisory managers will be responsible for informing their subordinates of Computer II requirements.

6. All employees transferring to ABI have received separation requirements guidelines and must sign transfer acknowledgements prior to their transfer. In addition, all business marketing managers who transfer from the General Departments to ABI will have been shown the videotape.

7. A separate set of training programs has been developed for I&M managers and technicans. Managers are shown tapes that describe the changes in the business order process and in material and facility order flows. Technicians will be shown tapes that describe the separation requirements and demonstrate new work order forms. Technicians also will be given a notebook containing detailed procedures and guidelines covering joint marketing and information flow restrictions. In response to a service request AT&T's business CPE installation workforce will be required to record information which will be used for monitoring the BOCs' provision of I&M to ABI. *See* letter from Chief, Common Carrier Bureau to Alfred Green (December 16, 1982); letter

from Bless Striter to William Tricarico, Attachment A (December 28, 1982); letter from Chief, Common Carrier Bureau to Daniel J. Culkin (February 18, 1983).

8. All Bell System employees, management and non-management, will receive, during the first quarter of 1983, a Bell System Code of Conduct which includes a discussion of the Computer II separation requirements. In addition, all nonsupervisory Bell System employees will receive training in a form deemed appropriate by their supervisors who are responsible for informing employees of the Computer II requirements. BTL, which controls access to a uniquely broad range of sensitive information, has required its Public Relations and Employee Information Division to establish a program to inform employees of their responsibilities for controlling information flows between BTL and ABI.

Conclusion

9. AT&T's training program fairly represents the Commission's prohibitions against transfer of customer proprietary information, network interface information and the prohibition against joint marketing of ABI's products and services. The training material available to the staff, however, fails to discuss Computer II's limitations on the joint development of software for ABI products or services. *See generally Final Decision* at 479–80; *Reconsideration* at 81.[1] In contrast, Computer II software limitations are reflected in BTL's General Executive Instructions and Procedures and in an agreement between BTL and ABI for technical information interchange. *See* paras. 27–28, *infra*. These documents are not generally circulated among BTL staff members. Because of BTL's access to a broad range of sensitive information, BTL's Employee Information Division training program should inform software development employees or their supervisors of the Computer II software development policy that is embodied in AT&T documents as summarized in paras. 27–28, *infra*. In addition, training for ABI employees should be consistent with that provided employees of affiliated entities. Finally, AT&T should complete BTL's training program and that of all other Bell entities within 30 days of the release date of this order.

III. *Computer Security*

Access to BTL Computers

10. The Commission permitted transitional sharing of BTL computers on the condition that AT&T institute adequate information controls. *CPE Order* at para. 94. The nucleus of the BTL computer network consists of large mainframe computers located at seven centers throughout the U.S. and interconnected by high speed communication lines. Attached to these mainframe computers are approximately 100 minicomputers. Users have access to these computing facilities and their data files via dial-up or hardwired terminals. Additionally, BTL has thousands of stand-alone mini and microcomputers at its various facilities.

11. ABI is currently in the process of acquiring and installing both mainframe and minicomputers for its sole use in engineering, design and development (ED&D). The process is expected to be completed by the end of 1983. AT&T proposes that until 1984 ABI share four mainframe computers located at two BTL computing facilities. At one other BTL location, AT&T proposes to dedicate two mainframe computers to ABI's exclusive use through December 1983. Peak loads at this latter location might require offloading of work from either of the dedicated mainframes for processing on one of BTL's non-dedicated mainframes.

[1] Briefly stated, Computer II prohibits joint software development for enhanced services but does not prohibit joint software development for CPE. If there is joint CPE software development, however, that software must be sold to unaffiliated vendors.

12. After the transition period, certain BTL computers may continue to be used to support ABI projects in areas where joint development is permitted by Computer II rules. In such cases, BTL and ABI might exchange data through controlled interfaces between their respective computer networks.

13. BTL's computer security program is designed to screen entry into the computer building, to prevent access to and use of the computers themselves, and to limit persons who are authorized to access the computers to specific data files in the computer. To assure that unauthorized employees do not obtain physical access to BTL computing facilities, only persons with appropriate identification cards are granted entry.

14. To assure the security of computerized data, BTL has established two major levels of security that, respectively, prevent unauthorized access either to BTL's computers or to the data files residing in them. The first level of security uses account numbers, USER/IDs and passwords to prevent unauthorized access to computers. Account numbers are assigned to authorized users by computer center personnel. USER/IDs are permanent codes unique to the user. Users create their own passwords which are known only to them and which must be changed periodically. Users must specify each of these identifiers every time they sign on the computer. All are validated by the computer. Authorized users can use only those computers for which their identifiers are valid. Inability to access certain computers prevents access to the files and data stored in that computer.

15. The second level of security limits the data that a user may reach once the computer has been accessed. The four mainframe computers that will be shared by ABI and BTL employees during the transition may contain BTL files with information prohibited to ABI. BTL standards require that each computer file should be the responsibility of a single employee. This employee, known as the "owner" of the file, may authorize other users to access that file. However, if the employee's data base contains proscribed data, the employee may extend access only to other BTL employees. If that employee's file is created after December 27, 1982, and is maintained in a computer containing proscribed material, the responsible "owner" may not extend access to any other employee. The computer is programmed to prevent access to files by unauthorized persons.

16. All applicable standards required to implement this two-tiered approach have been implemented on the mainframe computers to be shared by ABI during the transition period. The first tier of protection has been implemented on other BTL mainframes. In addition, BTL internal auditors will conduct operational audits of the files which ABI will access. These audits will analyze the preventive, detective and corrective controls contained in the file access software.

17. The security for stand-alone minicomputers and microcomputers consists of physical security. BTL computers will be located in BTL space. To the extent ABI employees will not have access to this space, they will not have access to these computers.

Access to Western Electric Computers

18. ABI is expected to use Western computers for both conveying and obtaining information and specifications pertaining to the design, development and manufacture of products manufactured under contract with Western. Western's computers will also be used to convey equipment ordering information. This use of Western's computers is expected to continue indefinitely. AT&T states that the potential for improper access to proprietary information is less at Western than at BTL because Western does little design or development work. Rather, Western manufactures according to the designs specified by affiliated entities or others. As a result, AT&T states that Western computers contain little, if any, customer proprietary information or network interface information that is not already available to other manufacturers.

AT&T has reviewed Western's computer files to determine both the location and the nature of information which should be protected from ABI access. The staff has analyzed AT&T's report on the results of this review and has sought additional information which it expects AT&T to provide shortly.

Access to BOC and Long Lines Computers

19. ABI will interface with regulated companies' computer systems for four purposes: cutover of installations pending on January 1, 1983; conversion of embedded CPE to unregulated service if authorized by the Commission; interim BOC provision of business I&M services to ABI; and ABI responses to customer service inquiries. For the first purpose, ABI will access the BOC Mechanized Cutover System (MCS) computer system for use in customer installations that are in process on January 1, 1983 and will be ABI CPE systems. Similarly, ABI will access Long Lines' Centralized On-line Data Aggregator (CONDA) computer system to complete electronic tandem network (ETN) activity pending on January 1, 1983. AT&T expects to complete these cutovers by March 31, 1983. ABI will be able to access data only for customers who have provided written authorization for release of those customers' information. *See* para. 40, *infra*.

20. Second, in preparation for the possible "conversion," that is, the detariffing and transfer to ABI of embedded CPE, AT&T plans that, prior to any such conversion, ABI will access all BOC Customer Records Information System (CRIS) data bases for development of test files to assure that conversion systems will function properly. CRIS data, which includes extensive proprietary customer information, will be processed by third party vendors or BOCs to create test files for ABI use. The customer information in these files cannot be used for marketing purposes because: (a) files for service and equipment testing cannot be related to customer identifications, and (b) files for testing customer identification cannot be cross-referenced to equipment files.

21. Third, CRIS will also be used by the BOCs to provide interim I&M to ABI. The security guidelines that AT&T has distributed to the BOCs protect CRIS data by, in general, requiring the BOCs to treat ABI as an independent vendor and, more specifically, prohibiting CRIS processing of ABI input and distribution of CRIS output to ABI.

22. Fourth, following conversion of embedded CPE, ABI service personnel will access BOC billing-related data filed for customer records in response to specific customer service inquiries. AT&T will establish, as part of its embedded base transition plan, controls to assure that ABI access to customers' basic service information cannot be used for marketing purposes.

Access to General Departments Computers

23. ABI and General Departments computers will interface for shared administrative services relying on computer programs and for collection of financial information from ABI. AT&T states that the computers involved may contain customer proprietary or network information, but that ABI will be authorized access only to the specific systems related to Commission-permitted shared services and to the collection of financial data. ABI will not have access to file names, data formats, passwords or other information necessary to access prohibited information.

Conclusion

24. AT&T appears to have devised adequate safeguards for assuring that ABI does not obtain unauthorized information through access to the computers controlled by unseparated affiliates. The effectiveness of these plans, of course, cannot be known until their implementation. Control of ABI access to CRIS, in particular, presents implementation problems of considerable complexity and importance. In order to assure that Computer II information flow prohibitions are properly observed, the staff will monitor AT&T's operation of its security systems.

IV. *Review of Information Transfer Decisions*

25. Computer II permitted ABI to perform joint research and development with other AT&T entities. In these instances, technical information transfer between affiliates and ABI is permissible. However, information cannot be transferred if it is proprietary customer or network information or if it may be used for the development of software for ABI services or products not made available to the general trade. To assure that all information transfers comply with these limitations, each AT&T entity should establish clearly identified channels of authority and points of review to monitor the information flows.

Facts

26. A November 2, 1982 agreement for the interchange of technical information between ABI and BTL states that technical interactions between the two entities are permitted only if network information and customer proprietary information are made available to others at the same time and under the same conditions as they are made available to ABI and if nongeneric software used in ABI's products and services is not obtained from BTL. The agreement states that transfer of technical information under these procedures may not include: (1) unpublished network design and technical standards and information affecting changes to the network which would affect either intercarrier interconnection or the manner in which customer premises equiment is attached to the interstate network; (2) information acquired by affiliate companies by virtue of their common carrier activities; and (3) software used for the provision of an enhanced service, or in customer premises equipment, unless the software is generic software within equipment that is sold "off the shelf" to any interested purchaser. Software is defined by BTL General Executive Instructions as any non-trivial computer program routine, whether in source or object code, and in whatever form or medium recorded, or any written or graphical disclosure from which such a routine can readily be derived. BTL's General Executive Instructions and Procedures prohibit transfer to ABI of unpublished or proprietary network information and customer information and nongeneric software (including firmware) for use in products or services of ABI or any documentation thereof. Such information may be in the form of unrecorded knowledge, ideas, or conceptions or in the more readily perceptible forms of documents, whether written, graphic or electromagnetically stored. Other types of information may be released to ABI by BTL only if in association with a written contract with ABI.

27. Under AT&T's compliance program, each party to the information interchange agreement is required to designate a representative within their companies who shall be responsible for administering these procedures. Transfers of technical information under these procedures shall be made through and received by the representative in each company. The representative shall review and complete the transfer in compliance with the Commission's Rules and shall keep an auditable record of all transfer of technical information under these procedures. BTL's General Executive Instructions and Procedures provide that, except for results of ABI-funded reseach, all requests from ABI for the transfer of information from BTL shall be in writing and be presented to BTL's Internal Technical Information Department (ITID). The ITID shall then obtain the written approval of the originating organizations to distribute the requested information. After it determines that information requested by ABI is in accordance with a written contract with ABI, ITID will transmit the information to ABI. Documents related to ABI-funded research may be forwarded directly to the ABI requestor by the responsible Technical Director, but the ITID shall be notified of the transmittal. The transfer of documents shall be recorded by the ITID in auditable form which shall identify the contract, document(s) transferred, originator, and recipient.

28. Western Electric has in place a security system to protect the company's interest in its proprietary technical information. Instructions issued by the Legal and Patent

Division require that ABI employees are to be treated as "outsiders" and not as Bell system employees. Consistent with this policy, all requests made by ABI for information are to be referred to the General Patent Attorney's organization for review before the requested information is provided. Also, employees who encounter specific information transfer problems must contact a supervisor or legal counsel who will be assisted by Western's Regulatory Matters-Legal organization in providing advice.

29. AT&T states that ABI may obtain information from the BOCs and Long Lines only from the contact points available to other customers and vendors. In addition, a single contact point has been established in each BOC and Long Lines to handle ABI requests for network and customer proprietary information.

Conclusion

30. In general, AT&T's plans describe appropriate steps to be taken to structure a review procedure that assures employees do not make individual and uninformed disclosure decisions. BTL's review procedure in particular uses criteria that appropriately can be used as broad statements of principles with which to identify proper information flows between ABI and any of the other unseparated affiliates. However, many details must be implemented before the plan's effectiveness is demonstrated. Accordingly, the staff should monitor the implementation and operation of these plans. In addition, the staff has identified specific areas where additional protections appear to be necessary. Because disclosures of computerized information are especially difficult to detect, the BTL data base administrator should maintain, as complement to the records kept by ITID, an auditable record of computerized information disclosures to ABI. Also, AT&T should assure that BTL's restrictions on the provision of software to ABI are applied in a manner consistent with the intent of the Computer II rules[2] Finally, we expect AT&T to consolidate in a single ABI office the responsibility to review the propriety of transactions between ABI or unseparated affiliates.

V. *Location of American Bell Technical Personnel*

31. AT&T's July 1, 1982, CPE Capitalization Plan proposed a transition plan for locating ABI's ED&D personnel in BTL buildings. The transition plan involves (1) providing a separate facility for all of ABI's New Jersey ED&D employees by 1985, (2) locating ABI ED&D personnel "to the maximum extent feasible" on January 1, 1983, in separate facilities, the leases for which will be held by ABI and (3) allowing the remainder of ABI's ED&D employees to share space with BTL, but "concentrating" those employees in separate space "to the maximum extent practicable."

32. ABI's separate facility scheduled for 1985 occupancy was tentatively planned for a Freehold, New Jersey site. In November 1982, development of the Freehold facility was postponed and ABI signed a letter of intent with a New Jersey developer for construction of a facility elsewhere in New Jersey for which ABI would sign a long term lease. During the first quarter of 1983, BTL will assist ABI in the lease negotiations and will bill ABI for the assistance on a direct charge basis. By letter dated December 22, 1982, AT&T states that all responsibility for this facility will be placed with ABI once BTL completes its assistance with ABI's lease negotiations, no later than March 31, 1983.

[2] The adequacy of AT&T's plans for the review of BTL staff decisions to transfer the results of and information associated with ABI-funded research is less clear. These plans may be sufficient if ABI-funded research will be specified by contract and if appropriate auditable records of such transfers are maintained. The staff makes no recommendations to the Commission at this time concerning whether contracts governing ABI-funded research sufficiently specify the subject of such research to support Commission oversight and thereby justify AT&T's plan for such information transfers.

33. Leases previously held by BTL for buildings at three other locations in New Jersey and one outside New Jersey were transferred to ABI on January 1, 1983. These four locations currently provide separate facilities for ABI technical employees.

34. As to the shared facilities, AT&T proposes to locate a substantial portion of ABI's ED&D workforce in BTL's Holmdel laboratory where BTL ED&D employees will also be located. Smaller numbers of ABI ED&D employees will be located with BTL technical staff in each of three BTL sites in Whippany, Morristown and South Plainfield, N.J. In Holmdel, most ABI employees will be consolidated on each of three floors in the six-floor building. In addition, approximately 300 ABI workers will remain in their current locations elsewhere in the building. ABI's Whippany employees will be on the second and third floors, in non-contiguous offices. ABI's South Plainfield employees will be clustered but, nevertheless, will be located on each of the building's three floors with BTL employees. ABI employees at Morristown will occupy contiguous space on the second floor of the building.

35. Despite Computer II's broad prohibitions of shared physical space for ABI and despite parties' objections to the sharing, the Commission permitted ABI's transitional sharing of space with BTL. *CPE Order* at paras. 94–95. That permission was conditioned on termination of the sharing by 1985 and on the institution of strict information flow control mechanisms. AT&T has stated that both ABI and BTL "may be involved in non-generic software development" at each of the sites where those employees would be colocated, but that ABI will develop such software independently.

36. In the view of the staff, AT&T's extensive plans for computer security, disclosure review systems and independently developed software can be greatly undermined by the broad interspersing of ABI and BTL employees. The staff does not believe that AT&T's plans for commingling of ABI and BTL employees represents the maximum separation feasible or practicable. Though consolidation of BTL employees in fewer locations would be preferable, colocation at the facilities identified above is acceptable as a transitional alternative, provided ABI employees are consolidated in clearly defined areas of the facilities. Such consolidation requires that random interspersing of ABI employees be eliminated and that ABI employees be consolidated into discrete working areas to the greatest extent possible. By June 30, 1983, AT&T should report to the Chief of the Common Carrier Bureau on its response to these concerns.

VI. *American Bell's Marketing Plans*

37. Section 64.702(d)(3), as modified by paragraph 98 of the *Reconsideration*, 84 FCC 2d 50, 83 (1980), permits disclosure of customer proprietary information only if a customer authorizes release of the information and if it is disclosed to all authorized members of the public under the same terms and conditions. AT&T's *Transition Guidelines: Account Instructions* indicate that letters may be sent to BOC customers informing them that certain customer proprietary information would be transferred to ABI unless the affected customer objects to the transfer. This would appear to be inconsistent with Section 64.702(d)(3). More specifically, any correspondence to customers which discusses release of customer proprietary information must inform the affected customer of the following: (1) the customer has the power to designate at any time parties that should receive any information pertaining to the customer's communications services or facilities or customer premises equipment, and (2) AT&T will not release any of this information to ABI or any other party without the customer's written authority. In contrast with the *Transition Guidelines*, the model customer letter proposed by AT&T in a November 30, 1982 letter to the Bureau appears consistent with the rules.[3]

[3] This letter states:

> Under the FCC's rules, (Telco) may not release "customer proprietary information"—that is, information describing your current (Telco) provided service and

38. In its November 30 letter, AT&T also proposed to designate individuals in each BOC and in Long Lines to be responsible for documenting transfers of customer information to ABI. In the staff's view, it is necessary for AT&T to maintain a central location in the General Departments which will be responsible for referring inquiries from the public to the appropriate personnel in the BOCs and Long Lines who maintain the records of ABI's access to information on customers. These BOC and Long Lines personnel would provide to any party authorized by the customer the same information provided to ABI.

39. AT&T's Employee Transfer Acknowledgement informed employees who are transferring to ABI that they might bring with them certain data and studies. According to the Transfer Acknowledgment, those studies might include customer proprietary information if such information was gathered prior to separation in anticipation of providing ABI's products and services to customers subsequent to separation. In a November 24 letter, the Bureau informed AT&T that the studies and data described in the Transfer Acknowledgment could be transferred to ABI prior to January 1, 1983 only if they did not identify specific customers. To the extent that AT&T allows transferring employees to retain documents containing customer proprietary information identifying a specific customer, such information may be transferred to ABI only if the affected customer affirmatively authorizes the transfer in writing and then only to those parties approved by the customer. AT&T's November 30 letter states that its Employee Transfer Acknowledgment had been redrafted to inform employees that, while aggregated customer information could be transferred, no such information that is customer specific may be transferred. AT&T's November 30 position appears consistent with the Rules.

40. The Bureau's review of AT&T's *BOC/Long Lines Implementation Guidelines* indicated that AT&T intended to have phones available at BOC Service Centers so that walk-in customers could contact ABI Residence Service Centers. The Bureau's November 24 letter informed AT&T that use of AT&T personnel and facilities to assist the subsidiary's sales and marketing is contrary to the requirements of Computer II. AT&T's November 30 letter states that BOC service centers will not have phones for customers' use in contacting ABI.

41. AT&T's *Transitional Guidelines: Account Instructions* indicated that joint visits to BOC and Long Lines customers by existing BOC and Long Lines representatives and future ABI account executives may be conducted during 1982 for the purpose of "educating and informing" customers concerning the effect of the reorganization on its relations with the Bell System. The joint visits were to be limited to accounts pending on December 31, 1982. The Bureau's November 24 letter informed AT&T that after January 1, 1983, joint visits must not take place except at a customer's (or its agent's) request, and BOCs must make themselves equally available to customers using CPE provided by non-AT&T equipment suppliers to assist in planning communications systems. AT&T's November 30 letter responds that AT&T intended that joint visits take place only at the customer's request after January 1, 1983 and "on a consistent basis for all suppliers." It stated AT&T's intent to reaffirm to account executives the cutoff date for AT&T-initiated joint visits.

VII. *Conclusion*

42. AT&T has taken initial steps toward implementation of Computer II separation

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equipment unless you authorize such release in writing. Such information must be made available on the same terms and conditions to any person you authorize in writing to receive it. It may be important for American Bell to have such information, in order to completely understand the current status of negotiations and to avoid disruption or delays in honoring commitments or proposals. If you wish to provide such information to American Bell, please sign the attached copy of this letter and return it promptly.

conditions. Full implementation, however, will not be attained unless AT&T adopts the modifications recommended above. In particular, AT&T should include in its training material for software development staff, a discussion of the Commission's limitations on joint software development. AT&T should complete training of all employees within 90 days of the implementation date. AT&T must also require that the BTL data base administrator maintain records of computerized information disclosures. AT&T must revise its plans for colocation of ABI and BTL facilities to provide for consolidation and identifiable separation of ABI software development staff. AT&T has stated that it is reviewing computer security at Western and that it will report to the staff on the results of that review. The staff will continue to monitor AT&T's ongoing implementation process.

APPENDIX B

REPORT ON CPE PREOPERATIONAL AND SUBSIDIARY FORMATION EXPRESS

I. *Introduction*

1. In the Computer II decisions[1] the Commission permitted the American Telephone and Telegraph Company (AT&T) to offer enhanced services through a new subsidiary separated from its regulated activities. The Computer II decisions also required that AT&T offer customer premises equipment (CPE) only through a separate subsidiary and on a non-tariffed basis. In order to protect ratepayers from bearing the costs of developing enhanced services or CPE which would ultimately be offered by the subsidiary, the Commission required AT&T to file periodic reports as to the "costs of setting up the separate subsidiaries and . . . the costs of developing the CPE and the enhanced services that will be offered by the unregulated subsidiaries after separation."[2]

2. On June 16, 1982, the Commission approved AT&T's plan for capitalizing its new subsidiary formed to offer unregulated enhanced services, American Bell, Inc. (ABI). *Enhanced Services Order*, 90 FCC 2d 404 (1982). That order included a report of the Common Carrier Bureau staff's review of enhanced services development expenses, subsidiary formation expenses, valuation of assets to be transferred to the subsidiary and AT&T's control mechanisms to assure compliance with Computer II separation requirements. The order directed the bureau staff to continue its review of these items and of development expenses for CPE.

3. On July 1, 1982 AT&T filed its plan for additional capitalization for ABI to allow it to offer new CPE. This plan contained, among other things, estimates of the value of fixed assets to be transferred to ABI, actual CPE engineering and development costs and subsidiary formation expenses through December 31, 1981 (as reported by AT&T) and AT&T's estimate of CPE and subsidiary formation expenses for 1982.

4. This report summarizes the Common Carrier Bureau staff's audit to date of AT&T's preoperational expenses on behalf of ABI for CPE and subsidiary formation. The report is divided into four sections. The first (at para. 5) is an overview of the

[1] Amendment to Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C.Cir. 1982).

[2] Reconsideration, para. 105. AT&T filed reports pursuant to para. 105 on January 29, 1981, August 14, 1981 March 5, 1982 and August 13, 1982. These reports are referred to herein as "the para. 105 reports." In the CPE Capitalization Plan Order, FCC 82-496 (released November 10, 1982) (CPE Order) the Commission again described the CPE and subsidiary formation expenses which were subject to the paragraph 105 reporting requirement and for which reimbursement to the regulated companies might be required. CPE Order, paras. 48–55.

staff's audit objectives and procedures. The second (at para. 11) is a brief summary of the AT&T General Departments' and Bell Telephone Laboratories' (BTL) accounting systems. The third (at para. 19) recapitulates the staff's review of the reported expenses for each Bell entity.[3] The fourth (at para. 68) lists staff recommendations and conclusions and summarizes the work to be completed.

II. *Overview of Audit Objectives and Procedures*

5. Separating expenditures for CPE which should properly be borne by ABI form those which should not is somewhat more difficult than for enhanced services. Unlike enhanced services, CPE has long been offered by AT&T's regulated companies. CPE already subject to tariff (the "embedded" CPE) will continue to be offered by the Bell Operating Companies for some time after January 1, 1983. Thus, due to AT&T's offering of both regulated and unregulated CPE, separating those CPE expenses which should properly be borne by ABI from those which are of benefit solely to the regulated companies is more complex.

6. In order to conduct an adequate review of preoperational expenses for CPE as well as enhanced services and subsidiary formation, the staff was required to look behind the books of account to AT&T's underlying assumptions as to what expenses were reportable. The staff was also required to review closely AT&T's systems and methodology for accumulating and reporting those expenses.

7. The audit of AT&T's preoperational expenses for subsidiary formation and CPE was intended to determine whether:

1) AT&T identified and reported all CPE preoperational and subsidiary formation expenses;

2) all direct expenses for CPE development or subsidiary formation were included in full in the reports and not included in overheads (loadings); and

3) all expenses for the benefit of ABI which were charged to ratepayers via license contract billings or as direct charges to the Bell Operating Companies (BOCs) or Long Lines were reported.

8. The audit steps necessary to resolve these issues include:

1) an independent staff identification of probable CPE development effort at Bell Telephone Laboratories (from cases and projects) and at AT&T's General Departments (from Budget Decision Packages (BDPs));

2) a review of all elements included in overhead pools to determine whether they are reasonable, whether they include specific tasks or expenses that should be charged directly to CPE preoperational or formation projects, and whether derivation of the overhead rate used for allocation is consistent with prior practices or in conformance with other Commission directives; and

3) an audit of intercompany accounts to ensure that: (a) CPE preoperational and formation expenses were excluded from license contract billings; (b) direct billings (non-license contract) to the BOCs, Long Lines, BTL, and other affiliated companies do not relate to CPE or formation activities; (c) bills for BOC support activities were identified and reported; and (d) the amounts to be reimbursed to the BOCs and Long Lines are correct and have been accurately reported.

[3] AT&T included expenses incurred by WECO in its para. 105 reports. AT&T states that all WECO expenses are recovered in the price of its products. Therefore, AT&T states, no reimbursement to ratepayers is required. The Commission has requested AT&T to provide additional support for these arguments regarding WECO expenses and has requested public comment on the matter. CPE Capitalization Order, FCC 82-496, paras. 75–84 (November 10, 1982).

9. The staff's review began with the Bell System internal auditors' audits of actual cost data submitted by AT&T. The internal auditors' findings, recommendations and workpapers were made available to the staff for review. The staff's analysis of this information and interviews with each of the Bell auditors helped define the issues.

10. The scope of the audit included field reviews at the sites where the major efforts relating to CPE development and subsidiary formation occurred, interviews with managers at BTL and the General Departments, tests of the internal controls and review of the internal changes to separate regulated and nonregulated effort within the company.

III. *AT&T's Accounting Systems*

A. *The AT&T General Departments*

11. Long Lines Department was responsible for implementing the first phase of AT&T's compliance with Computer II, the establishment of a separate subsidiary to offer enhanced services. In October 1980, AT&T formed a separate group in the General Departments,[4] Department 31, to organize a separate subsidiary to offer CPE. During 1981, other parts of the AT&T General Departments were enlisted to provide support to Department 31. Approximately 40% of the direct labor incurred by the General Departments for subsidiary formation was provided by these other groups.

12. The AT&T General Departments' cost accounting system is based on "Budget Decision Packages" (BDPs). AT&T defines BDPs as follows:

> A budget decision package is a grouping of section activities, and their associated costs, necessary to achieve a single result or organizational purpose. Decision packages are the building blocks of the General Departments budget; organization budgets are obtained by adding together the budgets of all decision packages in the organization . . . .
>
> The grouping of General Department's work into budget decision packages begins at the section level. A section may have any number of packages, depending upon how the section wishes to define its work. Definition of budget packages is a critical task in the budget process; it determines how spending proposals are presented to higher levels of management, how responsibilities for cost performance are allocated within the section and how costs will be tracked. For these reasons, the responsibility for defining budget decision packages rests with the section head. While preparation of budget packages can be assigned to subordinates, only the section head can make the decision on how to structure the work of the section into budget packages.

AT&T General Departments Budget Manual, sections 2.2.2 and 2.2.3.

13. The expenses incurred in forming ABI are captured for each department in separate BDPs and accumulated through the use of an interdepartmental code. This interdepartmental code reduces the need to compile expenses manually as was done during the earlier formation stages. It also reduces the possibility of omissions. Procedures and controls are presently in place to ensure that BDPs attributable to ABI contain the correct interdepartmental code. These procedures also permit costs incurred and billed by BOCs to be included in the proper BDPs and accumulated in the summary reports.

14. The expenses relating to preoperational CPE development efforts in the General Departments were not always clearly identified in the BDPs. The marketing departments, for example, initially used a system of product codes to identify all

[4] The AT&T General Departments provide overall corporate management services to all parts of the AT&T organization.

preoperational CPE activities. This system was changed after an internal audit finding in early 1982 disclosed that the accumulation of expenses to product codes was not reliable. As a result of this finding, the marketing departments (and all other affected departments) were required to analyze their operations to identify all CPE effort relating to the introduction of new products or to development of enhancements or new features for existing products. The marketing departments were required to estimate the portion of each BDP attributable to preoperational CPE expenses. As a result of this review, AT&T reported an additional $44 million in preoperational expenses incurred through December 31, 1981 in its August 13, 1982 para. 105 report. From 1980 through mid-1982, guidelines and definitions for General Departments BDPs were revised several times, resulting in the present system to separate regulated from unregulated activity and to separate unregulated activity into discrete identifiable BDPs.

B. *Bell Telephone Laboratories*

15. BTL does not itself manufacture or sell products. All of its work effort is funded by specific customers, usually other Bell System companies. The major categories of BTL work and the companies that authorize and fund them are as follows:

Research and Systems Engineering (R&SE)—

AT&T (including Long Lines Department);

Specific Design and Development (SD&D)—

Western Electric Company (WECo);

Government (Military)—subcontracts through WECo;

Business Information Systems Programs—Bell

Operating Telephone Companies (BOCs); and

Miscellaneous customers—Sandia, Teletype, etc.

Bell Laboratories Accounting System, 1 (1980).

16. BTL's work program budget is divided into the following sectors: Bell Regulated Entity (BRE),[5] Separated Subsidiary (FSS - now ABI), Directory, Advanced Mobile Phone Service, AT&T International, Military, and Common. Within these sectors BTL divides its work into cases and sub-cases for purposes of tracking costs and billing customers. All costs are charged to cases or sub-cases.

17. BTL work is divided into projects for purposes of managing the work effort. BTL's "Corporate Project Structure" is divided into eight broad segments: Network, Business, Residence, Directory and Public Services, Bell Projects—General, Basic Technology, Research, and Government and Other. The project structure was developed beginning in 1981 and was designed, in part, in response to regulatory changes. Prior to April 7, 1980, the date of adoption of the *Final Decision in Computer II*, development costs were also accumulated on an organizational basis. By early 1981, however, costs were identified by project, using the newly established corporate project structure. Each project falls within one of the segments. Each project is an aggregation of sub-cases. Each sub-case is assigned to one, and only one, project.

18. In preparing the para. 105 reports, BTL engineers first selected all projects which they deemed reportable. Costs accumulated in the sub-cases associated with those projects were included in the para. 105 reports. For those projects selected as

[5] At present, the BRE sector includes work for both Long Lines and the BOCs. BTL recognizes that, with the divestiture, one such entity will not be enough. This sector will, therefore, be further divided.

reportable, BTL reported all costs incurred after April 7, 1980. Developmental costs for the period prior to April 7, 1980 were reported for five specific products. These costs were limited to SD&D and are small in comparison to the total. Many BTL projects relate to both regulated and non-regulated equipment. For those developmental projects common to both, BTL estimated a percentage to be attributed to CPE development.

IV. *Staff Audit*

A. *Overview of Staff Procedures*

19. The staff reviewed the procedures for identifying and reporting CPE preoperational and subsidiary formation expenses at BTL, the General Departments, Western Electric Company (WECO), and the BOCs in Washington, D.C., and New York. On July 26, 27 and 28, 1982, Commission staff members visited BTL and the General Departments to assess the basic record keeping methods, supporting documents, and the types of internal reports generated. The purpose of this visit was to evaluate the scope of the audit review and develop detailed audit steps.

20. Beginning in August 1982, the staff reviewed all BDPs issued by the General Departments for the period 1980–82 to determine whether all those related to CPE development or subsidiary formation were reported. At the same time, the audit staff and FCC staff engineers reviewed all BTL cases and projects possibly related to reportable CPE development. The items selected by the staff were matched against the items reported by the General Departments and BTL. This selection and matching process permitted the staff to conduct an independent review of the General Departments and BTL systems for identifying and reporting CPE preoperational expenses. The unreported items were individually reviewed with General Departments and BTL personnel. The results of this review are described below.

B. *Review of Subsidiary Formation Expenses*

21. AT&T reported $446.3 million in total expenses for CPE development and subsidiary formation through December 31, 1981. Formation expenses were $27.4 million or approximately 6% of this total. Of this $27.4 million, $20.4 million were incurred by the General Departments and $7 million were incurred by the BOCs. These figures were increased by a total of $44 million in AT&T's August 13, 1982 supplemental filing to a total of $490 million, $28.3 million of which were for formation expenses. Approximately 25% of the $28.3 million in formation expenses were incurred by the BOCs.

22. The specific General Departments involved with the formation of ABI through December 1981 were:

Department	
08	Human Resources Development
11	Legal
14	Comptroller
15	Treasury
25	Business Services
26	Business Marketing
27	Residence Marketing
28	Support Services
31	Unregulated Entity Planning
58	Information Systems—Staff

23. Department 31 was established in October 1980 to plan for the unregulated subsidiary for CPE and enhanced services. Department 31 has been responsible for overall coordination and planning. This department incurred over 60% of the direct General Departments formation expenses. The marketing and information systems departments accounted for most of the remaining 40%. Other departments, including the comptrollers, legal and treasury departments, charged some expenses to this effort by use of separate BDPs and a special interdepartmental code. While the initial charges by these departments were insignificant compared to total reported expenses, they are now increasing as ABI gets closer to January 1, 1983.

24. The staff interviewed seventeen directors and managers in charge of approximately ten different functions in Department 31. These areas included data systems, security, human resources, accounting, treasury, purchasing, taxes and legal. All of these functions had separate BDPs which were identified as subsidiary formation expenses. Other departments interacted with Department 31 as certain information or advice became necessary. Certain of these departments had separate BDPs for subsidiary formation expenses. Their costs were accumulated and reported through use of the interdepartmental code. Other support activities were charged to subsidiary formation BDPs using the exception time reporting (ETR) procedure.[6]

25. The staff also reviewed ABI's acquisition of software. The staff obtained copies of contracts issued for software packages. These contracts were placed by AT&T with outside firms except for a WECO billing program being purchased from Long Lines and a payroll system purchased from C&P. AT&T informed the staff that charges for these programs were being made to appropriate reportable BDPs. In addition, AT&T stated that all contracts would be re-executed by ABI in December 1982. Other software packages for marketing data and non-administrative applications transferred to ABI prior to January 1, 1983 will be reviewed during our continued auditing oversight.

26. Several other parts of the General Departments appeared to have had some responsibility for subsidiary formation. This was particularly evident in the tax, security, and insurance functions. The staff will review these areas in greater depth to determine that all subsidiary formation expenses have actually been reported.

27. Generally, the staff found that AT&T attempted to separate ABI formation activity from its regulated business. The separation of the planning group, Department 31, appears to have been a reasonable approach. In the early stages, however, other groups outside of Department 31 did not immediately establish separate BDPs to report subsidiary formation expenses, but used the ETR procedures to charge time to ABI formation activity. This procedure was not completely documented to support fully the extent of charges. The staff was able to verify only that some charges were assigned to reportable BDPs via the ETR system. The ETR procedure was tested by the AT&T internal auditor who recommended that where a consistent portion of an employee's time can be expected to be charged to subsidiary formation or CPE development the guidelines should be amended to permit automated allocation.

C. *Review of CPE Development Expenses*

28. The system used by AT&T's management to decide whether a product should be developed for eventual sale or lease to potential users typically consists of eight phases: determination of market need, concept formation, system design, prototype test, final development, introduction, implementation, and life cycle management. The organizational vehicle used to accomplish these tasks is the Product Team. Each team includes participants from BTL, WECO and the General Departments, including

[6] *See* Shared Administrative Expenses Order, 90 FCC 2d 184, para. 55 (1982).

the comptrollers, legal, business services, marketing, and rates and tariffs departments. Thus each team includes all of the required expertise. Each team member participates to the extent necessary at the appropriate time. For example, advertising might be heavily involved during the product introductory phase but not involved at all during earlier phases.

29. Each team is directed by a product manager who is responsible for coordinating the effort and reporting to management. The team issues periodic progress reports to management including recommendations as to whether to proceed, modify, or abandon the project.

30. During 1981, project numbers were established by each team to capture individual product costs. In February 1982, however, the General Departments' internal auditor discovered that the project numbers were not controllable or reconcilable within the existing data collection system and could lead to possible under-reporting of expenses. As a result, AT&T abandoned the project number system and adopted its Budget Reporting and Tracking System (BRATS) to accumulate BDPs for General Departments' CPE development expenses.[7] AT&T established an interdepartmental code to summarize BDPs and changed the criteria for establishing BDPs (see para. 14 above).

31. For 1981 and prior periods, each department reviewed its BDPs and listed the ones it considered reportable. For BDPs containing both reportable and non-reportable work, each department estimated the percentage it considered reportable.

32. CPE development expenses were incurred by the General Departments, BTL, WECO, Long Lines, the BOCs, and the Bell System Center for Technical Education (BSCTE). The July 1, 1982 Capitalization Plan reported a total of $418.9 million for preoperational CPE development. The following chart sets out the amounts contributed by each of these entities for CPE development as of December 31, 1981:

Entity	*$ (in millions)*	*Percent of Total*
General Departments	35.8	8.6
Long Lines	.1	-----
BOC	.3	-----
BTL-R&SE	114.7	27.4
BTL-SD&D	242.5	57.9
WECO[8]	25.3	6.1
BSCTE	.2	-----
	418.9	100.0

33. During the week of August 30, 1982, members of the audit staff conducted interviews at Bell facilities in New Jersey to examine further the methods used by AT&T to collect and report preoperational CPE and subsidiary formation expenses. The field tests were designed to identify products or enhancements to be introduced after January 1, 1982.[9]

34. The staff reviewed over 11,000 BDPs in use during the 1980–1982 period and selected over 500 which appeared to contain CPE preoperational or formation activity

[7] Paras. 12–14, *supra*. See Enhanced Services Order Appendix D, paras. 28–39, for a more complete description of the General Departments' accounting and control systems (including BRATS).

[8] *See* note 3, *supra*.

[9] AT&T determined that since the major benefit from products introduced after January 1, 1982 would accrue to ABI, all developmental expenses for those products should be reported under para. 105.

and which appeared not to have been reported by AT&T. These 500 items were submitted to AT&T for review and further explanation as to why they were not included in the paragraph 105 reports. AT&T furnished explanations for many of the items. AT&T informed the staff that many of the other BDPs had already been reported in the August 13, 1982 filing. In addition, BDPs totalling an additional $2 million would be reported in the next paragraph 105 filing.

1. *The AT&T General Departments—Marketing*

35. The General Departments marketing organization reports to an executive vice president and is composed of three departments, each of which is directed by a vice president. A brief description of each of the three marketing departments is shown below:

1) Business Services—Provides support for AT&T's equipment, products, and services both in the regulated and unregulated sectors. Examples of activities supported include operations, standards, billing procedures, installation and repair, and information systems.

2) Business Marketing—Provides market research, product management, revenue strategy, and identification of customer needs.

3) Residence Marketing—Similar to the business segments but concentration is on residence customers rather than business.

36. These departments are similar, and presently function both in the regulated and unregulated environments. In 1980 and 1981, AT&T had to estimate the expenses for unregulated activities for each BDP to conform to Commission requirements. After the completion of AT&T's internal audit and the distribution of new guidelines in 1982, new BDPs were established to account for the unregulated activity. Establishment of BDPs is, however, highly discretionary with the individual managers. Reviewing these managerial judgments was a major problem for the Commission staff. The Business Services and Marketing Groups each used different methods of estimating the unregulated activities in the BDPs. Our review of their effort is still in progress. We are unable to complete this part of our audit until the final account balances for 1982 are determined.

a. *Business Services*

37. The staff interviewed five managers within this department to determine their specific functions and the basis they used for selecting reportable BDPs. The major divisions of the Business Services Department were small terminals, data systems, product performance, and large PBXs. These areas charged time to both CPE development and regulated activities. Approximately 50% of the expenses of this department are charged to clearing accounts that are distributed to other accounts. Clearing accounts are not billed through a license contract allocator but are included as overhead for billing purposes using the formula determined for each department billed. Amounts that are distributed from clearing accounts lose their identity and become either a loading element or part of the expenses of a specific department. Departments are then billed through the license contract using the formula determined for each as indicated in the annual License Contract Services and Costs Report (Grey Book). Non-license contract expenses incurred by this department are charged to a deferred asset account, and subsequently billed directly to the BOCs and Long Lines.

38. Each BDP for this department was reviewed by the staff. Those that appeared to be reportable were compared to those actually identified as reportable by AT&T. Not all of these staff selected items were included in the para. 105 reports or the July 1, 1982 Capitalization Plan. The company is presently reviewing the BDPs identified by the staff. AT&T has acquiesced in staff findings indicating that at least $3.6 million of additional CPE preoperational expenses should be reported.

39. AT&T guidelines for reporting CPE preoperational expenses state that "expenses incurred by one Bell System Company which are subsequently billed to another Bell System Company . . . , are to be reported only by the Company which initially incurred the cost." In its review of BDPs for the Business Services Department, the staff discovered that expenses incurred by the BOCs on behalf of Business Services for CPE development amounting to $1.2 million were not included in the para. 105 reports. This amount will be included in the next para. 105 report.

b. *Business Marketing*

40. The staff analyzed the product lists supplied by AT&T and selected nine product managers for interview. These interviews were conducted to determine the procedures which the managers used to select reportable CPE development expenses and to test the basis for estimating the 1980, -81 and -82 reported expenses. In addition, the staff reconciled the General Departments' product lists to BTL cases to ensure that BTL reported all CPE development effort. The staff's review showed that the basis for estimates used to assign a portion of a BDP to a reportable category was not fully supported by documentation. The staff is continuing its inquiry in this area.

41. The staff found that many products were being developed for ABI by unaffiliated companies. Some of these outside products are scheduled for modification by BTL and then for resale by ABI. The BTL modification costs are being charged to specific cases. They are presently billed to AT&T. To the extent that these costs have been included in license contract billings, the regulated companies must be reimbursed. In the future, ABI will be charged directly for modification costs as a specific customer.

c. *Residence Marketing*

42. Residence marketing is organized differently from the business departments, but its major functions are similar. The staff tested the basis for estimates that were used to separate BRE and ABI activity and found that the basis used was reasonable and was supported by underlying data and rationale. AT&T used product team reports to substantiate the estimates and rates of expenditure during the development cycle of specific products.

43. In reviewing Residence Marketing BDPs, the staff discovered that BOC expenses amounting to $2.9 million incurred on behalf of Residence Marketing were not included in the para. 105 reports by either the BOCs or Residence Marketing. These expenses will be reported in future para. 105 reports. See para. 39, *supra*.

44. The structure of this department includes an administrative division which is responsible for overall department direction, planning and coordination. None of the administrative expenses, however, were charged to ABI. The staff believes that the administrative expenses of this department as well as the other two marketing departments should be charged proportionately to ABI, instead of being charged wholly to the regulated companies. The staff has developed a method of allocating these administrative expenses ratably to both regulated and ABI efforts. See paras. 70–72, below.

2. *BTL*

45. Examination of BTL's identification and reporting of CPE preoperational expenses began with a review of the BTL internal audit reports and supporting workpapers. The extent of the auditor's tests appeared satisfactory. The staff, therefore, concluded that it would not be necessary to duplicate the internal auditor's program.

46. Instead, the staff determined that an independent process was necessary to identify CPE related effort. A group of FCC auditors and engineers and a computer systems analyst reviewed all of BTL's individual task descriptions (over 2000 cases and project profiles, See paras. 16–18, *supra*), and selected approximately 400 items

which appeared to be CPE related. The staff effort included tests to identify specific products that were included on the product lists furnished by the marketing departments. Approximately 300 of the 400 items selected by the staff had been reported by BTL as CPE preoperational expenses. The remaining 100 required further scrutiny in the field with BTL personnel.

47. That review took place during the week of September 13, 1982. The staff discussed BTL's identification and selection process for CPE preoperational expenses with BTL personnel. The staff found that the effort prior to April 7, 1980 that was considered reportable ($15 million) was for five specific products that would be introduced by ABI. The rest of BTL's CPE expenses prior to April 7, 1980 were for products that were in the embedded base and were not, therefore, reportable. Subsequent to April 7, 1980, all CPE development costs were identified and reported according to AT&T guidelines.

48. The 1980 CPE effort reported by BTL was derived from estimates based on the time each specific department spent on CPE related work. The staff's examination of this estimating process and the supporting documents led it to conclude that BTL had used a reasonable and appropriate method to identify and report its 1980 CPE preoperational expenses.

49. The staff reviewed BTL's project profile forms and selected 76 projects as possibly CPE related for the January 1, 1981 through June 30, 1982 period. These projects represented several of BTL's segments (Network, Business, Residence, Bell Projects, Research and Basic Technology).

50. Of the 76 projects identified by the staff as CPE related, 32 had already been reported by BTL in the March 5, 1982 paragraph 105 report and were, therefore, excluded from further review. Expenses reported for these 32 projects totalled $76.6 million.

51. The 44 remaining projects totalled $193.6 million. The staff discussed these projects with BTL officials to determine why they were not reported as CPE. Of the 44 projects, the staff discovered that 24 were funded by WECO as SD&D or by the operating telephone companies directly. The remaining 20 were funded by AT&T as R&SE. The results of staff reviews with various BTL managers for each of the segments concerning the 44 projects is discussed in paragraphs 53–63, below.

52. The staff also interviewed three BTL engineers responsible for 22 projects that were reported as CPE preoperational expense to test the procedures followed to identify these projects and report the expense.

a. *Network*

53. BTL did not include any of the 17 network projects selected by staff as CPE for purposes of paragraph 105 reporting. Twelve of the seventeen were funded by WECO as SD&D. Five were funded by AT&T as R&SE. Generally, staff discussions at BTL disclosed that the network projects identified involved services that were for the benefit of an entire network or system or were for the development of network-related products and, consequently, were not reportable under para. 105.

54. The staff identified two other BTL network projects that appeared to involve CPE development. These were mobile radio systems and CPE to be marketed internationally. According to BTL officials, neither of these projects involves products to be sold by ABI and, therefore, neither was reported. Mobile radio is being funded by a separate AT&T corporation. International CPE is being funded by AT&T Interna-

tional. The staff was informed that CPE to be sold internationally must meet different engineering and design standards than products to be sold domestically.[10]

b. *Business*

55. The staff identified fourteen business projects as CPE related. Thirteen had already been reported by BTL as CPE. The remaining project involved equipment used in the central evaluation of network services for business customers. It appears to be totally network related. It was, therefore, properly excluded from paragraph 105 reporting.

56. BTL reported $361 Million ($70 million for RS&E and $291 million for SD&D) of business related CPE development costs through June 30, 1982. This represents about 72 percent of the $501 million of CPE development expenses reported for this period.

57. The staff discussed the selection of the projects reported as business CPE with BTL managers, and reviewed the workpapers prepared by BTL engineers to support their selections. The staff also discussed the CPE identification process with three of the BTL engineers responsible for business projects.

58. The staff found that the BTL Business segment identified and reported all CPE related projects and costs for 1981 and the first six months of 1982. Exclusions from this segment were previously reported as preoperational expenses for the Advanced Communications Services (ACS).[11] Reported costs were traced to BTL reports showing project costs by segment. Therefore, the staff believes that BTL included all relevant business project costs in the paragraph 105 reports.

c. *Residence*

59. The staff identified sixteen residence projects as possibly CPE-related. Thirteen had already been reported by BTL as CPE. The three excluded projects appeared to be either ACS preoperational expenses or work for the operating telephone companies regarding embedded CPE. Therefore, BTL excluded them from the paragraph 105 reports. Whether this exclusion of work for the BOCs regarding embedded CPE was proper will require further study by the staff. See *CPE Capitalization Order*, paras. 50–54

d. *Bell Projects (BP)—General*

60. The staff identified fifteen BP-General projects as possibly CPE related. Only five were reported by BTL as CPE. Of the remaining 10, six were projects involving regulated products or services for the BOCs. One involved CPE work for AT&T International and was designed to meet international standards. Two projects were for business improvement studies involving development of software and standards for information systems. Neither of these projects appears to be directly related to CPE development work. The remaining one involved patent work for AT&T and WECO to secure CPE patents which became BTL property. In the opinion of BTL staff, any sales of patents to ABI must be for proper consideration, which would include the value of this patent work.

e. *Research*

61. The staff identified eight research projects totalling $62 million as possible CPE

[10] The Further Reconsideration of Computer II, 88 FCC 2d 512, 554 (1981), permits AT&T to continue marketing CPE internationally as it has in the past.

[11] ACS preoperational expenses were reported in connection with AT&T's Capitalization Plan for enhanced services, filed November 30, 1981. AT&T now calls this service the "Advanced Information Service, Net 1000." This enhanced service is offered by ABI. *See* Enhanced Services Order.

development work. One of these was reported as CPE by BTL. The staff discussed the remaining projects with BTL personnel and found that they were for experimental research that may evolve into products that can be used by the BOCs or possibly be sold by ABI. The point in time that this may occur, or even whether it will occur, is unknown at this time. In any event, much of this basic or fundamental research does result in some contribution to Bell's technology and it seems reasonable to allocate some portion of these expenses to ABI.

f. *Basic Technology*

62. Staff identified six projects totalling about $37 million that appeared to be CPE related. None of these projects were included in the paragraph 105 reports. All were funded by WECO as SD&D. The staff did not continue to examine this area at this time. See note 3, *supra.*

63. Several other pertinent areas were not reviewed because of time constrants. These include development of quality assurance and reliability standards for CPE under development. In addition, they include development of training courses, mannuals and other educational materials relating to that CPE. Additional analysis will be required to ensure that ABI bears its share of this type of effort.

g. *Analysis of Overhead*

64. The staff has begun its review of the composition of the overhead pools and the allocative formulas used at BTL. The staff will continue to examine the applied loadings and to assess the extent to which direct CPE expenses were being included as loadings.

65. The separate case required in the *Enhanced Services Order* for all moving expenses involving ABI has not yet been established. BTL is attempting to identify these expenses and their source.

66. Additional field work at BTL will include the review of certain adjustments to reported loading costs recommended to BTL by the staff. Apparently, the para. 105 reported data were selected from a BTL report computed by using standard loading rates. The billing to AT&T, however, included the actual load costs. These actual costs were not allocated to each individual case at year end. There was, therefore, a variance between the application of standard rates and the actual expense incurred. This difference had an effect on the reported CPE preoperational cost. BTL estimates the difference at $5.2 million for the period 1979–81. This adjustment will be included in the next para. 105 report.

67. Coincident with the audit of overhead elements, the staff discovered that BTL was providing certain administrative services to ABI. This situation occurred because of the temporary co-location of BTL and ABI personnel at the Lincroft facility. The cost of these services is estimated at $3.2 million for the period July 1, 1982 through December 31, 1982. BTL stated that ABI will be charged for the cost of these services as soon as the authorization for billing is established. Since these services are of an overhead nature, they are allocated to customer cases as a loading and billed. BTL, therefore, will have to adjust past billings to correct this misallocation. The actual billing to ABI and the effects of the adjustments will be monitored by the staff during its continuing audit program. The staff must also review the extent to which formation expenses were incurred by BTL on behalf of ABI and have been reported.

V. *Conclusions, Findings and Recommendations*

A. *Summary of Findings*

68. The staff's findings of additional expenses to be included in subsequent para. 105 reports and which may be eventually reimbursed to the BOCs and Long Lines are summarized below:

General Departments

	(000)'s
Business Services BDPs omitted (para. 38, *supra*)	3,583
BOC work for Business services (para. 39, *supra*)	1,180
BOC work for Residence Marketing (para. 43, *supra*)	2,929
Additional BDPs to be reported by other General Departments (para. 34, *supra*)	1,980
TOTAL GENERAL DEPARTMENTS	$9,672

BTL

Adjustment of BTL loading rates (para. 66, *supra*)	5,200
Administrative services to be billed to ABI (para. 67, *supra*)	3,200
TOTAL BTL	$8,400
COMBINED TOTAL	$18,072

These amounts have been discussed with AT&T. AT&T has agreed with staff findings and will include these increases in the next para. 105 report. Some of the unreported dollars shown above include 1982 estimates, but will be adjusted to actual costs when final figures are available. The staff is continuing to examine non-license contract invoices, overhead elements, and BOC billings.

69. As a result of the staff reviews of AT&T's reported CPE preoperational and subsidiary formation expenses, its applied overhead loadings, and its compliance with the Commission's separation requirements, the staff has concluded that AT&T has made a reasonable effort to identify and report all unregulated activity. Except for some omissions during compilation of the reported data and additional expenses to be reported as a result of staff findings, the actual costs reported in the July 1, 1982 Capitalization Plan have been reconciled to existing AT&T reports produced from their financial accounting systems. The July amounts have already been adjusted upward (see AT&T's August 13, 1982 para. 105 filing). These figures will again be increased as a result of staff findings. These adjustments will be reported in future para. 105 filings.

B. *Allocation of Administrative Expenses*

70. Other allocative mechanisms used by AT&T to distribute loadings to the unregulated activity appear to be inadequate. The staff found that the AT&T Marketing Departments have not assigned any part of their administrative costs to ABI. These costs were incurred to manage, plan and support the department's operations and benefited both AT&T's regulated operations and ABI. AT&T takes the position that the supervisory loadings applied to the CPE reported expenses compensate for not charging ABI for these administrative costs. Therefore, such assignment is unnecessary. The staff disagrees with this opinion.

71. The total expenses incurred by all three departments in the marketing organization, including administration, were $208 million for 1981. These three

departments spend money for both regulated and ABI effort. It can be presumed that administrative expenses are incurred in managing the entire organization. One department, Residence Marketing, incurred approximately 20% in 1980 and 30% in 1981 in its administrative division.[12] The remaining departments could be expected to have spent similar proportions on administration. Estimating conservatively, if we assume approximately 20% of the total expenses were administrative, $41 million would be a reasonable estimate of total marketing organization administrative expense. The remaining $167 million represents total marketing organization non-administrative expenses. ABI's share of total non-administrative expenses was about $40 million in 1981. Assuming further that administrative expenses were incurred in the same proportion as non-administrative expenses, ABI's share of administration should be approximately $9.8 million for 1981 for the three marketing departments. The staff will further analyze these departments to determine ABI's proper share of administrative expenses for all three years in question. AT&T is invited to submit to the staff its own data on this question.

72. The $86,000 supervisory loading for Residence Marketing used in the para. 105 report seems clearly insufficient since it only represents a proportionate share of sixth and seventh level management. In addition, the loading factor used for other corporate overhead expenses in the para. 105 reports does not include internal departmental administration. This expense should be allocated proportionately between regulated and unregulated activities. The staff recommends that administrative expenses for the marketing departments and any other of the General Departments which contributed to ABI formation or CPE development be recomputed according to the method described above. The additional dollars should be reported in the next para. 105 filing.

C. *Summary of Work to be Completed*

73. Work to be completed in the audit of CPE development and subsidiary formation expenses includes:

a) Review of AT&T responses to BDPs selected by staff as at least partially reportable but previously unreported by AT&T (paras. 34–44, *supra*);

b) Further examination of BDPs in departments with subsidiary formation responsibility to determine the extent of charges made to reportable formation BDPs (this would include the General Departments tax, legal and ASD departments at a minimum) (para. 26, *supra*);

c) Analysis of Business Services and Business Marketing (General Departments 25 and 26) to separate administrative expenses (paras. 70–72, *supra*);

d) Completion of staff review of General Departments non-license contract billings and direct BTL billings to the BOCs that appear to be related to CPE development or subsidiary formation (paras. 8 and 59, *supra*);[13]

[12] The administrative division of the Residence Marketing Department spent approximately $9 million in 1980 and $14 million in 1981. This division is responsible for personnel, planning, financial analysis and administration for the Residence Marketing Department. These administrative functions accounted for nearly 20% of the total departmental expense in 1980 and approximately 30% in 1981. The supervisory loading applied in the para. 105 report for the Residence Marketing for CPE was only $86,000 through 1981.

[13] The staff recommends that AT&T request its independent auditors to perform this reconciliation. The auditors' report on the results of that reconciliation should be provided to the Commission staff no later than April 30, 1983. The auditors' work papers should be made available for inspection by the Commission staff when the report is filed.

e) Reconciliation of license contract billings through December 31, 1981 to AT&T general books, and develop the extent to which preoperational and formation expenses were excluded from license contract billings (para. 8, *supra*);

f) Testing components of General Departments overhead pools for potential direct preoperational expenses, and verification of allocation algorithms used to distribute overheads (para. 8, *supra*);

g) Examination of subsidiary formation expenses identified by BTL, but not yet included in para. 105 reports (para. 67, *supra*); and

h) Testing of New York Telephone Company for expenses reported and the extent of subsidiary formation efforts. (paras. 13 and 21, *supra*).[14]

74. In the *CPE Capitalization Order*, para. 54, the Commission noted that AT&T has taken a different approach for CPE development expenses incurred by the BOCs, WECO and AT&T than it has taken for those incurred by BTL. In order to made the reporting more consistent, the Commission directed AT&T to account for all expenses incurred by the BOCs, WECO and AT&T after May 2, 1980 that relate to post May 2, 1980 BTL activities included in the preoperational expenses.

75. AT&T is in the process of reviewing its records and BDPs to estimate the increased expenses to be reported. The staff will have to review AT&T's results. These results may alter the findings described in other parts of this report.

[14] Approximately 20% of the $7 million in subsidiary formation expenses reported by the BOCs were incurred by New York Telephone Company. The staff may also review subsidiary formation expenses incurred by other BOCs, including the C&P Telephone Company. Oversight of expenses incurred by the BOCs is, of course, substantially a responsibility of the state regulatory agencies. By reviewing New York Telephone or any other BOCs the Commission staff does not intend to relieve the states of their responsibilities to oversee BOC expenses, nor does the Commission in any way warrant that all such BOC expenses were proper.

Common Carrier, in National Defense
Disaster Communications Service
Emergency
Government Communications
Rules, Waiver of
Telephone Company, Sale of Equipment

Temporary waiver of Computer II rules granted to permit Department of Defense and other specified government agencies to continue to obtain new customer premises equipment in emergencies or to meet national defense and emergency preparedness needs from AT&T Long Lines or the BOCs until the divestiture of the BOCs.
–AT&T Co.

FCC 83–143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations With Respect to the Department of Defense and Specified Government Agencies	ENF 83–13

MEMORANDUM, OPINION AND ORDER

(Adopted April 7, 1983 Released April 12, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT.

1. On January 5, 1983, the American Telephone and Telegraph Company ("AT&T") petitioned the Commission to waive the *Computer II* rules[1] to enable the Bell Operating Companies ("BOCs") and the Long Lines Department of AT&T ("Long Lines") to provide limited amounts of new customer premises equipment ("CPE") to the Department of Defense ("DoD") and certain other specified government agencies when necessary to meet critical national security and

[1] 47 C.F.R. §64.702. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), further reconsideration, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3676 (U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352).

emergency preparedness communications requirements. AT&T filed its petition at the request of, and on behalf of, DoD and other specified government agencies. The specified government agencies joining in this request are the Departments of Energy, Interior, Transportation/FAA/Coast Guard, the General Services Administration, the Central Intelligence Agency, the National Aeronautics and Space Administration, the U.S. Information Agency, the Nuclear Regulatory Commission and the Federal Emergency Management Agency (FEMA).[2]

2. The waiver is requested for a limited time, until divestiture of the BOCs pursuant to the Modification of Final Judgment (MFJ).[3] As AT&T has implemented our *Computer II* separate subsidiary requirement for deregulated CPE, the BOCs and Long Lines are currently precluded from meeting DOD's needs if embedded CPE inventory is inadequate. AT&T has established American Bell Inc. as the corporate subsidiary to market new CPE for the Bell System. After divestiture pursuant to the MFJ, the BOCs will have the option of reentering the CPE market and could at that time provide deregulated CPE to DoD and other customers.[4] Thus for the period prior to divestiture, AT&T seeks a waiver to permit DoD to deal directly with the BOCs and AT&T Long Lines in emergency situations where the provision of new CPE may be required. We have concluded that a waiver is justified but that it should be narrower than originally requested by AT&T and DoD.

3. AT&T requests the transitional waiver for three sets of circumstances:

> First, in cases of Presidentially declared disasters and emergencies;
>
> Second, in emergency or crisis situations not formally declared by the President; and
>
> Third, with respect to critical national security communications systems and circuits.

In emergencies, AT&T states, it is critical to continue to allow DoD and the specified government agencies to turn to a single point of contact which will be responsible for providing without delay, and managing, all the necessary communications facilities and CPE on an end-to-end basis. Furthermore, it is claimed that this end-to-end

[2] DoD Statement in Support of Petition for Waiver, at 1, n. *; DoD Reply Comments, at 1, n. *.

[3] U.S. v. American Telephone and Telegraph Co., Civ. Nos. 74–1698 and 82–0192, 47 Fed. Reg. 40,392 (D.D.C. 1982), *aff'd sub nom.* Maryland et al. v. United States, Nos. 82–952, 82–953, 82–992 and 82–1001, 51 U.S.L.W. 3628 (U.S. March 1, 1983).

[4] The Commission is presently considering whether the divested BOCs should be subject to the Computer II structural separation requirements. Notice of Proposed Rulemaking, FCC 83–71, released March 4, 1983. If the Commission decides to impose the separate subsidiary requirements on the BOCs, we expect that the government agencies will make appropriate arrangements to procure CPE consistently with that requirement well in advance of the divestiture of the BOCs.

management capability is necessary to ensure the continued operation of certain critical national security communications systems such as the Strategic Air Command Primary Alert System and the North American Air Defense Command Alerting System.

4. AT&T states that only a small amount of new CPE would actually be provided under the requested waiver. Embedded inventory will be used until depleted. In addition, AT&T states that most of the government's requirements for new CPE can be satisfied in compliance with the *Computer II* rules, and according to federal statutes and procurement regulations requiring competitive purchasing practices wherever feasible.[5] New CPE will be provided under the waiver only in the three situations described above, AT&T states, and only where needs cannot be met with CPE from embedded inventories. It will be used only on communications systems qualifying for restoration priority under the Commission's restoration priority rating system (*see* 47 CFR §64.401) and only where sole source procurement would be justified under applicable procurement regulations.

5. In support of the waiver request, DoD stresses its claim of need in an emergency to be able to turn to a single entity to provide end-to-end communications services. Due to the urgency of time in emergency situations, it would be unreasonable, DoD states, to require the government agency itself to attempt to contact and coordinate multiple suppliers. Furthermore, regarding critical national security communications systems, DoD argues that a single supplier is necessary to ensure maximum performance, compatibility of equipment and comprehensive system coverage.

6. Four parties filed comments regarding the waiver request. FEMA states that any waiver should be structured so as to avoid giving any carrier a competitive advantage. Tone Commander Systems, Inc. and Valcom Corporation propose expanding the waiver to permit the BOCs to provide new CPE to all customers until divestiture. GTE service Corporation opposes granting of a "blanket waiver." It notes that national security and emergency preparedness do not necessarily require sole source procurement. It proposes that DoD and the other government agencies list the systems they regard as critical to national defense and emergency preparedness and that they submit the list to the FCC for review. GTE argues that any waiver should be restricted to the systems listed. It points out that companies other than AT&T have the capability of providing communications services to DoD.

7. The Department of Justice ("DoJ") states that it does not oppose a waiver for Presidentially declared emergencies or for other genuine crisis situations.[6] For the other, non-emergency situations,

[5] *See* 10 U.S.C. §§2301 *et seq.*, and 41 U.S.C. §§252–53.

however, where there is no practical alternative to obtaining new CPE from the service provider, DoJ suggests that a waiver should be granted only if made subject to certain conditions and procedures which it describes as follows:

> Wherever applicable procurement regulations would permit the specified government agencies to justify sole-source procurement of a particular piece of equipment, the specified government agencies would retain and exercise the discretion to select the particular equipment, and designate their service provider (a BOC or Long Lines) as their representative to obtain and supply the new CPE. Title could reside in the specified government agencies, or alternatively, the BOC or AT&T Long Lines could own this new CPE, but would not be allowed to include it in its embedded rate base.

DoJ Comments, 5 (February 3, 1983) [footnote omitted]. DoJ states that retaining in the government agencies the discretion to choose the equipment supplier would minimize conflict with *Computer II*.

8. In each such transaction, DoJ suggests, the service provider should be required to file with the Commission for public inspection a description of the transaction and a copy of the federal agency's sole-source justification. Public inspection of these documents, DoJ states, would discourage abuse of the *Computer II* waiver.

9. Four parties filed reply comments. MCI Telecommunications Corporation argues that grant of the waiver would effectively postpone for a year or more its opportunity to serve the government market. Furthermore, MCI argues, the waiver request is overbroad, fails to indicate the specific provisions of the rule sought to be waived, fails to specify the types and amounts of CPE involved, and fails to satisfy public interest concerns regarding the anticompetitive effects of sole source procurement. MCI states that since 59% of DoD procurement is on a sole source basis, a "limitation" to those situations is meaningless.

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[6] DoJ proposed that these "other crisis situations" be defined as in Defense Communications Agency Circular 310–130–1, Chapter II, Paragraph 2 (February 1982):

> d. Submission of Communications Requirements for Emergency service
>
> (1) Communications requirements resulting from any of the below circumstances may be submitted as emergency requirements and afforded special handling:
>
> (a) State of crisis declared by the national command authorities.
>
> (b) Efforts to protect endangered U.S. personnel or property.
>
> (c) Enemy action, civil disturbance, national disaster, or any other unpredictable occurrence that has damaged facilities whose uninterrupted operation is essential to national security or other ongoing crisis.
>
> (d) The director of a federal agency, commander of a unified/specified command, head of a MILDEP, or commander of a major command, e.g., TAC, COM 2ND FLT, etc. (CINCEUR ONLY IN THE EUROPEAN AREA), has certified that a communications requirement is so critical to protection of life and property or to the national defense that it must be processed immediately.

10. GTE notes that the DoJ comments support a waiver only under limited circumstances and subject to certain conditions. GTE agrees with DoJ's conclusion that the petition is not an attempt to obtain a waiver of the *Computer II* finding that CPE should be deregulated. It argues, therefore, that any waiver should not permit continued provision of CPE subject to tariff regulation.

11. AT&T rejects as impractical GTE's suggestion that the waiver only apply to a pre-certified list of critical systems. AT&T supports DoD's proposal to use the Commission's restoration priority rating system as a waiver criterion to assure that critical national security systems and circuits are identified. AT&T states that, rather than restricting DoD procurement to AT&T or the BOCs, grant of the waiver would merely permit DoD to use Long Lines or the BOCs when its needs could not adequately be met any other way.

12. In its reply comments, DoD describes an approach to granting of a waiver under the guidelines suggested by DoJ. That approach would operate as follows:

> For "emergency" situations as defined in DCA Circular 310-130-1, DoD or a specified Government agency could turn to AT&T Long Lines or a BOC whenever deemed necessary, and service involving new CPE would be provided as it is today (i.e., under tariff and added to the embedded base).
>
> For those other situations in which sole source procurement of service involving new CPE is warranted under applicable regulations, DoD or a specified Government agency could turn to AT&T Long Lines or a BOC in the same manner they do today. Thereafter, if the service cannot be provided with CPE from the embedded base, Long Lines or a BOC will so notify the affected Government agency, specifying both that CPE which is unavailable from the embedded base and one or more suppliers where such CPE is available. The affected Government agency will then determine from which supplier Long Lines or the BOC will obtain the new CPE in question and advise Long Lines or the BOC, which will then obtain the CPE and provide or be responsible for it as part of an end-to-end service to the U.S. Government in the same operational fashion as is done so today. Title to new CPE provided under these circumstances could, however, reside either with the Government, Long Lines, or the BOCs, but if Long Lines or a BOC possesses ownership it cannot be provided under tariff or added to the embedded rate base. In each of these situations the affected Government agency will provide a copy of its sole source justification to the service provider, for submission as part of the required "transaction description".

DoD Reply Comments, 4 (February 16, 1983) [footnote omitted]. DoD states that this approach would be adequate to meet national security and emergency preparedness needs.

Discussion

13. DoD has described two fundamental needs in providing emergency services and maintaining critical national security communications systems for a limited time period: first, a need, in emergency situations where time is of the essence, to be able to turn to a single entity to obtain end-to-end communications services including any necessary CPE; and second, a need to assure the continued availability of new CPE for critical national security

systems. DoD is seeking, through this waiver petition, to preserve the option of turning to AT&T Long Lines or the BOCs to meet these needs for a transitional period until AT&T divests the BOCs pursuant to the Modification of Final Judgment in *U.S. v. American Telephone and Telegraph Co.*

14. Based on the showing made by AT&T and DoD and the comments filed by other parties, we find that the public interest favors grant of a waiver along the lines of DoJ's comments. That waiver, however, must be narrower than that originally requested and must be subject to certain conditions.

15. We shall adopt the approach suggested by DoJ and DoD with one significant change: we see no need for any CPE obtained under this waiver to be provided under tariff or added to the embedded rate base (or regulatory revenue requirements) of the service provider. The policy of *Computer II* is that ratepayers should not bear costs associated with provision of new CPE. Furthermore, additions of CPE to the embedded base under this waiver would complicate the already difficult process of detariffing the embedded CPE. *See Notice of Inquiry* (CC Docket No. 81–893). The purposes of the waiver can be accomplished without adding new CPE to the embedded base. Thus, any new CPE that is provided according to this waiver, and any expenses incurred in its provision, must be accounted for separately from CPE which is in the embedded base and must be treated for accounting purposes in "below the line" accounts.

16. In the case of Presidentially declared emergencies and other emergencies as defined in DCA Circular 310–130–1, therefore, DoD and the specified government agencies may continue to turn to AT&T Long Lines or a BOC if necessary to obtain service, including new CPE if CPE is not available from the embedded inventory. For other situations, where sole source procurement is justified, DoD and the specified government agencies may also continue to obtain service from AT&T Long Lines or the BOCs. In that case, however, if the necessary CPE is not available from embedded inventory, Long Lines or the BOC must notify the government agency of that fact and identify the CPE which is unavailable. DoJ proposed that Long Lines or the BOC then identify "one or more suppliers" who might be able to provide the CPE in question. The government agency would retain the discretion to specify the CPE supplier. Consistent with the spirit of DoJ's proposal, in these situations we require Long Lines and the BOCs to identify at least one supplier other than an affiliate which can supply the CPE in question (unless, within their knowledge there

is no unaffiliated source). Long Lines or the BOC may then obtain the new CPE from the supplier selected by the government agency[7] and be responsible for it.

17. In both situations, title to any new CPE provided according to this waiver may reside in the government agency, in Long Lines or a BOC or in the third party CPE supplier. No CPE provided under this waiver, however, may be provided under tariff or added to the embedded rate base. The government agencies, the service providers and the CPE suppliers are to free to make any suitable arrangements for procurement of CPE—outright sale, lease, sale and buyback, or any other arrangement—as long as those arrangements do not result in adding equipment to the rate base of any carriers or in adding costs to revenue requirements for ratemaking purposes.

18. We stress that this waiver is temporary. It will expire immediately on the date of divestiture of the BOCs pursuant to the Modification of Final Judgment. After that date, any provision of new CPE to DoD or any of the other agencies included in this waiver must be in compliance with the requirements of *Computer II* and any Commission decision rendered in the interim which may affect the structure under which the divested BOCs provide new CPE.

19. Accordingly, we conclude that the public interest in defense and emergency communications, 47 USC § 151, would be served by grant of a temporary waiver as previously limited. This waiver does not change the *status quo*. It merely has the effect of changing the effective date of certain of the requirements of our *Computer II* rules as they apply to the affected parties. *Waiver*, 70 FCC 2d 1354, 1356 (1978).

20. IT IS THEREFORE ORDERED, pursuant to Section 1.3 of the Commission's Rules and Regulations that AT&T's Petition for Waiver IS GRANTED to the extent described herein. This waiver SHALL TERMINATE UPON DIVESTITURE OF THE BELL OPERATING COMPANIES. We expressly conclude that this ruling shall have no effect upon applicable procurement regulations governing the subject agencies.

21. IT IS FURTHER ORDERED that AT&T shall provide quarterly reports to the Chief, Common Carrier Bureau on the types and quantities of new CPE provided by AT&T Long Lines and the BOCs pursuant to this waiver. These reports shall be filed no later than thirty days after the close of any calendar quarter beginning with the quarter ending June 30, 1983.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[7] Nothing in this order is intended to limit the government agencies' selection of CPE suppliers to those identified by a Long Lines or a BOC. The agencies are free to choose any suppliers who can meet their CPE needs.

Coverage, Principal City
Remand from Court of Appeals
Site Location, Change of
Studio Location, Main
Suburban Community 307(b) Issue, FM Station

Grant of applications for new transmitter locations affirmed in light of Commission abolition of suburban community. *Berwick* and *de facto* reallocation policies where compliance with licensing rules—provision of requisite signal to community of license, location of main studio in community, and programming proposal that will serve needs of community of license—supports presumption of intention to serve designated community.
-Ben Lomond B/cing Co.

FCC 83-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BEN LOMOND BROADCASTING CO. (KZAN) Ogden, Utah	File No. BPH-8, 473- KZAN(FM)
Req: 97.9 MHz, Channel No. 250 49 kW (H&V), 700 feet (Amend. to 25 kW (H&V);3,650 feet)	
KDAB, INC. (KDAB) Ogden, Utah	File No. BPH-10, 056- KDAB(FM)
Has: 101.1 MHz, Channel No. 266 100 kW (H&V), 700 feet	
Req: 101.1 MHz, Channel No. 266 25 kW (H&V); 3,740 feet	
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: February 25, 1983; Released: March 14, 1983)

BY THE COMMISSION:

1. The Commission has before it: (i) the above-referenced applications for construction permits, which were subject to petitions to deny filed by Carman Corporation (Carman) and Communications

Investment Corp. (CIC), licensees of stations KLUB AM-FM and KALL AM-FM, Salt Lake City, Utah, respectively; (ii) the opinion of the United States Court of Appeals, District of Columbia Circuit, in *Communications Investment Corp. v. FCC.*, 641 F.2d 954 (1981), as amended by Order of the Court, which reversed the Commission's actions granting the applications[1], and remanded the cases for proceedings consistent with the opinion; (iii) statements and replies submitted by the applicants and the petitioners in August and September 1981 at the Commission's request; (iv) a joint petition on remand filed by Carman and CIC; and (v) related pleadings and correspondence.

2. As set forth more fully in our earlier orders and in *Communications Investment Corporation*, the applicants sought transmitter sites for two Ogden FM stations—KDAB and KZAN—at the Farnsworth Peak antenna farm, located in the Oquirrh Mountains, 18 miles west of Salt Lake City but 41 miles southwest of Ogden. The petitions to deny alleged that the proposals violated the Commission's *Berwick* doctrine[2], which questions the applicant's true intent to serve its community of license when the transmitter location is close to a larger market, and *de facto* reallocation policy, an attempt to utilize the channels assigned to Ogden to establish broadcast service in Salt Lake City, and thereby deprive Ogden of service from the channels specified. In granting the applications and denying the petitions, the Commission found that petitioners had failed to raise a substantial and material question of fact that required an evidentiary hearing on either the *Berwick* or *de facto* reallocation issues. The Commission found no basis for the arguments that KDAB would fail to provide a local service to Ogden from the Farnsworth Peak site. The Commission also concluded that KDAB had adequately documented the unavailability of alternative sites that could cure severe multipath interference problems experienced at its existing site, and that petitioners had failed to substantiate the availability of other sites. With respect to KZAN, the Commission held the KDAB decision dispositive of the matters raised by CIC.

3. Based upon its analysis of previous FCC decisions, the reviewing Court identified certain factors it believed the Commission has in the past considered relevant to a determination of intent with respect to *de facto* reallocation and *Berwick* issues, and rejected the Commission's determination that, applying these factors to the present cases, no substantial and material questions of fact existed.

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[1] The applications were granted in *D&B Broadcasting Co. (KDAB)*, 67 FCC 2d 570, 42 RR 2d 589 (1978), *recon. den., D&B Broadcasting Co.* (KDAB), 69 FCC 2d 1116, 43 RR 2d 551 (1978), and *Ben Lomond Broadcasting Co. (KZAN)*, 68 FCC 2d 1331, 43 RR 2d 1598 (1978).

[2] *Berwick Broadcasting Corp.*, 12 FCC 2d 8, 12 RR 2d 665 (Rev. Bd. 1968); 20 FCC 2d 393, 17 RR 2d 884 (1969); *sub nom. P.A.L. Broadcasters, Inc.*, 40 FCC 2d 546, 27 RR 2d 311 (Rev. Bd. 1973).

However, the Court recognized that "the Commission, by modifying its policies and practices could affect the nature and extent to which an evidentiary hearing is required." *Id.* at 978–9. Thus, the Court acknowledged the Commission's discretion to resolve by general rulemaking broad policy issues that otherwise would arise in successive adjudicatory proceedings and noted that the FCC might wish to proceed in that manner with respect to the instant cases. *SEC v. Chenery Corporation*, 332 U.S. 194 (1947); *Report and Order in Docket No. 14711 (Amendment of Multiple Ownership Rules)*, 29 Fed. Reg. 7535, 2 RR 2d 1588 (1964).

4. On July 1, 1982, the Commission published its *Notice of Proposed Rulemaking in BC Docket 82–320*, 47 Fed. Reg. 29282, which instituted a rulemaking proceeding to reexamine the purpose and necessity for its suburban community, *Berwick* and *de facto* reallocation policies in light of the Court's remand in *CIC* and the requirement of Section 307(b) of the Communications Act of 1934, as amended, that the Commission "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In its *Report and Order in BC Docket 82–320*, adopted February 17, 1983, the Commission concluded on the basis of the record adduced in the rulemaking, that stations in larger communities frequently use these policies to impede the establishment or improvement of competing stations in nearby smaller communities, and thereby frustrate the objectives of Section 307(b). The Commission was also convinced that the *de facto* reallocation policy has too frequently been invoked by existing stations to preclude additional competition. In addition, the Commission noted that FM is a mature, thriving broadcast service today, well dispersed throughout the United States, and does not now require such policies designed to foster and facilitate its development. Accordingly, the Commission determined that the public interest would be better served by abolishing the subject policies, and that in circumstances where applicants are in compliance with the licensing rules—provision of the requisite signal to the community of license, location of the main studio in the community, and a programming proposal that will serve the needs of the community of license—it will be presumed that the applicant intends to serve the designated community. *Report and Order*, para 38.

5. Applying these new criteria to the instant case, we note that during the period since KDAB was relocated to Farnsworth Peak and since KZAN commenced operations at that location, both KDAB and KZAN have complied with their representations to the Commission. The applicant's compositional studies and ascertainments of needs and interests have been directed to Ogden. Both stations have aimed the bulk of their public affairs, news and public service

programming at Ogden subjects and Ogden listeners. Both stations' studios and business offices are in Ogden.[3] With respect to primary signal coverage of Ogden, both stations provide the required signal.[4] Based upon these factors, which demonstrate service to the community of license consistent with our licensing rules, we conclude that the transmitter locations proposed by KZAN and KDAB comport with the mandate of Section 307(b) of the Act, and no substantial or material questions of fact therefore remain that require an evidentiary hearing or which should otherwise disturb the grants of the construction permits at issue.[5]

6. Accordingly, IT IS ORDERED, That the petitions to deny and the joint petition on remand filed by Communications Investment Corp. and Carman Corp., ARE DENIED.

7. IT IS FURTHER ORDERED, That the above-captioned applications ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[3] Joint Comments on FCC Action on Remand, filed by KDAB and KZAN. August 3, 1981, Para. 62.

[4] Carman alleged for the first time in a reply pleading that KDAB would not provide the required minimum signal to the entire city of Ogden. According to Carman's allegation, KDAB would provide primary signal coverage to all but 0.4 square miles of that city and 99% of the population. It would provide a signal only 1 dbu below the required standard (70 dbu) to the remaining 1% of the population. In our original orders we concluded that even if Carman's allegation was true and had been timely raised, it presented a *de minimis* shortfall and that under the circumstances, waiver of the rule would be appropriate. (69 F.C.C. 2d at 1121 n.14) Neither Carman nor CIC has presented any further evidence to lead us to conclude that our initial determination was incorrect. We adhere to it in this order.

[5] We noted in our original order that the public interest detriment that would result from the creation of a small loss area as a result of KDAB's transmitter relocation was outweighed by the significant public interest benefits of the move. (67 F.C.C. 2d at 573 n.10) There is no factual dispute that would warrant a hearing on this issue, and additional information on the loss area submitted by the applicants in their August 1981 Joint Comments, which is undisputed by the petitioners, confirms our original conclusion.

Control, Concentration of
Diversification, of Control of Mass Media
Financial Qualifications, Loan Commitment, Ability to Meet
Local Residence, see also Comparative Criteria
Ownership and Management, Integration of
Power Equipment, Auxiliary

Review Board affirms FM grant where credit due 100% female ownership integration proposal, combined with past local residence credit, overcomes opponent's previous broadcast experience, proposed future residence, and very slight comparative coverage preference. Auxiliary power proposals are deemed equal, and ALJ properly declined to add real party in interest or regional concentration of control issues.
–*Cannon's Point Broadcasting Co.*
BC Docket No. 81–306

FCC 83R–22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81–306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81–307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81–309 File No. BPH-801003AF
For Construction Permit for a New FM Broadcast Station	

Appearances

Jerrold D. Miller, on behalf of Cannon's Point Broadcasting Company; *Stuart A. Shorenstein*, on behalf of James U. Steele; *Robert S. Stone*, on behalf of Dale Bell; and *Charles W. Kelley* and *Stephen T. Yelverton*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: March 18, 1983; Released: March 29, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Cannon's Point Broadcasting Company (Cannon's Point), James U. Steele (Steele), and Dale Bell (Bell) for authority to construct a new FM broadcast station to operate on Channel 224 at St. Simons Island, Georgia.[1] By Hearing Designation Order, 46 Fed. Reg. 26689, published May 14, 1981, these applications were designated for consolidated hearing on a limited financial qualifications issue (against Cannon's Point) as well as the standard comparative issue to determine which applicant would best serve the public interest.[2]

2. In an Initial Decision (I.D.), FCC 82D-58, released August 17, 1982, Administrative Law Judge (ALJ) John M. Frysiak granted the Bell application. After finding that Cannon's Point was financially qualified, he concluded that Bell was comparatively the best applicant based on determinations that: (a) Bell and Steele, which were both credited with 100% full-time integration of ownership and management, were preferred over Cannon's Point, which was awarded 87.15% quantitative integration credit; (b) Bell's qualitative attributes as an integrated female owner with past local residence were superior to Steele's attributes as an experienced broadcaster; (c) Steele merited a slight preference for comparative coverage, which was offset by Bell's slight preference for proposing auxiliary power at both its studio and transmitter sites; and (d) Cannon's Point deserved a very slight diversification "demerit."

3. The proceeding is now before the Review Board on exceptions filed by Cannon's Point and Steele and reply briefs filed by Steele, Bell, and the Mass Media Bureau.[3] The Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral argument held December 17, 1982, and our examination of the record. We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the

[1] The application of Burrows Broadcasting Company (File No. BPH-801001AA) was also designated for hearing. Subsequently, the Burrows application was dismissed at the applicant's request. Memorandum Opinion and Order, FCC 81M-4012, released December 18, 1981.

[2] Because there appeared to be significant differences in the areas and populations that would receive service from the respective engineering proposals, the Order indicated that geographic and demographic coverage would be considered under the standard comparative issue.

[3] In a short "Statement in Support of Initial Decision and Limited Exceptions," Bell excepts only to the ALJ's conclusion that Steele has no other media interests, arguing that Steele neglected to introduce the necessary evidence to meet its burden of proof on this point. Because Bell does not contend that Steele does have any other media interests, and noting that at oral argument counsel for Bell conceded that Steele's failure of proof was harmless error (Tr. 370), the exception will be denied.

Bell application will best serve the public interest, convenience and necessity.

4. *Financial Qualifications of Cannon's Point.* A limited financial issue was designated against Cannon's Point to determine the source and availability of an additional $24,539 to meet its costs for station construction and three months of operation. Hearing Designation Order, *supra*. Because Cannon's Point indicated that it would require a further $6,000 to purchase standby power generating equipment, the ALJ ruled that, to receive comparative credit for proposing auxiliary power, it must also demonstrate that it had sufficient funds to purchase the equipment. I.D., para. 37. Thus, Cannon's Point was faced with the burden of demonstrating that it had available approximately $31,000 in additional funds. The ALJ found that the applicant had adequately shown that it could rely on a $25,000 stock subscription by Mr. and Mrs. J. Wesley Cox, who in turn would borrow the $25,000 needed to make the stock purchase from Miss Betty Baell (Mr. Cox's aunt), and a $10,000 loan from Mrs. Jerome C. (Dorothy) Cox. *Id.*, paras. 36–37. He therefore concluded that Cannon's Point was financially qualified. *Id.*

5. In its exceptions, Steele argues that Cannon's Point should not be permitted to rely on these sources of funds because neither Miss Baell nor Mrs. Cox has sufficient current and liquid assets to meet her respective loan commitment and because the "earmarking" of the funds specifically for use by Cannon's Point is inadequate assurance that they actually will be available to it since both Cox families are technically close to financial insolvency. In reply, the Bureau asserts that the ALJ correctly found Cannon's Point to be financially qualified because the individuals making the loans have adequate financial wherewithal to provide the funds and are requiring that the loan proceeds be used by Cannon's Point only. We will affirm the ALJ's conclusion that Cannon's Point is financially qualified.

6. Miss Baell's balance sheet indicates that she has net current assets "in excess of $50,000" (Cannon's Point Exh. 1, p. 3) but the hearing record establishes only $43,000 of this amount (Cannon's Point Exh. 1B and Tr. 90) and she testified that she has about $16,000 per year in current liabilities. Tr. 77–80. Nevertheless, this leaves current assets exceeding current liabilities by $27,000, which is sufficient to meet Miss Baell's $25,000 loan commitment.[4] The

[4] Steele obliquely questions in note 25 of its Brief the adequacy of Miss Baell's showing, referencing his analysis in his proposed findings and conclusions. Neither this "exception" nor Steele's cited analysis amounts to more than speculation and quibbling about details. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1093, 50 RR 2d 1251, 1254 (Rev. Bd. 1982). And the Mass Media Bureau has apparently resolved its previous concerns in Miss Baell's favor. See Bur. Brief, note 4. Steele's "exception" will be denied. Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2). Similarly, we will deny Steele's exception to the ALJ's

Bureau supports the ALJ's application of the rationale of *Contemporary Television Broadcasting, Inc.* (Hearing Designation Order), Mimeo No. 05812, 46 Fed. Reg. 9202, published January 28, 1981, to Miss Baell's loan commitment. In that case, the Bureau held that where a bank has earmarked a loan specifically for station construction, it is not necessary to rely on the recipient's financial statement in order to determine whether the bank loan will be available; "it is reasonable to assume that the loan will be made available only for the stated purpose." *Id.* Here, Miss Baell earmarked her commitment (Cannon's Point Exh. 1, p. 5), and the Bureau maintains (Brief, p. 7) that the new processing policy that it announced in *Contemporary* is equally applicable because "As long as the party making the loan has the financial ability to provide such funds, it should make no difference whether that party is a bank or an individual." We affirm the ALJ's interpretation of *Contemporary* as supported by the Bureau charged with the new policy's administration. While Steele argues that a distinction should be drawn between bank loans and private loans (because in bank financing there are "adequate built-in assurances in the usual course of business to satisfy the Commission" (Brief, p. 43) that earmarked funds will in fact be used for station construction and here we are faced with "unsecured inter-family borrowing" (Brief, p. 44)), the Bureau rejects this distinction, and so do we. It is clear that the underlying rationale of *Contemporary* is that earmarking representations made to the Commission will be honored by both the lender and the borrower, so that if the lender is shown to have the necessary funds available and the funds are specifically earmarked for broadcast construction, the financial statement of the borrower becomes immaterial. While Steele is apparently unprepared to accept the Bureau's assumption (or presumption) that non-bank earmarked funds will be properly used, "the course of the positive or civil law . . . virtually abounds in . . . legal fictions . . ., not to speak of their close kin, presumptions" (ALJ Tierney in *Muncie Broadcasting Corporation*, FCC 81M-651, released March 10, 1981), and the Commission's entire scheme of regulation is premised on our ability to depend on the accuracy and truthfulness of representations made to us. *See Country Broadcasting Company*, FCC 83R-12, 93 FCC 2d ___ (Rev. Bd. 1983), citing *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157, 37 RR 2d 1235, 1248 (1976). Thus, we affirm the ALJ's approval of Miss Baell as a source of $25,000 for Cannon's Point without passing on the financial state-

refusal to broaden the designated financial issue into a general financial issue or to add a financial misrepresentation issue in Memorandum Opinion and Order, FCC 82M-0722, released March 5, 1982. We agree with the ALJ's conclusion that Cannon's Point's hearing testimony is not at variance with its application as amended and that no evidence has been produced which calls into question the Commission's previous discussion and conclusion in the Hearing Designation Order, *supra*, that only a limited financial issue was warranted. *See Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720, 8 RR 2d 991, 995–996 (1966).

ment of Mr. and Mrs. J. Wesley Cox. *Cf. Hassayampa Broadcasting*, 92 FCC 2d 472, 52 RR 2d 1059 (Rev. Bd. 1982).

7. As to Mrs. Jerome Cox's $10,000 loan to Cannon's Point, her ability to provide the funds is evidenced by a certificate of deposit in the amount of $10,092 and a loan commitment letter dated October 12, 1981. Cannon's Point Exh. 1, pp. 6 and 7. While the May 14, 1981 statement of financial condition of Dr. and Mrs. Jerome Cox (Bur. Exh. 1) puts their current liquid assets (including the $10,092 certificate of deposit) at approximate equilibrium with their current liabilities, the ALJ focused instead on their net worth of $220,067 and concluded that Mrs. Cox's certificate is not needed to meet the Coxes' current liabilities and, hence, is available to Cannon's Point as a loan. I.D., para. 37. While Steele asserts that "This ruling is contrary to years of precedent and cannot be sustained" (Brief, p. 41), Steele is clearly wrong. Steele does not question that the Coxes' net worth is more than $200,000 (because of some $300,000 in nonliquid assets), which is 20 times the size of the proposed loan, and the Commission has long held that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds. *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev.Bd. 1982). Thus, we affirm the ALJ's conclusion that Cannon's Point can rely on Mrs. Cox's $10,000 loan and his overall conclusion that Cannon's Point is financially qualified.

8. *Diversification of Control of the Media of Mass Communications.* The ALJ concluded that neither Steele nor Bell has any "present" interests in other media of mass communications; however, Cannon's Point was assessed a "very slight" diversification "demerit" based on the fact that a 0.4% stockholder and unintegrated vice-president and director, Anne Gallion, is also publisher and editor of a weekly newspaper serving Jekyll Island, a community located about one mile from St. Simons Island. I.D., para. 38. Cannon's Point and Steele except to the ALJ's refusal to take account of the interests of Mrs. Dale Bell (Bell's sole proprietor) in three Georgia cable television systems. While they note her undertaking (Bell Exh. 1, p. 1) to divest herself of all ownership and official relationships with those cable systems upon grant of her St. Simons Island application, as did the ALJ, Steele questions the likelihood that Mrs. Bell will carry out this promise, and both Steele and Cannon's Point argue that the promise is inconsistent with Bell's financial plan, which relies on the cable stocks as collateral for her bank financing. These exceptions will be denied. Steele's misgivings about Bell's divestiture intentions are based on hearing testimony in which she indicated that she had not yet taken any steps to sell the stocks. Tr. 262–265. We do not find anything unusual or disturbing

about this testimony, coming as it did on November 17, 1981, only six months after this proceeding began and nine months before the I.D. was released. Steele's concerns are rejected as premature and speculative. *Cf. Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 44 RR 2d 127 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423, 49 RR 2d 606 (1981), *pet. for mod. of Decision denied*, 50 RR 2d 789 (1981). As to the relationship between the proposed divestiture and Bell's financial qualifications, Bell amended her application on July 10, 1981 to include a letter from the Baxley State Bank, dated June 26, 1981, which indicates that the bank will accept as security for its loan commitment either the assignment of Bell's cable stocks or a certificate of deposit equaling the proceeds Bell would receive from sale of the stocks. This amendment was adequate to allow the ALJ to reject a proposed financial issue against Bell in Memorandum Opinion and Order, FCC 81M-2776, released September 2, 1981, and we affirm that action here. It is clear from the bank's letter that divestiture will not adversely affect its loan commitment to Bell. Finally, while Cannon's Point did not specifically except to its diversification "demerit," we will treat Ms. Gallion's multiple media interest as *de minimis* in view of her almost infinitesimal ownership interest in Cannon's Point (five shares out of 1312), her unintegrated role, the marginality of the other medium of expression (a weekly newspaper on a state park resort island—Tr. 172–4), and the fact that St. Simons Island, a much larger community, has its own weekly newspaper (I.D., para. 38). *Cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982). Hence, no applicant will receive any diversification preference or "demerit".

9. *Integration of Ownership and Management.* As sole proprietors and proposed full-time general managers, both James U. Steele and Dale Bell were credited with 100% full-time quantitative integration credit by the ALJ, and Cannon's Point was awarded 87.15% full-time credit for the 76.3% full-time integrated ownership of Mr. and Mrs. J. Wesley Cox and the 21.7% part-time (20 hours) integrated ownership of deceased principal Mrs. J. J. Baell, whose interest was purchased by the Coxes.[5] I.D., para. 39. Steele received qualitative enhancement credit for his previous broadcast experience, Bell, for her local residence and female ownership participation, and Cannon's Point, for local residence, past participation in civic affairs, previous broadcast experience, and female ownership participation. *Id.*, paras. 40–43. The ALJ eliminated Cannon's Point from integration preference contention because of the "clear quantitative difference" between its proposal and those of Steele and Bell, and gave the preference to Bell, concluding that her status as a female, coupled with her past local residence on St. Simons Island,

[5] The ALJ granted "full proportional credit of 10.85%" for Mrs. Baell's 21.7% interest by giving it 50% weight as a 20-hour proposal. I.D., para. 30 and note 7.

overcame Steele's superior past broadcast experience. *Id.*, paras. 46–47.

10. In its exceptions, Cannon's Point concedes (as it must) that the ALJ was too generous with its quantitative integration credit, and that it only deserves 76.3% full-time credit and 21.7% part-time credit. Brief, p. 11; *see New Continental Broadcasting Co.*, 88 FCC 2d 830, 838–839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981). However, the applicant then urges that it is appropriate to combine its full and part time quantitative credits into a 97.7% ownership integration total, and that the numerical difference between this total and Bell's and Steele's 100% is too slight to permit a preference to be awarded without including Cannon's Point and considering the qualitative enhancements of all three applicants.

11. A comparative integration preference may not be based on relative amounts of quantitative integration credit alone, unless there is a "clear quantitative difference." *Van Buren Community Service*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981). In addition, we have emphasized that full-time and part-time integration credit are entitled to significantly different weight. *Id.* Also see *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 52 RR 2d 1210, 1215–1218 (Rev. Bd. 1982), for an extensive discussion of the relationship between quantitative integration credit and qualitative enhancement factors. These cases make clear that lumping together full-time and part-time quantitative integration credit is contrary to the letter and spirit of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965), which focuses on full-time ownership participation as the preferable integration course. In analyzing integration credit, we sometimes juxtapose full-time and part-time proposals, *see, e.g., Cleveland Television Corp.*, 91 FCC 2d 1148, 52 RR 2d 581 (Rev. Bd. 1982) (15% full-time/20% part-time proposal weighed against 50% full-time/50% part-time proposal), but each type of proposal is separately considered. Thus, we must decline Cannon's Point's request that we elide all distinctions between full-time and part-time integration proposals and, in effect, raise its integration credit to the equivalent of a 97.7% full-time proposal. We conclude that Cannon's Point's 76.3% full-time quantitative credit is sufficiently below that of Steele and Bell that the gap cannot be overcome by qualitative enhancements. *Van Buren Community Service, supra*; *New Continental Broadcasting Co., supra* (12.5% quantitative difference held "clear"). Hence, the ALJ properly eliminated Cannon's Point from integration preference contention.[6]

12. Both Steele and Cannon's Point challenge the ability of Bell

[6] Under the circumstances, we need not reach Steele's argument that the Coxes should not have been awarded any part-time quantitative integration credit, based on the late Mrs. Baell's integration proposal, and his challenge to Cannon's Point's qualitative enhancements.

to effectuate her integration proposal, asserting that her 100% integration credit should be either severely reduced or completely eliminated because her hearing testimony exhibited extreme lack of familiarity with her proposed station's policies on commercial advertising, controversial issues, political advertising, and format. Steele emphasizes that the question is not whether Bell will be physically available, but whether her proposal has any credibility and whether the applicant has the necessary abilities to carry out her duties as general manager. Lack of past broadcast experience or non-broadcast experience is not relevant to quantitative integration credit. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951–952, 50 RR 2d 1142, 1148 (Rev. Bd. 1982). A contrary approach would discourage the very newcomers to broadcasting that the *Policy Statement*, *supra*, is trying to encourage. While lack of familiarity with the proposals in one's application is a more substantial concern, we do not believe that Mrs. Bell's brief cross-examination testimony about station policies and her duties (Tr. 274, 278–279) sufficiently explored these matters to be regarded as a full or fair indication of her grasp of her application or of her proposed job, or to seriously call into question Bell's ability to effectuate her proposal. We affirm the ALJ's award of 100% quantitative integration credit to Bell.

13. As to qualitative enhancements, Steele and Cannon's Point except to Bell's local residence credit. They maintain that the *Policy Statement's* recognition of local residence as an enhancing factor, 1 FCC 2d at 395–396, 5 RR 2d at 1910, envisions a longer term residence than Bell's and a greater familiarity with the community and its needs and interests than Bell demonstrated on cross-examination. In particular, Steele observes that Bell moved to St. Simons Island in September 1979, resided there for only one year prior to filing her application, and demonstrated a "profound disinterest" and lack of knowledge concerning the proposed community of license. Steele Brief, pp. 14–15. And Cannon's Point urged at oral argument that local residence credit is based on a rebuttable presumption of local knowledge and familiarity, and that the presumption was successfully rebutted here. Tr. 314–315. Hence, according to the exceptors, Bell's *actual* local residence is entitled to no greater credit than Steele's *proposed* future residence (which is also entitled to some slight credit under the *Policy Statement*, *supra*), if any. While we agree that Bell's relatively short local residence is not entitled to the same enhancement credit as residence of "several years' duration," *Policy Statement*, *supra*, we do not agree that *Ocean County Radio Broadcasting Co.*, 4 FCC 2d 953, 8 RR 2d 695 (Rev. Bd. 1966), relied upon by Steele, supports the proposition that short term actual residence is entitled to no more credit than mere proposed residence. In *Ocean County*, we equated two years of pre-application full-time local residence with 25 years of prior residence followed by

14 years of frequent visits and proposed resumption of full-time residence.[7] In the instant case, Steele does not allege any previous residence on St. Simons Island, but Mrs. Bell testified that her parents had a summer home there to which she went ever since she was in grammer school (Mrs. Bell was born in 1951) so that it was "already . . . like a second home to me before I moved" (Tr. 267). Given this record, it is clear that Bell is entitled to greater local residence credit than Steele. As with the exceptors' integration effectuation argument in paragraph 12, *supra*, we cannot conclude that Mrs. Bell's brief cross-examination testimony on local subjects (Tr. 267, 269–272) provides a serious challenge to the slight local residence preference we are awarding. And we note that Bell is neither seeking nor receiving any credit for past participation in civic affairs.[8]

14. We turn now to Steele's extensive argument that Bell should not be awarded substantial female ownership participation enhancement credit, if any. Steele's argument is two-pronged: first, that Mrs. Bell is a "stalking-horse" for a husband-wife management team (Mrs. Bell's husband, Dewayne Bell, will be "employed" by her as assistant general manager—Tr. 294), so that Bell should receive only 50% female integration credit; and, second, that the Commission's "automatic preference for females" cannot be reconciled with its policy statement on *Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591, 44 RR 2d 1051 (1978). At the core of Steele's first argument is an abortive attempt to convince the ALJ to add a real party in interest issue in this proceeding to inquire into Mr. Bell's alleged concealed interest in the Bell application and his principal's role. FCC 81M-2776, *supra*. The only bases for the proposed issue were Mrs. Bell's youth and lack of previous broadcast experience, Mr. Bell's proposed managerial role, and a $3000 joint savings account which would finance a small portion of the station's construction costs. The ALJ correctly held that these facts were inadequate to meet the test for determining whether a third person is a real party in interest—whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc.*, 49 FCC 2d 962, 31 RR 2d 1589 (Rev. Bd. 1974). A family relationship alone does not warrant addition of such an issue, *Jimmie H. Howell*, 46 FCC 2d 50, 29 RR 2d 1317 (Rev. Bd. 1974), and there is no basis on this record to regard

[7] *But cf. Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 52 RR 2d 1447 (Rev. Bd. 1982), in which the Board awarded no enhancement credit for 25 year old past civic participation.

[8] Cannon's Point's further exception that Bell's *quantitative* integration credit should be greatly reduced because of her "abysmal showing of involvement" with the community of St. Simons Island (Brief, p. 14) is rejected as unsupported by the record and without case precedent. To the extent that it is an integration effectuation argument, see paragraph 12, *supra*.

the Bell proprietorship as jointly owned. *Cf. Ottumwa Broadcasting Co., supra* note 7. Steele's argument is premised only on speculation and surmise, and it fails. *See Folkways Broadcasting Co.*, 33 FCC 2d 806, 811, 23 RR 2d 992, 999 (Rev. Bd. 1972).

15. Steele's second argument attacks the policy basis for granting enhancement credit for female ownership integration, which had its genesis in *Gainesville Media, Inc.*, 70 FCC 2d 143, 43 RR 2d 604 (Rev. Bd. 1978). In *Gainesville*, the Board held that female ownership integration would promote a "public interest benefit" and was an affirmative factor enhancing an applicant's integration proposal which did not require a special showing of anticipated increased program diversity attributable to that integration or proof that females are an unrepresented or poorly represented class in the local mass media. 70 FCC 2d at 149, 43 RR 2d at 611. In so holding, the Board took account of the teachings of the U.S. Court of Appeals in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *rehearing denied*, 495 F.2d 941, *cert. denied*, 419 U.S. 986 (1974), and the Commission in *WPIX, Inc.*, 68 FCC 2d 381, 411–412, 43 RR 2d 278, 315–316 (1978), concerning merit for minority ownership and participation. Finding a similar public interest benefit in female ownership integration, the Board felt obliged to accord similar credit, but later made it clear that "the credit awarded for female participation is less than that accorded black participation." *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829, 45 RR 2d 1709, 1715 (Rev. Bd. 1979), *review denied*, FCC 80–734, adopted December 4, 1980.

16. The Commission appears to have endorsed this type of female enhancement credit in *Alexander S. Klein, Jr., supra*, 86 FCC 2d at 432, 49 RR 2d at 613, and, most recently, in *Waters Broadcasting Corp., 91* FCC 2d *1260*, 52 RR 2d 1063, 1069 (1982), and has denied review of a number of Board decisions over the years that have followed *Gainesville Media, Inc., supra*. *E.g., Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd.), *review denied*, FCC 79–397, adopted June 21, 1979. Steele's contention that the credit is inconsistent with *Minority Ownership of Broadcast Facilities, supra*, because the latter policy statement declined to include females among "minority groups" for purposes of tax incentives and distress sale procedural relief, is incorrect. The *Minority Ownership* statement specifically declined to address the comparative hearing implications of its minority group policies, 69 FCC 2d at 1595–96, 44 RR 2d at 1057; hence, the refusal to consider females as "minorities" cannot be construed as ruling out comparative enhancement credit for females as non-minorities. Therefore, with Commission case precedent supporting the credit, Steele's request that the matter be revisited may only be properly addressed by the Commission *en*

banc.[9] Accordingly, we deny Steele's exception and affirm the ALJ's award of 100% female enhancement credit to Bell.

17. Taking into account all of the preceding integration contentions and Steele's 20-year history in the broadcast industry (I.D., paras. 19–24), we affirm the ALJ's conclusion (*Id.*, para. 47) that as between Steele and Bell, their quantitative integration credit being equal, Bell's qualitative enhancement credits for 100% female integration and past local residence "overcome" Steele's credits for previous broadcast experience and proposed future residence. While Steele's previous broadcast experience is impressive, the *Policy Statement* mandates that even such experience is "of minor significance" in the overall integration analysis, since it generally confers only an initial advantage and so as not to discourage inexperienced newcomers (such as Mrs. Bell). 1 FCC 2d at 396, 5 RR 2d at 1910.

18. *Auxiliary Power.* Each of the applicants proposed to install auxiliary power generators, but Bell proposed to use such generators at "both her studio and transmitter sites" (Bell Exh. 1, p. 2), while Steele proposed a generator as an "emergency back-up to his main transmitter" (Steele Exh. 3) and Cannon's Point proposed to "equip its radio station" with a generator (Cannon's Point Exh. 2, p. 2). Based on these differences, the ALJ awarded a very slight auxiliary power preference to Bell, citing *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966). Steele excepts to this preference, arguing that it is without precedent, since the *Addendum* does not distinguish between the quality and type of auxiliary equipment proposed but rather between those who propose some equipment and those who don't, and because the generalities of each proposal in the record allow no basis for drawing reasonable comparative distinctions. We agree on both counts, and conclude that all of the applicants are equal on this comparative factor.

19. *Petition to Enlarge Issues.* In FCC 81M-2776, *supra*, the ALJ denied a petition to enlarge issues filed by Steel, in which he unsuccessfully sought to have 11 new issues added against Bell. Some of the denied issues have already been discussed in paragraphs 8 and 14, *supra*. What remains are exceptions by Cannon's Point to the ALJ's refusal to add misrepresentation and failure-to-report issues pertaining to the nature and extent of Mrs. Bell's cable television interests, and exceptions by Steele to the ALJ's failure to add regional concentration of control or real party in interest issues to explore whether the broadcast holdings of Mrs. Bell's parents and other relatives, when added to the St. Simons Island application, would create a prohibited regional concentration or whether Mrs.

[9] We note that in *Horne Industries, Inc.*, 52 RR 2d 1009 (Rev. Bd. 1982), we certified to the Commission, as a policy question of first impression, what degree of merit should be awarded for 100% female ownership when compared with 15% minority ownership. The instant case raises a very different question which, we believe, is amply guided by existing policy and precedent.

Bell's parents are real parties in interest in the St. Simons Island application.

20. We quickly dispose of Cannon's Point's objection. In requesting the misrepresentation and reporting issues, Steele failed to make the requisite *prima facie* demonstration of deception and of a desire, motive, or logical reason to mislead, *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1180, 49 RR 2d 1001, 1007 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (1981), and the alleged reporting errors were not adequately shown to be substantial and potentially of decisional significance, *Radio Laredo, Inc.*, 87 FCC 2d 353, 361, 49 RR 2d 1489, 1495 (Rev. Bd. 1981), *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982). Hence, the requested issues were properly denied.

21. As to Steele's exception, he essentially argues that Mrs. Bell's application is a "sham" (Tr. 401) and that she is being used as a "surrogate" for her father, Farnell O'Quinn, a multiple broadcast station owner in southeastern Georgia (Brief, p. 28). Steele sought enlargement of the issues to inquire into the interest and role of Bell's father in her application and whether the broadcast holdings or pending applications of the O'Quinn family, taken together (father, mother, sister, son and daughter), violate the Commission's rules against regional concentration of control. The ALJ denied enlargement on the ground that Steele had failed to present a sufficient *prima facie* case of common ownership or control to warrant further inquiry. In his exceptions, Steele urges that the ties between Mrs. Bell and her father as they relate to the St. Simons Island application go far beyond just the parental relationship and that, absent a full investigation of these matters at hearing, further probative evidence than has already been presented cannot be developed. As to regional concentration, he asserts that if the Commission grants Mrs. Bell's application, as well as a pending Waycross, Georgia FM application (in which Mr. O'Quinn's sister is a 50% principal) and a future FM application for Kingsland, Georgia to be filed by Mr. O'Quinn's son,[10] the O'Quinn family will control three stations in a 50-mile radius, six stations in a 100-mile radius, and a total of seven stations in the state of Georgia, as well as three Georgia cable television systems.

22. We affirm the ALJ's denial of the requested issues. A party seeking a real party in interest or regional concentration issue where family members are involved has a heavy *prima facie* burden, because the Commission is aware that even independent family relationships may have attributes, such as financial and business ties, which in non-family situations would be persuasive indicia of

[10] Report and Order, Mimeo No. 32257, 52 RR 2d 699 (MM Bur. 1982), the Commission granted Mr. F. Keith O'Quinn's petition for rulemaking and assigned Channel 292A to Kingsland.

common ownership or control or real party status. *See Alan K. Levin* (Hearing Designation Order), FCC 80–657, 45 Fed. Reg. 85512, published December 29, 1980, at para. 9. While Steele maintains that he has met the *Levin* standard by showing family relationship, close business ties, a pattern of oligopolistic and anticompetitive behavior by Farnell O'Quinn, and a motive for deception (the fact that the multiple ownership rules would not permit O'Quinn to file the subject application in his own name), we disagree.

23. In *Levin*, the Commission found that "the history of the Gayer interests and the striking parallels among supposedly independent stations and proposals suggest at least an informal family business operation revolving around the senior Gayers." *Id.*, para. 11. These factors included identical articles of incorporation, bylaws, financial structure, communications counsel, consulting engineers, and responses to questions involving five purportedly independent broadcast applications and different ownership combinations by six members of the Gayer family. Of these factors, Steele has alleged only family consanguinity and common legal counsel. He also points out that Mrs. Bell briefly worked for her father and that her father gave her the cable stock which forms the basis of her application's financial plan and continues to have his own ownership interest in the cable systems. All of the subject cable stock was transferred to Mrs. Bell between December 1973 and January 1979, and Mrs. Bell did not file her application until October 3, 1980. We do not find that these father-daughter transactions constitute the type of "close business ties" that warrant further exploration. Similarly, we decline to pursue Steele's additional charges of oligopolistic conduct by Mr. O'Quinn, since his credentials are not at issue in this proceeding, only his daughter's. We note, however, that in *Farnell O'Quinn*, 11 FCC 2d 801, 12 RR 2d 422 (Rev. Bd. 1968), cited by Steele to show that the Commission has previously expressed some concern about Mr. O'Quinn's regional broadcast holdings, the Board declined to enlarge the issues, failing to find that the stations at issue would be operated as a family unit or that O'Quinn would have some voice in the operation or control of the non-O'Quinn station. The Board there concluded, as we do here, that the nature and extent of the business relationship between O'Quinn and his relatives (there, his brothers-in-law) did not raise any serious doubt concerning the relatives' ability to operate independently of O'Quinn.

24. Simply stated, Mrs. Bell's physical and mental independence from her father are at the heart of Steele's proposed issues, and the circumstantial evidence that he has offered to show lack of independence is speculative and otherwise insufficient. *See Folkways Broadcasting Co., supra.* In this connection, we reject Steele's attempt to shift the *prima facie* burden to Bell to show that, despite family relationships, she will operate her station independently, citing *Alabama Radio Corp.*, 69 FCC 2d 1256, 44 RR 2d 465 (1978). In

Alabama, no such issue was added, and the burden was not shifted. While there are situations in which considerations of fairness argue in favor of placing even the burden of proceeding on the party with particular access to the relevant evidence, *e.g.*, *D.H. Overmyer Communications Co.*, 31 FCC 2d 203, 22 RR 2d 837 (1971), this is not one. The burden of showing that a qualified applicant is not its own man or woman but a mere "front" for another party is properly heavy in these family cases, *Alan K. Levin*, *supra*, and Steele has buckled under it.

25. Having affirmed the ALJ's decision not to explore these issues in this case, we nevertheless caution the O'Quinn family that their broadcast entrepreneurial endeavors are operating at the outer limits of what is permissible without an evidentiary hearing concerning regional concentration, but no further exploration is called for by this record. Our action herein does not preclude such inquiry in the Waycross or Kingsland proceedings (see paragraph 21, *supra*), if further *Levin*-type evidence is proffered there.

26. *Final Comparative Evaluation*. All exceptions having decisional significance have been considered by the Board. There were no exceptions to the ALJ's conclusion that Cannon's Point and Steele deserve a "very slight" comparative coverage preference over Bell, I.D., para. 44, and we affirm that conclusion. *Resort Broadcasting Co.*, 41 FCC 2d 640, 27 RR 2d 1379 (Rev. Bd. 1973). Since all three applicants are basically qualified, a choice in this case hinges on the applicants' comparative qualifications and, more particularly, on how they fulfill the primary objective of best practicable service to the public.[11] *Policy Statement*, *supra*. This objective encompasses the applicants' integration, comparative coverage, and auxiliary power showings, in that order of importance. *Id*. Thus, having eliminated Cannon's Point from integration preference contention (see paragraph 11, *supra*), it perforce finishes the comparative race in third place. We have already affirmed the ALJ's conclusion that, under the integration criterion, Bell's qualitative enhancement credits for 100% female integration and past local residence overcome Steele's credits for previous broadcast experience and proposed future residence (paragraph 17, *supra*). We must now factor in the final best practicable service ingredient of a very slight comparative coverage preference to Steele.[12] Having done so, we affirm the ALJ's ultimate conclusion that grant of Bell's application will better serve the public interest, convenience and necessity. Under the comparative circumstances of this case, Bell's 100% female integration is decisively

[11] The primary objective of diversification of control has had no winnowing effect in this case, because all three applicants have been found equal under this rubric. See paragraph 8, *supra*.

[12] The applicants were deemed equal on the auxiliary power comparative factor (paragraph 18, *supra*).

important, a conclusion which is consistent with the *Policy Statement*, *supra*, other Commission policy, and past case precedent. In paragraphs 15–17, *supra*, we elaborated on the qualitative enhancement to be attached to female ownership integration, and in *North Carolina Radio Service, Inc.*, *92* FCC 2d *621*, 52 RR 2d 993 (Rev. Bd. 1982), we recently affirmed an application grant in which the only arguable difference between the applicants was the winner's 49% female integration. Applying the principle of *Gainesville Media, Inc.*, *supra*, and its progeny, the magnitude of the enhancement credit due a 100% female integration proposal in which the female will be the station's general manager (Mrs. Bell's application) is proportionately greater here and more than ample, when combined with Bell's past local residence credit, to overcome Steele's integration enhancement credits and very slight coverage preference.

27. ACCORDINGLY, IT IS ORDERED, That the application of Dale Bell (File No. BPH-801003AF) for a construction permit to establish a new FM station at St. Simons Island, Georgia, IS GRANTED; and that the applications of Cannon's Point Broadcasting Company (File No. BPH-800714AK) and James U. Steele (File No. BPH-800930AE) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

FCC 82D-58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	BC Docket No. 81-306 File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	BC Docket No. 81-307 File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	BC Docket No. 81-309 File No. BPH-801003AF
For a Construction Permit	

Appearances

Jerrold Miller on behalf of Cannon's Point Broadcasting Company; *Stuart A. Shorenstein* on behalf of James U. Steele; *David Tillotson* on behalf of Burrows Broadcasting Company; *Robert S. Stone* and *Rudolph L. Ennis* on behalf of Dale Bell; and *William D. Freedman* and *Stephen T. Yelverton* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: August 12, 1982; Released: August 17, 1982)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of Cannon's Point Broadcasting Company (CPBC), James U. Steele (Steele) and Dale Bell (Bell). By *Order* (BC 706) released May 6, 1981, the captioned applications were designated for hearing on the following issues:[1]

1. To determine with respect to Cannon's Point Broadcasting Company: (a) the source and availability of additional funds over and above the $39,824 indicated; and

[1] The application of Burrows Broadcasting Company was also designated for hearing, but was dismissed at its own request by *Memorandum Opinion and Order* FCC 81M-4012, released December 18, 1981.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

The *Order* noted that there would be a significant difference in the size of the areas and populations which would receive service from the proposals and provided that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural service in such areas, would be considered under the standard comparative issue (para. 6).

2. The prehearing conference was held on July 16, 1981. Hearing sessions were held on November 16 and 17, 1981. During the hearing it was agreed that, based on questions raised by the Broadcast Bureau as to the adequacy of the parties' joint engineering exhibit, a revised joint engineering exhibit would be filed following the hearing sessions. By *Order* (FCC 82M-0228) released January 22, 1982, Joint Exhibit 1 was received in evidence and the record was closed. Proposed findings of fact and conclusions of law were filed by Dale Bell on February 2, 1982 and by the remaining parties on February 23, 1982. Replies were filed by all the parties on March 16, 1982.

Findings of Fact

A. *Limited Financial Issue*

3. A limited financial issue was specified against CPBC in the *Hearing Designation Order* because CPBC failed to show that it had sufficient funds to cover $64,363.36 in estimated expenses for the first three months of operation and construction. CPBC was credited with $30,722 in existing capital[2] and with a $9,102 bank loan. However, a $25,000 stock subscription agreement by Mrs. J. J. Baell, one of CPBC's principals, was not credited. Mrs. Baell was depending on a $25,000 loan from her daughter, Miss Betty Baell, and neither had submitted balance sheets or financial statements, as required by FCC Form 301, Section III, item 4(b) (*Order*, para. 2 and 3). Subsequently, Mrs. J. J. Baell died, and by amendment filed June 15, 1981,[3] it was reported that Mr. and Mrs. J. Wesley Cox, the main principals of CPBC, had agreed to subscribe to an additional $25,000 worth of stock. It was reported further that the funds for this purchase would come from Miss Betty Baell as a loan to J. Wesley Cox. A request for summary disposition of the financial issue was

[2] Of these funds, $21,000 are on deposit at Moultrie Federal Savings & Loan Association, Moultrie, Georgia, in a certificate of deposit #2198. The certificate originally was in the name of Mrs. J. J. Baell as trustee for CPBC. After Mrs. Baell's death, Miss Betty Baell became the named trustee for CPBC. These funds are also part of the $30,000 that Dr. and Mrs. Jerome C. Cox agreed to loan by letter which was included in the CPBC amendment filed October 2, 1980.

[3] Amendment was accepted by *Order* FCC 81M-2755, released September 2, 1981.

denied on the basis that CPBC had failed to submit a balance sheet or financial statement for Mr. and Mrs. Cox as required by FCC Form 301. It was also ruled that the balance sheet submitted for Miss Betty Baell was inadequate. *Memorandum Opinion and Order* FCC 81M-3136, released October 2, 1981. By amendment filed October 19, 1981,[4] CPBC supplied a letter from Miss Betty Baell clarifying that the full proceeds of the $25,000 loan to J. Wesley Cox could only be used for investment in CPBC. *See also* CPBC Exh. 1, p. 5. The amendment of October 19, 1981 also contained a letter from Mrs. Dorothy Baell (Mrs. Jerome Cox), the mother of J. Wesley Cox, stating that she would lend CPBC the sum of $10,000 for purposes of construction and operation of the proposed broadcast station. CPBC Exh. 1, p. 6. Finally, the amendment contained a balance sheet for Mr. and Mrs. J. Wesley Cox which was dated October 1, 1981. CPBC Exh. 1, p. 8.

4. By amendment filed February 5, 1981, CPBC indicated that it will purchase standby power generating equipment. It was estimated that it would cost $6,000. Tr. 164.

5. The balance sheet for Miss Betty Baell indicates that she has net current assets in excess of $50,000 and liabilities not in excess of $1.00. CPBC Exh. 1, p. 3. Miss Baell has approximately $90,000 worth of certificates of deposit which she has in savings and loan associations. Tr. 82. At the hearing, she produced five certificates totaling some $43,000. CPBC Exh. 1b. Although Miss Baell has no accrued liabilities, she does have ongoing monthly personal expenses and business expenses. Her personal expenses consist of rent ($250), gasoline, utilities and the like. Tr. 75–80. Monthly expenses incurred in her business of physical therapy consist of rent ($275), salary ($800) and utilities. Tr. 79–80.

6. Jerome and Dorothy Cox's financial statement indicates a net worth of some $200,000. BB Exh. 1. The financial statement of Dr. and Mrs. Jerome Cox reflects the $10,000 which Mrs. Cox will loan to CPBC. That sum is on deposit as a certificate of deposit #3269 at the Moultrie Federal Savings & Loan Association, Moultrie, Georgia, and has been earmarked by Mrs. Cox as a loan for CPBC. CPBC Exh. 1, p. 7. The full proceeds of this loan will be available to CPBC, as no payments of either principal or interest will be due during the first three months of station operation.

B. *Comparative Issue*

7. *Cannon's Point Broadcasting Company.* CPBC is an applicant for an FM radio station at St. Simons Island, Georgia. Its officers, stockholders and directors are as follows:

[4] Amendment was accepted by *Order* FCC 81M-3598, released November 12, 1981.

Name and Address	*Number of Shares*	*Office*	*Director*
Mr. and Mrs. J. Wesley Cos Joint Tenants St. Simons Island, Georgia	1,286 (held and subscribed)		
J. Wesley Cox St. Simons Island, Georgia		President	Yes
Mrs. J. Wesley Cox St. Simons Island, Georgia		Secretary	Yes
J. Wesley Cox, Jr. St. Simons Island, Georgia	1		
Dr. Jerome C. Cox Moultrie, Georgia		Vice President	Yes
Mrs. Jerome C. Cox Moultrie, Georgia		Treasurer	Yes
Dr. Frederick C. Marland Darien, Georgia	10	Vice President	Yes
Sarita Carmen Marland Darien, Georgia	10	Asst. Secretary	Yes
Anne Gallion Jekyll Island, Georgia	5	Vice President	Yes

CPBC Exh. 2.

8. With one slight exception, neither CPBC nor any of its principals have any connection with any medium of mass communication. The exception is Anne Gallion (holder of five shares or less than 0.4%), who is the publisher and editor of a weekly newspaper serving Jekyll Island, Georgia, a community located about one mile from St. Simons Island. Tr. 171–2.

9. The principals of CPBC who will be active in its proposed radio station are J. Wesley Cox and Mrs. J. Wesley Cox. CPBC Exh. 3 and 4. Mr. Cox will be the general manager of the station on a full-time basis, and Mrs. Cox will be the station's operations manager, also on a full-time basis.

10. As of the cut-off date for changing the comparative qualifications of the applicants, CPBC was proposing that Mrs. J. J. Baell was to be the sales manager of the station, working a minimum of 20 hours per week. Tr. 213. She was to hold a total of 285 shares of CPBC stock, with Mr. and Mrs. J. Wesley Cox holding 1001 shares. Tr. 175. Subsequent to the cut-off date, Mrs. Baell passed away and her stockholdings in CPBC were taken over by Mr. and Mrs. Cox. No other principal of CPBC will be active in the station on a daily basis.

11. J. Wesley Cox has lived in Georgia all his life, and has resided in St. Simons Island since 1979. He attended Valdosta State

College in Valdosta, Georgia. While there he edited the student newspaper and was active in the student television show. He has worked as an announcer, news director and account executive for WZZZ, West Point, Georgia, from December 1, 1977 to August 13, 1979; as announcer and account executive at WLAG, LaGrange, Georgia, from August 13, 1979 to November 21, 1979; and as account executive at WAPE, Jacksonville, Florida, from December 11, 1980 to March 20, 1981. At St. Simons Island, he is involved in the following civic and community groups: Chamber of Commerce; Exchange Club, member of board of directors; Island Players; Coastal Georgia Historical Society; and past member of Brunswick-Glynn County Clean Community Commission. CPBC Exh. 3.

12. Mrs. J. Wesley Cox has also lived in Georgia for all of her life, although she was born in Jacksonville, Florida. She received a bachelor of fine arts degree from Valdosta State College in 1974. After graduating she worked as an advertising and display person during 1975 and did paste-up and layout work for a locally-produced magazine during that period. CPBC Exh. 4. From February 1978 to July 1979, she was employed with West Point Pepperell as their corporate artist and regularly had two to three people working under her. Tr. 230.

13. Mrs. Cox has not had a paying job at a radio station, but does have some broadcast experience at her uncle's station, WZZZ. She has made commercials, gone on remotes and generally observed the processes that take place at an operating station. Her involvement at WZZZ lasted between nine months and a year. Tr. 236.

14. Mrs. Cox has lived in St. Simons Island for the same period as her husband, *i.e.*, since 1979. She is actively involved in the Christian Renewal Center in Brunswick, Georgia, the Ladies' Bible Study and the Daughters of the American Revolution. CPBC Exh. 4.

15. CPBC will equip its station with standby power generating equipment to enable it to remain on the air in case of a commercial power failure. CPBC Exh. 2, p. 2.

16. *James U. Steele.* Steele is a sole proprietorship and has no ownership interests in any broadcast facility or other mass communications media. Steele Exh. 1.

17. Steele will serve as full-time general manager of the station and will devote full time to supervising the station, its equipment and operation and he will have sole responsibility for making programming decisions on a day-to-day basis. Following grant of the construction permit, Steele intends to move to and reside in St. Simons Island. In the interim, Steele has kept up to date with the problems and needs of St. Simons Island by maintaining a subscription to the St. Simons Island weekly newspaper. Steele Exh. 1; Exh. 2, pp. 5–6; Tr. 251.

18. Steele grew up and attended college in the south, having lived in Meridian, Mississippi from 1953–1966. Tr. 252. He is a

college graduate, having attended Meridian Junior College and the University of Miami where he earned a bachelor of science degree after having majored in radio-TV-film and minored in marketing. Following graduation Steele matriculated at the University of Denver where he pursued post-graduate studies and earned a masters degree in mass communications. Steele Exh. 2, pp. 1–2.

19. Steele's twenty years history in the broadcast industry has spanned radio, television and trade association work, and he has held numerous management level positions. Steele's broadcast career began in 1962 when he was employed by WTOK-TV, Meridian, Mississippi, as studio cameraman, audio boom operator, set designer, floor crew manager and booth announcer. He worked for WTOK-TV until 1966 on a part-time basis while attending high school and junior college. From 1964 to 1966, Steele also worked on a part-time basis for radio station WOKK-AM as a weekend on-air personality and newscaster, commercial/public service writer and producer and salesman. During this period, Steele obtained a third-class radio telephone license with broadcast endorsement, and at station WOKK he performed limited engineering functions in accordance with that license. Steele Exh. 2, p. 1; Tr. 246–8.

20. While in graduate school, Steele worked on a part-time basis for station KBTV-TV, Denver, Colorado, as master control director. His responsibilities included supervision of master control operations, including duty director of all locally-originated programming and non-program material inserts into or between programs, program log entries and broadcast quality control reports. Steele Exh. 2, p. 2.

21. Following receipt of his masters degree from the University of Denver, Steele moved in February of 1971 to Indianapolis, Indiana, where he became director, traffic/operations, for WISH-TV. Among his responsibilities were preparation of the daily program logs, commercial/public service/promotion announcement scheduling, sales contracts and agency/client media buying instructions, commercial avails log and liaison with national advertising representatives. Steele Exh. 2, pp. 2–3.

22. In August 1971, Steele was offered and accepted the position of continuity supervisor for WBBM-TV, a CBS-owned and operated station in Chicago, Illinois. He was soon promoted to manager, television standards and practices. In that capacity, Steele was responsible for assuring station compliance with CBS corporate policies and practices, NAB television code, FCC rules, and regulations of other federal, state and local entities applicable to commercial broadcast programming and advertising. Steele helped prepare FCC annual reports and license renewal applications. He also supervised the continuity department staff, oversaw local and national advertising, as well as locally-produced and syndicated programming, in order to assure compliance with applicable pro-

gramming/advertising standards. Steele further served as management liaison with the CBS network legal and program/commercial clearance departments, maintained the station's local public file and coordinated music clearance rights with ASCAP and BMI, and prepared departmental budgets and payroll records. Steele Exh. 2, pp. 7–8.

23. In 1974 Steele became an editor of the Code Authority of the National Association of Broadcasters. He is currently in his eighth year with that organization. After a series of promotions, he now holds the position of Senior Supervisor, Childrens Advertising Review Unit. His responsibilities at the NAB have included supervisor of the childrens advertising unit's editorial staff; advisor to member stations and networks, advertising agencies, manufacturers and the general public regarding Code policies and guidelines; formulator with senior management of new or modified industry self-regulatory policies; and representative for NAB at industry-related functions. Steele Exh. 2, pp. 9–10.

24. In addition to holding a third-class radio telephone license with broadcast endorsement, Steele has successfully completed an FCC first-class license correspondence course offered by the Cleveland Institute of Electronics. Steele holds memberships in the International Radio and Television Society, New York Chapter of the National Academy of Television Arts and Sciences, Antique Wireless Association, Museum of Broadcasting, Texas Broadcast Museum, and WNET/Thirteen, Inc. Steele also holds an associate membership status in the Society of Broadcast Engineers. In addition, as an FAA certified private pilot, Steele is also a member of the Aircraft Owners and Pilots Association. Steele Exh. 2, pp. 4, 5.

25. Steele, throughout his career, has participated actively in the civic affairs of the communities in which he has lived. While in college in Meridian, his active support as a disc jockey of a local teenage activity center won him an "Outstanding Service" plaque for service to teenagers of Meridian from the Meridian Department of Parks and Recreation. In Indianapolis he was a volunteer motor pool driver for the Indianapolis Chapter of the American Red Cross. For the past five years in New York, Steele has been a play therapy volunteer in the Pediatrics Department/Ward of Lenox Hill Hospital. Steele intends to be active in civic affairs in St. Simons Island when he moves there after grant of his application. He proposes to devote a minimum of three hours per week to such civic involvement. Steele Exh. 2, pp. 1, 3, 5, 6.

26. As part of his equipment proposal, Steele plans to install auxiliary generator equipment to provide emergency backup to his main facilities. Steele Exh. 3.

27. *Dale Bell.* Bell, like Steele, is prosecuting her application as a sole proprietor or individual. Bell, a resident of St. Simons Island, Georgia since September 1979, will work at her proposed station as

general manager, devoting a minimum of forty hours per week to that position. Bell Exh. 1, p. 2. She currently holds interests in three cable systems within the state of Georgia. However, upon grant of her construction permit application, she will divest herself of all ownership and official relationships with those cable systems. Bell Exh. 1, p. 1. Aside from such ownership interests and/or official relationships, Bell does not own or hold such a relationship in any form, whether legal or beneficial, direct or indirect, at any radio station, television station, CATV system, newspaper, or any other medium of mass communications. Bell Exh. 1, p. 1.

28. As general manager of her proposed radio station, Bell would be in charge of day-to-day supervision of all staff activities and would exercise ultimate decision-making authority and responsibility for all station operations, including development of station policies, financial matters, hiring and firing, filing reports with the FCC, reviewing advertising contracts, and a determination of salaries and/or benefits paid to employees. Bell Exh. 1, p. 2.

29. Bell's broadcast experience is limited, but does include news gathering and announcing at WUFE, Baxley, Georgia, as well as assisting staff members there in advertising and production areas. Bell Exh. 1, p. 2; Tr. 275–8.

30. Bell proposes to acquire and utilize auxiliary power equipment at both her studios and transmitter sites so as to assure continued service in the public interest, including the safety of the public. Bell Exh. 1, p. 2.

C. *Coverage Comparison*

31. The applicants request a permit to construct a Class A FM broadcast station on Channel 224 operating with an effective radiated power (ERP) of 3.0 kW. Both CPBC and Steele propose to operate with an antenna whose height above average terrain (HAAT) is 300 feet. Bell proposes to operate with an antenna whose HAAT is 147 feet. Jt. Exh. 1, p. 1. St. Simons Island (population 6,818) is located in Glynn County (population 50,528) which is in the southeastern part of Georgia. There are no existing aural facilities licensed to St. Simons Island. Jt. Exh. 1, pp. 1–3.

32. There is some difference in the areas and populations proposed to be served by the three applicants. These areas and populations are tabulated below (Jt. Exh. 1, p. 1):

Applicant	*Primary Service*	
	Area (sq. mi.)	*Population*
CPBC	498	53,328
Steele	456	51,633
Bell	291	44,055

Applicant	*Primary Service*	
	Area (sq. mi.)	*Population*
CPBC's advantage over Steele	42 (9.2%)	1,695 (3.3%)
CPBC's advantage over Bell	207 (71%)	9,273 (21%)
Steele's advantage over Bell	165 (57%)	7,578 (17%)

33. There are at least five aural services available to each applicant's 1 mV/m service area full time. Jt. Exh. 1, p. 1. In establishing the number of aural services available to the 1 mV/m service areas of each of the applicants, the following stations were considered (Jt. Exh. 1, p. 1):

Location	*Call Sign*	*Facilities*
Jacksonville, Florida	WJAX	930 kHz, 5 kW, DA-N
Brunswick, Georgia	WGIG	1440 kHz, 5 kW-D, 1 kW-N
Brunswick, Georgia	WMOG	1490 kHz, 1 kW-D, .25 kW-N
Brunswick, Georgia	WPIQ	101.5 MHz, 100 kW, 245'
Brunswick, Georgia	WSBI	100.7 MHz, 6 kW, 170'

Conclusions of Law

34. This proceeding involves the mutually-exclusive applications of CPBC, Steele and Bell to construct a new FM station at St. Simons Island, Georgia. The issues to be resolved in this proceeding are the limited financial issue specified against CPBC and the standard comparative issue. Under the standard comparative issue, each of the qualified applicants must be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement*, 1 FCC 2d at 394.

A. *Limited Financial Issue*

35. The *Hearing Designation Order* noted that CPBC's cost of construction and operation of $64,363.36 would be met by $30,722 existing capital, $25,000 new capital and a bank loan of $9,102. Originally the $25,000 new capital was to be based on a stock subscription by Mrs. J. J. Baell, one of the applicant's principals. Mrs. J. J. Baell in turn depended upon a loan from her daughter, Miss Betty Baell, to purchase the $25,000 worth of stock. Since neither of these persons submitted a balance sheet to the Commission at the time the *Designation Order* was being issued, a financial issue was specified.

36. Subsequently Mrs. J. J. Baell died, and by amendment it was

reported that the $25,000 stock subscription would be made by Mr. and Mrs. J. Wesley Cox, the applicant's principal stockholders. It was also reported that J. Wesley Cox would borrow $25,000 from Miss Betty Baell to make the stock purchase. In committing herself to loan J. Wesley Cox the $25,000, Miss Baell conditioned it on the proceeds being used only to buy the above-mentioned stock subscription. Miss Baell submitted a balance sheet which, together with the testimony adduced at the hearing, indicates that she has enough liquid assets to make the loan in question. J. Wesley Cox also submitted a balance sheet. It is argued that the balance sheet indicates that Mr. and Mrs. Cox have $5,000 worth of current liabilities while owning only $150 in current assets and, therefore, do not possess sufficient "net liquid assets" to contribute the $25,000 to the corporation. However, in *Contemporary Television Broadcasting, Inc.*, BC Docket No. 80-768 (hearing Designation Order BC 05812, released January 16, 1981), the Broadcast Bureau announced that it will no longer require a financial statement in situations where a bank loan commitment letter to an investor has "earmarked" the loan funds specifically for the purpose of the investment. The reason underlying the ruling can be easily ascertained, that is, if the funds loaned are circumscribed for a sole specified use, the financial statement of the borrower is immaterial. It is ruled that the Bureau's change in policy is controlling herein and dispositive of the arguments made by Bell and Steele. It is not believed that the policy change is limited to situations where a "bank" makes the loan, since the thrust of the policy change is to eliminate the need for filing financial statements on the part of the person who is making the investment in an applicant.[5] Having made these findings, the conclusion can be made and is made that CPBC is financially qualified to be a Commission licensee.

37. CPBC, however, has also proposed to equip its station with standby power generating equipment to enable it to remain on the air in case of a commercial power failure. The estimated cost of this equipment is $6,000. The use of such equipment is not required by the Commission, but for CPBC to receive a comparative credit for its proposal, it has to demonstrate that it has sufficient funds to purchase the equipment. To that end, CPBC has proposed to borrow $10,000 from Mrs. Jerome C. (Dorothy) Cox. Mrs. Cox has designated the proceeds of a certificate of deposit in the amount of $10,092 for this purpose. CPBC also filed a statement of financial condition of Dr. and Mrs. Jerome C. Cox as of May 14, 1981. That statement shows a net worth for Dr. and Mrs. Jerome C. Cox in the amount of $220,067. Although certain adjustments were made in said statement because of testimony rendered at the hearing, the conclusion

[5] In the instant situation, it has been established that Miss Baell has sufficient funds to make the loan of $25,000.

reached is that the proceeds of the certificate of deposit designated for the CPBC loan of $10,000 are not needed by Dr. or Mrs. Cox to meet current liabilities and are, therefore, available to CPBC as a loan. In sum, CPBC has sufficient funds to construct and operate the proposed FM station for three months and to purchase standby power generating equipment.

B. *Comparative Analysis*

Diversification of Control of the Media of Mass Communications

38. Neither Steele nor Bell has present interests in the media of mass communications.[6] CPBC has an interest, by virtue of Anne Gallion's position as publisher and editor of a weekly newspaper serving Jekyll Island, a community located about one mile from St. Simons Island. Ms. Gallion holds only five shares, which represents less than 0.4% of the CPBC stock. She will have no active part in the operation of the CPBC station. St. Simons Island has its own weekly newspaper. There are five aural services to the coverage area of CPBC's station. It is concluded that CPBC's interest in the media of mass communications is very slight and CPBC receives only a very slight demerit for it.

Integration of Ownership and Management

39. Both Steele and Bell have timely proposed the equivalent of 100% integration of ownership and management. CPBC receives credit for 76.3% full-time integration owing to the full-time participation of J. Wesley Cox (38.15%) as general manager and Mrs. J. Wesley Cox (38.15%) as operations manager. CPBC also receives credit for the part-time (20 hours) integration of Mrs. J. J. Baell (21.7%) who had been proposed as sales manager. Mrs. Baell's status as sales manager is deemed to be a true management integration proposal and CPBC is entitled to the full promotional credit of 10.85%[7] for Mrs. Baell's proposed participation. In sum, CPBC receives credit for 87.15% full-time integration of its principals.

40. The qualitative attributes of CPBC's integrated owners enhance its proposal. Specifically, CPBC is enhanced because Mr. and Mrs. J. Wesley Cox are residents of St. Simons Island, have participated in the community's civic affairs and have previous

[6] Dale Bell is secretary/treasurer, director and 12% shareholder of Micro-Wave TV, Inc. in Jesup, Georgia; a 1/8 owner of Blackshear TV Cable, Inc. in Blackshear, Georgia; and a director and 1/8 owner of Cable Vue TV, Inc. in Baxley, Georgia. Prior to the cut-off date for amendments to her application, Bell advised the Commission that she would divest her interests in these CATV systems upon grant of her application for a construction permit.

[7] The figure of 10.85% is reached by multiplying Mrs. Baell's ownership interest of 21.7% by 50% (20 hours proposed participation).

broadcast experience. In addition, CPBC receives credit for female participation of 49% (38.15% + 10.85%).

41. Steele's proposal is qualitatively enhanced by virtue of his previous broadcast experience. Steele argues for substantial enhancement. However, the *Policy Statement* makes clear that previous broadcast experience, as an attribute of participating owners, is of only minor significance since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience generally confers only an initial advantage. 1 FCC 2d at 396. *See also Webster-Baker Broadcasting Co.*, FCC 81R-109, para. 17, 50 RR 2d 1142 (Rev. Bd. 1982).

42. Steele also claims qualitative enhancement by virtue of his educational background which includes a masters degree in communications. This contention is rejected. Steele has not cited any case which sets forth educational standards applicable to potential broadcast positions. Indeed, broadcasters have come from all walks of life and from diverse educational and employment backgrounds. Furthermore, Steele may not be credited for any involvement in civic affairs since all of it was in communities too far removed from the community of license.

43. Bell's integration proposal is qualitatively enhanced by virtue of her past local residence within the proposed community of license and her status as a female.

C. *Coverage Comparison*

44. The record fails to establish that any of the applicants merit a significant comparative coverage preference. Although there are some differences in the proposed coverage, the service areas of the proposed applicants are already well served. *WVOC, Inc.*, 45 FCC 2d 420 (Rev. Bd. 1974). Five aural services already place a 1 mV/m or greater intensity coverage over each applicant's proposed coverage area (1 mV/m contours). None of the proposals would bring a first, second, third, fourth or even fifth service to any service area proposed, whether common or uncommon. Consequently, CPBC and Steele are awarded a very slight coverage preference over Bell.

D. *Auxiliary Power*

45. Each of the applicants has proposed to install auxiliary power generation. Bell, however, has proposed auxiliary power generating equipment for both studios and transmitter sites. Consequently, a very slight preference is awarded Bell for proposing to use auxiliary power at both studios and transmitter sites. *See Addendum To Policy Statement of July 28, 1965 on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

E. *Final Comparative Evaluation*

46. Steele and Bell are entitled to 100% quantitative integration

credit. CPBC is entitled to 87.15% full-time credit. The choice is, therefore, between Steele and Bell since it has been ruled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981); *New Continental Broadcasting Co.*, 88 FCC 2d 830 (Rev. Bd. 1981).[8]

47. As between Steele and Bell, Bell's status as a female, coupled with her past local residence in the proposed community of license, overcomes Steele's past broadcast experience. Steele's slight preference for his coverage proposal is offset by Bell's slight preference due her proposal for auxiliary power generating equipment at both studios and transmitter sites.[9] It is, therefore, concluded that a grant of Bell's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Dale Bell to construct a new FM broadcast station at St. Simons Island, Georgia (File No. BPH-801003AF) IS GRANTED and the applications of Cannon's Point Broadcasting Company (File No. BPH-800714AK) and James U. Steele (File No. BPH-800930AE) ARE DENIED.[10]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK *Administrative Law Judge*

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[8] In *New Continental Broadcasting Co.*, the Review Board deemed a 12.5% quantitative difference between two proposals a "clear quantitative difference." 88 FCC 2d at 850.

[9] Even if Bell were not to receive a greater preference for auxiliary power than Steele, Steele's very slight preference for his coverage proposal, together with his broadcast experience, still would not overcome the qualitative enhancement awarded Bell's integration proposal.

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Comparative Hearing
FM Station, Authorization
Review by Review Board
Settlement

Review Board approved settlement agreement because it complied with 47 U.S.C. Sec. 311(c)(3) and granted FM broadcast application. Agreement was found to serve public interest and no party to it filed its application for purpose of reaching or carrying out such agreement.
– *Cedar Creek Radio Company*
BC Docket No. 82–46

FCC 83R-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
EDD LOWE ROUTT, NORMA LEE ROUTT, EDD L. ROUTT, JR. and KENDALL A. MINTER, d/b/a CEDAR CREEK RADIO COMPANY Malakoff, Texas	BC Docket No. 82–46 File No. BPH-800710AF
KENNETH R. JONES and GLENDA J. JONES d/b/a HENDERSON COUNTY RADIO Malakoff, Texas	BC Docket No. 82–47 File No. BPH-801003AA
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: March 14, 1983; Released: March 17, 1983.)

BY THE REVIEW BOARD:

1. On March 9, 1983 the two applicants in this proceeding filed a joint petition for approval of agreement which was supplemented on March 10, 1983. We will grant this petition because the applicants complied with the new settlement requirements of Section 311(c)(3) of the Communications Act, 96 Stat. 1087. *See Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982), *review denied*, FCC 83–95, released March 9, 1983.

2. Section 311(c)(3) as amended now provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience, or necessity; and (b)

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no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

In an Initial Decision, FCC 83D-10, released February 11, 1983, the Administrative Law Judge concluded that a grant of Cedar Creek's application would better serve the public interest. Instead of filing exceptions, the applicants have entered into an agreement which on approval would result in the dismissal of the competing application of Henderson County Radio and an immediate grant of Cedar Creek Radio Company's application. The Commission and Congress have recognized that settlement agreements such as the one in this case shorten lengthy and expensive proceedings, expedite initiation of new service, and generally serve the public interest. *See Texas Television, Inc., supra. See also Bison City Television 49 Limited Partnership*, FCC 83R-17, released March 16, 1983 (Rev. Bd.).

3. Section 311(c)(3)(b) requires a showing that "no party to the agreement filed its application for the purpose of reaching such agreement." The supplement filed March 10, 1983 showed that Henderson County Radio's application which is to be dismissed contained a certification that "The applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict." It also pointed to extensive pre-trial investigations and extensive litigation and that the Henderson County Radio application was vigorously prosecuted throughout the comparative hearing. Thus, there is no appearance or assertion that Henderson's application was filed for the purpose of reaching or carrying out the settlement agreement. Since the parties have shown compliance with both Section 311(c)(3)(a) and (b), their joint request is hereby granted.

4. ACCORDINGLY, IT IS ORDERED, That, the Joint Petition for Approval of Agreement, filed March 9, and supplemented March 10, 1983 IS GRANTED; that the application of Henderson County Radio (BPH 801003AA) IS DISMISSED; that the application of Cedar Creek Radio Company (BPH 800710AF) IS GRANTED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 83D-10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
EDD LOWE ROUTT, NORMA LEE ROUTT, EDD L. ROUTT, JR., and KENDALL A. MINTER, d/b/a CEDAR CREEK RADIO COMPANY Malakoff, Texas	BC Docket No. 82–46 File No. BPH-800710AF
KENNETH R. JONES and GLENDA J. JONES d/b/a HENDERSON COUNTY RADIO Malakoff, Texas	BC Docket No. 82–47 File No. BPH-801003AA
For Construction Permit	

Appearances

Joseph E. Dunne, III on behalf of Cedar Creek Radio Company; *Harold K. McCombs, Jr.*on behalf of Henderson County Radio and *Arthur Steinberg* and *Brian Kilbane* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued: February 4, 1983; Released: February 11, 1983)

Preliminary Statement

1. This proceeding involves two mutually-exclusive applications for a new FM channel at Malakoff, Texas. The applicants are Cedar Creek Radio Company (Cedar Creek) and Henderson County Radio (Henderson County).

2. Since only one of the mutually-exclusive applications may be granted, the Commission by *Hearing Designation Order*, BC Mimeo No. 1930, 47 Fed. Reg. 5772 (released February 8, 1982), designated this matter for hearing on the following issues:

(1) To determine the site of Cedar Creek's transmitter and whether a proper engineering amendment is required.[1]

(2) To determine with respect to Henderson County:[1]

(a) the source and availability of additional funds over and above the $42,550 indicated; and

[1] The Presiding Officer granted Motions for Summary Decision deleting Issues 1 and 2 in Order, FCC 82M-1532 released May 13, 1982 (Issue 1) and Order, FCC 82M-2112 released July 9, 1982 (Issue 2).

(b) whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(3) To determine which of the proposals would, on a comparative basis, better serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. On March 10, 1982, Henderson County petitioned to enlarge issues against Cedar Creek. That petition was denied by *Order* (FCC 82M-1245) released April 19, 1982. Henderson County then filed two additional petitions to enlarge issues on August 10 and 16, 1982. These petitions were denied by *Memorandum Opinion and Order* (FCC 82M-3190) released October 15, 1982.

4. On June 7, 1982, Henderson County submitted a threshold showing concerning a claim of unusually good past broadcast record in the operation of KTLR-FM, Terrell, Texas and sought to introduce evidence in this proceeding. The request was denied in a *Memorandum Opinion and Order* (FCC 82-2148) released July 13, 1982.

5. A prehearing conference was held on April 15, 1982. The hearing was held on August 24, 1982 and the record was closed that date, but reopened and reclosed again on October 4, 1982 (FCC 82M-3082) released October 5, 1982.

6. Both applicants filed proposed findings of fact and conclusions of law on October 25, 1982 and each filed optional reply findings and conclusions on November 8, 1982.

Findings of Fact

The Applicants

7. Cedar Creek is a limited partnership established under the laws of the state of Texas and authorized to engage in the business of radio broadcasting. The general partners and their partnership interests are: Edd Lowe Routt, Sr. - 35%; Norma Lee Routt (his wife) - 35% and Edd Lowe Routt, Jr. (their son) - 25%. The only limited partner is Kendall A. Minter, who owns the remaining 5% partnership interest. To date, the only business in which Cedar Creek has engaged has been the February, 1980 filing and prosecution of the instant application for a construction permit to build and operate an FM station in Malakoff (Cedar Creek Exhibit 1, p. 1).

8. Kenneth R. Jones and Glenda J. Jones have applied for a construction permit for a new FM broadcast station at Malakoff, Texas, as individuals using the name Henderson County Radio. As husband and wife under Texas community property law they have an equal undivided one-half interest in the application (Henderson County Exhibit 1, p. 1; Tr. 79–80, 107–08).

Ownership of Media of Mass Communications

9. Kendall A. Minter, Cedar Creek's limited partner, is a 5%

shareholder, Vice-President and a Director of Commerce Broadcasting, Inc., licensee of KEMM, a Class A FM station licensed to Commerce-Greenville (Hunt County), Texas; the Secretary of Nash Communications Corp., the licensee of WILD-AM, Boston, Massachusetts; and the Assistant Secretary of P & L Broadcasting of Johnstown, Inc., licensee of WMYL-AM and WIZR-FM, Johnstown, New York. None of Cedar Creek's general partners possess an ownership interest in any other media of mass communications (Cedar Creek Exhibit 1, pp. 1–2).

10. Kenneth R. Jones, d/b/a Terrell Radio, applied for and obtained a construction permit and license for KTLR-FM at Terrell, Texas. Glenda J. Jones is the wife of Kenneth R. Jones and she has only such interest in KTLR-FM as may be pertinent under the Commission's multiple ownership rules. Mrs. Jones also has such interest in KTLR-FM as may be applicable under the Texas community property law and not in conflict with the rules and policies of this Commission (FCC 82M-3082, released October 5, 1982). The airline distance between the transmitting sites for Henderson County's proposed Malakoff station and KTLR-FM is 42 miles and the distance between the centers of Terrell and Malakoff is 42.5 miles (Henderson County Exhibit 3, p. 1). The 1 mV/m contour of KTLR-FM and Henderson County's proposed Malakoff station are separated by 12 miles (Henderson County Exhibit 2, p. 1).

Integration of Ownership and Management

Cedar Creek

Edd Lowe Routt, Sr.

11. If Cedar Creek is granted a construction permit to build the proposed station in Malakoff, Edd L. Routt, Sr., a general partner of Cedar Creek, will function as the station's General Manager, working a minimum of 40 hours per week. As General Manager, Mr. Routt will be responsible for: the overall operation of the station and its relationship to the communities served; the evaluation of station facilities and equipment; insuring Cedar Creek's compliance with FCC Rules and Regulations; the development of variations needed in individual and overall program formats; the development of rate structure on marketing; and the establishment and revision of office procedures at Cedar Creek. As the manager of a small market station, Mr. Routt will also be involved in the gathering, writing and broadcasting of some of Cedar Creek's local news, function as the station's chief editorialist and select guests and topics for proposed telephone talk shows (Cedar Creek Exhibit 2, pp. 5–6).

12. Mr. Routt's prior broadcast experience is quite extensive and includes work as a General Manager in radio stations ranging from Canada to Louisiana to Oregon. Mr. Routt is now functioning as a General Manager of an AM-FM combination radio station (a job he

can leave on two weeks notice), has some 12 years experience as General Manager of various radio stations, and some ten years additional experience in all aspects of radio broadcasting. Mr. Routt has also had experience in applying for and prosecuting an application for an FM station to grant by the Commission and actually building the station and commencing operation. He has, in addition, served for five years as a college instructor in broadcasting and has written several college textbooks on broadcasting and radio station operation (Cedar Creek Exhibit 2, pp. 2–5).

13. Mr. Routt resides at Rt. 2, Box 21 (Star Harbor), Malakoff, Texas although he has maintained an apartment in Salem, Oregon since January, 1981. Star Harbor is approximately three miles from downtown Malakoff or a five-minute drive from downtown Malakoff and within the 1 mV/m contour of Cedar Creek's proposed station. Mr. and Mrs. Routt have lived at that address since late April, 1980 (Cedar Creek Exhibit 2, p. 1; Tr. 42).

Norma Lee Routt

14. Mrs. Routt, a general partner of Cedar Creek, plans to work as Office Manager at the Malakoff station a minimum of 40 hours per week. As Office Manager, Mrs. Routt will set up the various forms the station needs to function, including the log forms, invoice/billing forms and will coordinate with the other general partners on setting up broadcasting orders and sales contracts. Mrs. Routt will also set up the regular commercial telephone system in the station; assist in the studio-office design; answer the telephones; prepare the daily logs; open and process the daily mail and will write copy and handle PSA material when necessary. Mrs. Routt will be responsible for supervising the announcers with respect to their logging; salespersons with respect to broadcast orders and sales contracts; be responsible to see that all timecards are filled in correctly and turned in on time; will oversee the group insurance plan; and will also compile the payroll as well as do the bookkeeping. In addition, Mrs. Routt will be in charge of station operation in the absence of the General manager, Mr. Routt (Cedar Creek Exhibit 3, p. 3).

15. Mrs. Routt's prior broadcast experience involves office management positions at two different radio stations (KRIM Radio, Rayville, Louisiana and KREB Radio, Monroe, Louisiana). At both KRIM and KREB, Mrs. Routt organized internal systems such as logs and billings; answered the phones; kept the books; handled the payroll and billing; and was in charge of station operation in the absence of her husband (Cedar Creek Exhibit 3, p. 1).

16. Mrs. Routt resides with her husband at Rt. 2, Box 21 (Star Harbor) Malakoff, Texas. See para 13, *supra*.

Edd Lowe Routt, Jr.

17. If Cedar Creek is successful in its bid for a construction permit to build a station in Malakoff, Edd Lowe Routt, Jr., a general partner of Cedar Creek, will assume the duties of Sales Manager, a minimum of 40 hours per week. In this capacity, he will be responsible for directing the marketing effort under the general supervision of the General Manager; will hire and supervise one full-time and several part-time persons; identify prospective advertisers and plan rate cards and promotional packages. Mr. Routt will also conduct regular sales meetings; instruct sales staff members on how to present the station product to prospective advertisers, write commercial copy and public service material and assist in the production of all such material. Mr. Routt may, on occasion, do an air shift and will gather, write and broadcast news material when appropriate. He will also provide input in the development of overall station policy including but not limited to editorials, news, sales and administrative policies and will be in charge of the overall operation in the absence of the General Manager and Office Manager (Cedar Creek Exhibit 4, pp. 3–4).

18. Mr. Routt has no real broadcast experience except his service as a disc jockey in several radio stations when he was a student (Cedar Creek Exhibit 4, p. 1).

19. Mr. Routt resides with his wife, Susan, at 144 Cedar Oaks Drive, Carolynn Estates, Mabank, Texas. This is within the "Cedar Creek" area, about eight miles from Malakoff and within the 1 mV/m contour of Cedar Creek's proposed station (Cedar Creek Exhibit 4, p. 1).

Kendall A. Minter

20. Kendall A. Minter is a 5% limited partner. Under the terms of the Cedar Creek limited partnership agreement, limited partners may not manage the business of the partnership and only general partners have the power to manage and operate the business of the partnership and determine its business policies therefore. Mr. Minter may provide occasional counsel when needed but will not participate in the management of the station (Cedar Creek Exhibit 1, p. 1; Tr. 40).

Henderson County

Kenneth R. Jones

21. In the event Henderson County's application is granted, Mr. Kenneth R. Jones will work at the station as General Manager and supervise overall station operations. As General Manager, Mr. Jones will devote a minimum of 30 hours and no less than three days per week to the Malakoff FM station. He will continue to serve as

General Manager of KTLR-FM to which he will devote 20 hours per week (Henderson County Exhibit 1, p. 1; Tr. 88).

22. Mr. Jones has extensive broadcast experience which includes work in several radio stations from 1959–1971 as part and full-time announcer, full-time General Manager and full-time Account Executive. From 1971–1979, Mr. Jones owned and managed ABC/Dal-land Advertising which was involved in broadcast advertising. In addition, Mr. Jones was responsible for constructing KTLR-FM, Terrell and has been active in the daily management and operation of the station since May, 1979 (Henderson County Exhibit 1, p. 2).

23. Mr. Jones resides with his wife, Glenda J. Jones, at Rockwall, Texas, outside the 1 mV/m contour of Henderson County's proposed station. Rockwall is approximately 60 miles from Malakoff by road and Mr. Jones estimates that the drive will take an hour during most of the year and longer during hazardous conditions in the winter (Henderson County Exhibit 1, p. 1; Tr. 80).

Glenda J. Jones

24. In the event the Jones' application is granted, Mrs. Jones will work at the station, supervising overall operation of the station in the absence of Mr. Jones. She will devote 20 hours per week to the Malakoff FM station. She will continue to serve as Station Manager of KTLR-FM, Terrell, Texas to which she will devote 30 hours per week (Henderson County Exhibit 1, p. 1).

25. Mrs. Jones has had some prior broadcast experience in that she has aided her husband in the construction, daily management and operation of KTLR-FM, Terrell since May, 1979 (Henderson County Exhibit 1, p. 2).

26. Mrs. Jones resides with her husband at Rockwall, Texas. See para. 23, *supra*.

Auxiliary Power

27. Cedar Creek will obtain an emergency generator to operate the station when regular power sources fail (Cedar Creek Exhibit 1, p. 2).

28. Henderson County will purchase and install an auxiliary power generator at the proposed station (Henderson County Exhibit 1, p. 3).

Comparative Coverage

29. Malakoff (population 2,082) is situated in Henderson County (population 42,606) and does not lie within any urbanized area, according to the 1980 U. S. Census. It is the third largest city in the county, behind Athens, the county seat (population 10,197) and Brownsboro (population 5,265). Malakoff presently has no AM or FM service licensed to it (Joint Engineering Exhibit, p. 1).

30. The predicted coverage contours of the Henderson County

and Cedar Creek propsals are not concentric. There is a common area both applicants propose to serve and two non-common crescent-shaped service areas formed by the intersection of the predicted 1 mV/m contours (Joint Engineering Exhibit, p. 9).

31. During the daytime, both non-common areas receive more than five aural services (Joint Engineering Exhibit, pp. 2 and 5).

32. There are four nighttime AM services and 13 FM services available within both the non-common areas (Joint Engineering Exhibit, pp. 2, 6, 7 and 9). These available nighttime aural services in the noncommon areas can be summarized by the following tabulation:

POPULATION AND AREA DATA

AVAILABLE NIGHTTIME AURAL SERVICES

	Cedar Creek		*Henderson*	
Non-Common Areas	*Pop.*	*Area (sq. mi.)*	*Pop.*	*Area (sq. mi.)*
No other service	0	0	0	0
One other service	0	0	0	0
Two other services	0	0	0	0
Three other services	225	18	75	3
Four other services	887	98	902	45
Five or more other services	1,839	19	5,894	76
Common Area	25,282	485	25,282	485
TOTAL	28,213	620	32,153	609

Cedar Creek Lake is located within the proposed service areas of the two applicants. The area of this lake was not included in the square mileage listed above (Joint Engineering Exhibit, p. 8).

Conclusions of Law

Diversity of Media of Mass Communications

1. The diversification factor is one of primary significance in the licensing scheme. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter referred to as *Policy Statement*). In this proceeding, the principals of Henderson County, Mr. and Mrs. Jones, own 100% of a broadcast licensee whose transmitter site is only 42 miles from the proposed transmitter of the Malakoff station and where the proposed 1 mV/m or primary service contour of KTLR misses overlapping the primary service contour of the proposed Malakoff station by only 12 miles.[2]

[2] It is the Commission's policy to treat the mass media interest of a husband and wife in combination when applying the multiple ownership rules, absent a

2. On the other hand, none of the general partners of Cedar Creek have any ownership interest in any media of mass communications. The only media interests which may be attributed to Cedar Creek is the interest of Mr. Kendall A. Minter, Cedar Creek's 5% limited partner. Because Mr. Minter is merely a limited partner and because his media interests (see para. 9 *supra.*) are of little decisional significance when compared to the 100% ownership by the 100% owners of the applicant in a station so near the proposed station in Malakoff, significant comparative preference must be awarded to Cedar Creek.

Best Practicable Service

3. Though Cedar Creek has been awarded significant preference on the issue of diversification, this preference must now be considered along with other preferences accruing to each applicant under the criterion set out by the *Policy Statement*.

Integration of Ownership and Control

4. Cedar Creek is entitled to 100% quantitative credit for 100% integration of ownership and management by virtue of its proposal to integrate all of its general partners in significant managerial positions at its proposed station full-time, 40 hours per week. Because Mr. Minter, as a limited partner, can have no hand in the management of the applicant, his interest is of no significance here.[3]

5. Cedar Creek's integration proposal is qualitatively enhanced by virtue of the fact that all three Routts are residents of the proposed service area. However, the credit given to integrated principals who are local residents is lessened slightly because their local residence is neither of great duration nor do any of the Routts actually reside in the city of license, Malakoff, but nearby within the service area. *Policy Statement*, 1 FCC at 396, 5 RR 2d at 1910.

6. By contrast, Henderson County's proposed General Manager and 50% owner proposes to work 30 hours per week at the station, 3 days per week, in addition to his duties as General Manager of KTLR. Mrs. Jones proposes to work 20 hours or two days per week as Station Manager and devote 30 hours per week to her duties at KTLR-FM. Clearly the time commitments of the principals of

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showing that such consideration is inappropriate. . . . Since those rules and the diversification criteria applied in comparative broadcast proceedings are both facets of the same policy objectives to promote diversification of program and service viewpoints and to encourage competition among the media of mass communications, the principle is to be applied in the same manner for both proposals. *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2149, 44 RR 2d 127, 137 (Rev. Bd. 1978).

[3] See *Anax Broadcasting, Incorporated*, 87 FCC 2d 483, 488; 49 RR 2d 1589 (1981) where it was stated that "We do not consider the interest of limited partners relevant to determining integration credit".

Henderson County fall short of those commitments made by the principals of Cedar Creek.

7. Further, Henderson County can claim no qualitative enhancement by virtue of residence since neither principal is a resident of the Malakoff service area. See paras. 23 and 26, *supra*.

8. Though prior broadcast experience has also been a traditional area of comparison in the qualitative analysis, the Commission has repeatedly held it to be a factor of minor significance. See *Policy Statement*, 1 FCC 2d 396, n. 8, 5 RR 2d 1910, n. 8. Moreover, it is felt that no meaningful differentiation can be made by the applicants on this particular subject because of the extensive broadcast backgrounds of both Mr. Routt and Mr. Jones. Though Mrs. Jones' prior broadcast experience might merit slightly higher consideration than Mrs. Routt's, due to her work at Terrell, this would not bring Henderson County's integration credit even close to the level of credit that has been accorded Cedar Creek.

Comparative Coverage

9. The one preference to be awarded Henderson County among the general comparative factors, relates to comparative coverage. However, the weight to be accorded this preference must turn on the facts peculiar to the case.

10. Though Henderson County's proposal would serve 3,940 more persons than Cedar Creek, this particular population already receives service from five or more stations. And it has been held that greater area coverage enjoys less significance where the respective reception areas are well served. *Simon Geller*, 90 FCC 2d 250, 251, 51 RR 2d 1019, 1042 (1983). As a result, Henderson County will be awarded slight preference for its more substantial comparative coverage.

Auxiliary Power

11. Since both applicants propose auxiliary power, neither warrants a preference in this area of the comparative analysis.

Ultimate Conclusions

12. Based on a review of all of the comparative factors and the comparative preferences awarded to Cedar Creek and to Henderson County, it is concluded that on a comparative basis, Cedar Creek's application is superior to Henderson County's and that the public interest will be better served by a grant of Cedar Creek's application and a denial of the Henderson County application.

13. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Cedar Creek (File No. BPH-800710AF) IS

GRANTED and the application of Henderson County (File No. BPH-801003AA) IS DENIED.[4]

BYRON E. HARRISON
Administrative Law Judge

[4] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular
Rules, Amendment of

Memorandum Opinion and Order adopted extending filing date for accepting cellular applications for all other markets to December 1, 1983 and revises procedural rules for licensing and operation of cellular communications systems. Part 22 of rules amended to change dates for filing direct and rebuttal cases and clarify the amended rules. Petitions for reconsideration requesting revision of procedural rules denied.
-Cellular Communications Systems

FCC-83-124

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ADVANCED MOBILE PHONE SERVICE, INC.	File No. 26030-CL-P-82
CONTEL MOBILCOM, INC.	File No. 26038-CL-P-82
GTE Mobilnet of Los Angeles, Incorporated	File No. 26053-CL-P-82
For a construction permit to establish a cellular system to operate on frequency block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Los Angeles-Long Beach, California, modified Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER GRANTING APPLICATION

(Adopted March 31, 1983; Released April 26, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (1) the

captioned applications of Advanced Mobile Phone Service, Inc. (AMPS),[1] GTE Mobilnet of Los Angeles Incorporated (GTE Mobilnet),[2] and ConTel Mobilcom, Inc. (ConTel),[3] each requesting authorization to construct a cellular mobile telephone system in the Los Angeles, California, Modified Standard Metropolitan Statistical Area; (2) a Limited Partnership Agreement for the Provision of Cellular Mobile Communications in the Los Angeles, California, Modified Standard Metropolitan Statistical Area and a Joint Request for Approval of Limited Partnership Agreement filed by AMPS, GTE Mobilnet, ConTel and United States Cellular Corporation (USCC);[4] and (3) various comments and pleadings relating to the applications and referenced agreement.

2. The applications from AMPS, GTE Mobilnet and ConTel are electrically mutually exclusive and, thus, cannot all be granted. In the ordinary course of events, these applications would be designated for comparative hearing to determine which application would best serve the public interest.[5] However, after filing their applications, AMPS, GTE Mobilnet, and ConTel formed a limited partnership jointly to provide cellular mobile telephone service in the Los Angeles market. As explained below, USCC has a 5% limited share of the partnership. The applicants have requested that the Commission approve their limited partnership agreement, dismiss conditionally and without prejudice GTE Mobilnet's and ConTel's applications, permit AMPS to amend its application to substitute the limited partnership as the applicant, and grant AMPS' application, as amended.

3. Comments regarding the agreement were filed by the Department of Justice, ICS/MCI, a partnership of ICS Communications and MCI Communications, and Telocator, the national council of independent nonwireline common carriers. These commenters all question whether the agreement may have anticompetitive consequences. The Department of Justice, for instance, maintains that the agreement may violate the antitrust laws unless the Commission can reconcile its reliance on the comparative hearing process to select among mutually exclusive applicants and its statements encouraging such applicants to reach settlement agreements to avoid such hearings. ICS/MCI maintains that the agreement may be anticompetitive since it includes, among other things, provisions restricting

[1] AMPS is a wholly-owned subsidiary of American Telephone and Telegraph Company (AT&T).

[2] GTE Mobilnet of Los Angeles is a wholly-owned subsidiary of General Telephone and Electronics Corporation (GTE).

[3] ConTel Mobilcom, Inc. is a wholly-owned subsidiary of Continental Telephone Company.

[4] United States Cellular Corporation is a wholly-owned subsidiary of Telephone and Data Systems, Inc. (TDS), a wireline telephone company.

[5] *See* Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e).

the rights of the limited partners to assign and sell their interests to others; and Telocator questions the provisions in the agreement which restrain against alienation of the limited partners' investment interests to nonwireline entities.

4. ICS/MCI also maintains that the amended application should be designated for hearing because of AMPS' alleged extensive anti-competitive conduct through AT&T's subsidiary, Pacific Telephone and Telegraph Company; because the capitalization plan evidences that AMPS has unlawfully subsidized its proposed cellular service; because AMPS has not demonstrated that it is a financially qualified applicant in the Los Angeles market; and because AMPS' interconnection proposals are inadequate. Finally, ICS/MCI maintains that the agreement violates the Commission's rules since one of the limited partners (USCC) is not an eligible wireline carrier in the Los Angeles market.

5. The objections expressed by the Department of Justice, ICS/MCI and Telocator are discussed below. Briefly, however, we find that the petitioners have failed to raise any substantial and material question of fact warranting exploration in an evidentiary hearing or requiring rejection of the limited partnership agreement. Rather, we find that the public interest will be served by approval of the agreement and grant of AMPS' application as amended.

Background

6. In January, 1980, the Commission announced its intention to develop policies, standards and procedures for the establishment and licensing of cellular mobile telephone systems in the 825–845 and 870–890 MHz frequency bands.[6] Following the receipt and evaluation of comments, the Commission, in May 1981, decided to license two cellular systems per service area by allocating one 20 MHz frequency block to wireline carriers and one to nonwireline carriers.[7]

7. Eligibility for the 20 MHz wireline allocation was limited to those telephone companies already providing wireline telephone service in a particular market.[8] The Commission reasoned that, in this way relatively few electrically mutually exclusive applications would be filed for the wireline allocation, thus promoting rapid institution of the service to the public. In those instances where there could be more than one eligible wireline applicant, the Commission encouraged settlement, stating:

> Where more than one wireline carrier is certified in a Standard Metropolitan Statistical Area (SMSA), and those carriers desire to provide cellular service, we

[6] Cellular Communications Systems, 78 FCC 2d 984 (1980).
[7] Cellular Communications Systems, 86 FCC 2d 469 (1981), *reconsideration*, 89 FCC 2d 58 (1982), *further reconsideration*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. March 3, 1983).
[8] *Id.*, 86 FCC 2d at 482, 487–93; 89 FCC 2d at 61, 69–74.

strongly urge them to reach mutually acceptable arrangements in order to avoid electrically mutually exclusive applications which require comparative hearings. For example, they might agree upon joint operation of one large system or coordinated operations of adjacent systems which cover the entire metropolitan area.[9]

8. The Commission provided that cellular applications for both the wireline and nonwireline allocations in the largest 30 markets were to be filed on June 7, 1982. On that date, AMPS filed cellular applications in twenty-nine of the top-30 markets, GTE Mobilnet filed cellular applications in fifteen of the top-30 markets, and ConTel filed cellular applications in four of the top-30 markets. On the following day, June 8, 1982, the Commission was advised that AMPS and nineteen other wireline companies had reached agreements in principle designed to avoid their electrically mutually exclusive applications in 18 of the top-30 markets, including the Los Angeles market.[10]

9. Pursuant to the terms of these letter agreements, AMPS would have a majority ownership interest in and would operate cellular systems in fifteen markets,[11] GTE Mobilnet would have a majority ownership interest and would operate cellular systems in six markets,[12] and various other independent wireline telephone companies would have a minority ownership interest in some of these systems. While AMPS and GTE would continue to prosecute their cellular applications in certain markets where only one of them is the applicant[13] in consideration of the accord, AMPS, GTE Mobilnet and the other wireline carriers participating agreed not to

[9] *Id.*, 86 FCC 2d at 490–91, 89 FCC 2d at 76. The Commission has also strongly encouraged nonwireline applicants to reach settlements. 86 FCC 2d at 490–91.

[10] These letter agreements were expressly contingent upon and subject to: a continuation of the Commission's *Cellular* decisions, *supra*, note 7, relating to the cellular wireline allocation; the issuance of licenses to GTE and AT&T or their cellular subsidiaries authorizing them to construct and provide cellular radio service in the identified SMSAs; and any requisite state or other regulatory approvals.

[11] New York, NY/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ; Los Angeles-Long Beach/Anaheim-Santa Ana Garden Grove/Riverside-San Bernardino-Ontario, CA; Chicago, IL; Detroit/Ann Arbor, MI; Washington, DC-MD-VA; Dallas-Fort Worth, TX; St. Louis, MO-IL; Pittsburgh, PA; Minneapolis-St. Paul, MN-WI; Atlanta, GA; San Diego, CA; Seattle-Everett, WA; Milwaukee, WI; Cincinnati-OH-KY-IN; and Kansas City, MO-KS. Various independent telephone companies will have minority ownership interests in some of these systems. Cincinnati Bell Inc. will have a minority ownership interest in the cellular system for the Cinncinnati-OH-KY-IN SMSA.

[12] Cleveland, OH; Houston, TX; Indianapolis, IN; Portland, OR-WA; San Francisco-Oakland, CA; and San Jose, CA. AMPS and various independent telephone companies will have minority ownership interests in these systems.

[13] AMPS would continue to pursue its applications to provide cellular service in: Phoenix, AZ; Philadelphia, PA; New Orleans, LA; Miami/Fort Lauderdale-Hollywood, FL; Denver-Boulder, CO; Buffalo, NY; Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH; and Baltimore, MD. General Telephone & Electronics Corporation or its cellular subsidiary(s) would continue to pursue its application

pursue their mutually exclusive applications in those markets subject to the letter agreements. To this end, however, the parties noted that their letter agreements were subject to the execution of more definitive contracts among them in each specific market.

10. Beginning on October 26, 1982, the parties executed specific agreements for each of the various cellular markets where they had reached an accord. These agreements were duly filed with the Commission. The full terms of these agreements will not be set forth in detail here. While the details of the agreements vary from market-to-market, the essential provisions are substantially identical. Either AMPS or GTE Mobilnet is both a General and Limited Partner with majority ownership interest in a particular market, and either AMPS, GTE Mobilnet or one or more of the other wireline carriers is a Limited Partner in those markets. For instance, pursuant to the terms of the Los Angeles agreement, AMPS will have a 40 percent interest as a General Partner and a 25 percent interest as a Limited Partner. GTE Mobilnet, ConTel and USCC, on the other hand, will have a 20 percent, 10 percent, and 5 percent interest, respectively, as Limited Partners.

11. The agreements also provide that the parties will share in income and expenses in proportion to their ownership interest. However, for the most part, the responsibilities of the Limited Partners are confined to meeting their cash investment obligations, whereas the General Partner is responsible for the operation, expansion and funding decisions, and must seek all necessary regulatory approvals. The General Partner is also responsible for obtaining interconnection with the landline network. The agreements also provide that, while a Limited Partner may transfer its interest to an affiliate without restriction, otherwise there can be " . . . no sale, exchange, or other transfer or assignment of the whole or any part of any Limited Partner's interest without the prior written consent of the General Partner . . .;" that "[n]o such sale or exchange or other transfer or assignment shall . . . be made to a non-wireline carrier;" and that, "[i]n addition, before any Limited Partner sells any part of its . . . interest to a non-affiliate . . ., it shall offer, by giving written notice to the General Partner, that interest to all other Partners . . .."

12. On November 2, 1982, AMPS, GTE Mobilnet, Contel and USCC[14] filed a Joint Request seeking approval of their Limited

to provide cellular service in the Tampa-St. Petersburg, FL SMSA. We have already granted AMPS' applications in Chicago, Boston, Pittsburgh, Buffalo, Philadelphia, Phoenix and New York.

[14] USCC's participation in this settlement apparently is part of an overall web of settlements among cellular applicants. TDS, through its subsidiary, USCC, is a wireline applicant for the Indianapolis, Indiana, wireline cellular system. TDS, in a Joint Motion submitted to the Commission in regard to its Indianapolis application, requests dismissal of that application contingent on and subject to approval by the Commission of the Los Angeles Limited Partnership Agreement.

Partnership Agreement for the provision of cellular mobile telephone service in the Los Angeles, California, Modified SMSA. In support therefore, the parties note that " . . . the instant request relies not only upon . . . Commission encouragement of cooperation by wireline carriers but also upon the agency's well-established policies for settlement of conflicts between electrically mutually exclusive applications," citing Section 22.29 of the Commission's rules.[15] To this end, the parties submit that " . . . grant of . . . [the Joint Request] and subsequent implementation of the Limited Partnership Agreement will serve the public interest in that it will eliminate the need for a costly and time-consuming comparative proceeding, thereby conserving the time and funds of the Commission and of the parties and permitting the early initiation of cellular mobile communications service in the Los Angeles Modified SMSA." Accordingly, the parties request that their Los Angeles Limited Partnership Agreement be approved, that the applications of GTE Mobilnet and ConTel be conditionally dismissed without prejudice, that AMPS be permitted to amend its application in accordance with the terms of the agreement, and that the AMPS' application, as amended, be granted.

Department of Justice Petition

13. The Department of Justice maintains that unless the Commission can reconcile its reliance on the comparative hearing process to select among mutually exclusive applicants and its statements encouraging settlements to avoid such hearings, the agency could subject the agreement participants herein to liability under the antitrust laws. This is so, asserts the Department, because the Commission has failed to state explicitly that "the public interest is served better by such an agreement than by a decision among competitive applications." The Department notes, in this regard, that while the Commission's cellular orders encourage competitive applications, on the one hand, and settlements to avoid comparative hearings, on the other, by failing to place its language encouraging settlements in its ordering clauses" the Commission created . . . ambiguity for anyone attempting to ascertain its legal effect." Thus, asserts the Department, the "applicants must choose either to frustrate the Commission's apparent eagerness to eliminate comparative hearings and risk subsequent denials of their individual license applications, or follow what they believe to be the Commission's urgings—although issued without explicit Commission mandate—and possibly violate the anti-trust laws." The Department therefore

[15] Section 22.29(a)(2)(ii) of the Commission's rules, 47 C.F.R. § 2.29(a)(2)(ii), requires a formal filing in all cases involving "[a] proposed withdrawal, amendment or dismissal of any application(s), petition(s), pleading(s), or any combination thereof, which would thereby permit the grant without hearing of an application previously in contested status."

concludes that the Commission must "consider the impact of the conduct it has invited;" and, "[i]f comparative hearings are not to be used, the Commission should eliminate that procedure, and state expressly why private agreements are the best way to satisfy the public interest, convenience and necessity."

14. AMPS, in reply, initially notes that the Department does not address the parties' Limited Partnership Agreements, the Joint Requests, or the parties' cellular applications. Rather, AMPS asserts, the Department untimely seeks to have the Commission revisit the policies and procedures [it] clearly enunciated in the *Cellular Radio* decisions relating to the use of comparative procedures to select between applicants, on the one hand, and its statements encouraging settlements, on the other. Moreover, argues AMPS, the Commission throughout its cellular decisions "has been explicit in strongly urging both wireline and non-wireline applicants to reach mutually acceptable arrangements for the provision of cellular service." AMPS maintains, in this regard, that "it would be both incongruous and impractical for the Commission, having just set out a detailed opinion, to restate its entire opinion in the ordering clause" of its cellular decisions to assure that cellular applicants more clearly understand its policies and procedure, including those relating to settlements.

15. AMPS further asserts that the "Department is simply incorrect" in maintaining that "the Commission's encouragement of settlements while also streamlining its comparative hearing process suggests inconsistent and contradictory methods of handling competing applications." In view of the Commission's goal of making cellular service available to the public as rapidly as possible, AMPS notes that "both settlements and expedited hearings serve the same ends." In this respect, AMPS argues:

> Settlements avoid the delay inherent in the most streamlined of hearings: to the extent comparative hearings can be avoided, the public interest will be served in the rapid deployment of service. Where comparative hearings are unavoidable, a streamlined hearing also serves the public interest by choosing among competing applicants as quickly as feasible.

16. The Commission, of course, must consider the antitrust implications of its actions when developing new policies and procedures. *National Broadcasting Co. v. United States*, 319 U.S. 190, 222–224 (1943). Competitive concerns, however, may be balanced against other public interest benefits, *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94–95 (1953), and the Commission may find that these benefits warrant approval of a policy even if it is assumed to have some antitrust consequences. *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980).

17. We recognize that there may be some antitrust value that could accrue by preserving competition at the application stage for a

cellular license. Here, however, other public interest benefits far outweigh any perceived benefit this undefined value may have.[16]

18. In our *Cellular* decisions, we found that there is a pressing need for new mobile telephone service and that such service could result in increased productivity, energy savings, and economic efficiency.[17] We sought therefore to reduce the regulatory delay inherent in the comparative hearing process.[18] However, we also recognized that even streamlined comparative hearing procedures would result in significant administrative delay.[19] Thus, we strongly urged wireline and non-wireline mutually exclusive applicants to reach settlements to provide this much needed communication service to the public more expeditiously.[20] Such agreements are pivotal to the rapid implementation of cellular service. Indeed, settlement agreements may be the most viable method of providing the public with expeditious cellular service. The Commission thus far has received 543 acceptable applications in the top 60 markets—122 for the wireline allocations, 421 for the nonwireline allocations, and 567 more applications for markets 61–90. We have also received over 700 pleadings relating to those applications filed in the top 50 markets and many more pleadings will be filed when all the applications have been placed on public notice.[21] The longer the use of cellular spectrum is delayed, the greater the loss to the public will be in terms of productivity, energy savings, and economic efficiency. To this end, our agreement policy is equally strong for both wireline and non-wireline applicants. We will make no grant to any applicant who is not fully qualified to establish a high-quality cellular system. The slight benefit we might realize through comparative proceedings

[16] As previously noted, our Cellular decisions provide for actual competition in each market between two competing systems, one operated by a wireline carrier and the other by a non-wireline carrier. The actual competition between these two competing systems in each market provides a far more significant competitive stimulant than that which may flow from having each class of cellular applicants compete for their respective licenses at the application stage. *See, e.g.*, United States v. El Paso Natural Gas Co., 376 U.S. 651, 660 (1964), which demonstrates the advantageous role competition from only one competitor can play as a complementary force in a regulated industry.

[17] 86 FCC 2d at 490–91.

[18] *Id.*, 86 FCC 2d at 490.

[19] The Department in its comments suggests that the use of a lottery may be the best means of reducing regulatory delay. The Commission considered the use of lotteries in cellular proceedings and decided not to use this alternative at that time. Second Notice of Proposed Rulemaking, Gen. Doc. No. 81–768, 47 Fed. Reg. 45046, 45047 (October 13, 1982).

[20] 86 FCC 2d at 490, 491.

[21] Absent agreements on both the wireline and non-wireline allocation side, it will take a great deal of time to process these applications even with the streamlined comparative hearing process. As of the date of this order, applications in 13 markets have been designated for hearing and applications in 9 markets have been granted due to settlement agreements or due to the fact that there was no competing application.

in identifying marginally better qualified candidates than those obtainable through settlements, is significantly outweighed by the loss of service time that the public will suffer under the hearing procedures necessary to make that identification.

19. We cannot, of course, direct mutually exclusive applicants to enter into agreements to avoid the comparative evaluation to which they are entitled under Section 309(e) of the Communications Act and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The public interest will be better served, however, if applicants settle their differences. We therefore again strongly encourage settlements whenever possible. Assuming agreements to be otherwise consistent with our policies and law, we will approve them as being in the public interest. Thus, we find no conflict between our statements in the cellular decisions calling for settlements and the need to establish reasonable comparative criteria and expedited processing procedures when settlement is not possible. We therefore reject the Department of Justice's Petition to the extent that it argues that such a conflict exists and we find that settlements agreements are in accord with the public interest, convenience and necessity standard of the Communications Act.

USCC Eligibility

20. ICS/MCI asserts that since USCC and its parent, TDS, are not eligible wireline carriers in the Los Angeles market within the meaning of Section 22.902(b) of the Commission's rules, "the Commission should bar it from the outset from obtaining an ownership interest in the Los Angeles wireline system." This is particularly so, asserts ICS/MCI, because USCC, pursuant to the right of first refusal provision in the Agreement, could acquire up to a 60 percent interest in the system over a period of time.

21. In conjunction with the foregoing, ICS/MCI also argues that "any approval of USCC's involvement in the licenses . . . would be highly inequitable." ICS/MCI notes that USCC unlike non-wireline applicants has "not expended great amounts of time and money preparing and prosecuting" its own application. Nonetheless, asserts ICS/MCI, USCC has positioned itself to earn a share of the profits of potentially the most lucrative cellular franchise in the country solely by reason of its ability to strike a "sweetheart" deal with AMPS and other wireline applicants. This, maintains ICS/MCI, is inequitable because the non-wireline applicants for the Los Angeles market have "no assurances that they will become participants and share in the profits of any cellular franchise awarded in the market."

22. The applicants all maintain that ICS/MCI's allegations relating to USCC's participation as a limited partner should be denied. They contend that Section 22.902(b) of the Commission's rules does not restrict an ineligible wireline carrier or anyone else from having a mere investment interest in a wireline system without

any control whatsoever. AMPS also notes that each non-wireline applicant in the Los Angeles market could share in their separate allocation in the system "if they followed the Commission's strong encouragement to settle their differences and form partnerships as the wireline carriers have done."

23. When the Commission adopted the eligibility requirement, we stated that a wireline applicant is "eligible to apply only in those general areas in which it or an affiliate company is certified as a wireline carrier." *Cellular Communications Systems*, 86 FCC 2d 469, 490 (1981), at n. 56. In the past, we have permitted wireline companies to apply for wireline frequencies in any market without regard to where they were doing business as a wireline, under *Bonduel Telephone Co. (Bonduel)*.[22] However, we determined that in order to achieve our objective of rapid implementation of cellular service, we would not apply the *Bonduel* rule to cellular carriers during the separate allocation period. *Id.*

24. The eligibility requirement expressly pertains to application eligibility, not to ownership participation. In a March 24, 1982 Public Notice, *Cellular Application Filing Procedures*, Mimeo 2973, the Common Carrier Bureau stated correctly that the Commission had not determined the level of minority investment ownership which would affect eligibility for purposes of the separate frequency blocks. It stated further that such questions would be determined on a case-by-case basis.

25. As a general matter, we find that it is permissible for ineligible carriers to have a minority ownership interest in an eligible cellular applicant during the two year set-aside period. Therefore, both ineligible wireline carriers and non-wireline carriers could have minority ownership interests in a wireline company, and vice versa. However, the ownership interest must be minor and control of the company must remain vested in the eligible carrier during the two year set-aside period. This decision is consistent with the objectives of the eligibility requirement: avoiding lengthy comparative hearings and speeding implementation of service. Minority wireline/non-wireline participation will not cause additional applications or delay beyond the Commission's general review of the limited partnership agreement.

26. Accordingly, we find that inclusion of USCC as a 5% limited partner in the Los Angeles wireline, without any operational control, is permissible. Petitioner's concern that USCC could acquire up to a sixty percent interest in the system, pursuant to a right of first refusal, is unfounded. Each partner is initially entitled to purchase only its proportionate share of the offering partner's interest. Therefore, so long as USCC does not acquire a majority of the limited

[22] 68 FCC 2d 497 (1978).

partner shares during the two year set-aside period, its participation in the wireline system is consistent with our rules and policies.

Sale of Partnership Interest

27. Both ICS/MCI and Telocator assert that the Agreement improperly restricts sale of a limited partner's interest to non-wireline carriers, and impermissibly extends the period of the wireline set aside.[23] In reply, GTE Mobilnet notes that "[t]he Commission has not yet determined whether or to what extent a non-wireline company may invest in a wireline cellular system." In light of this uncertainty, argues GTE Mobilnet, "the agreement takes the conservative approach and restricts sale of a limited partner's interest to non-wirelines." GTE Mobilnet also states, however, that it is not the company's "intention to exclude non-wirelines from future partnership consideration for reasons other than regulatory eligibility;" and, accordingly, "[a]t the end of the two-year set aside period, GTE would not oppose eliminating this restriction."

28. AMPS also maintains that the agreement does not constitute an invalid restraint on alienation of a partner's interests or an invalid attempt to extend the duration of the wireline set-aside. AMPS argues, in this regard, that "the power to assign may be restricted in . . . [a] partnership agreement" if it is a reasonable restraint. Also, while recognizing that "[t]he Commission's set aside . . . controls the *application process* for the initial two-year period," AMPS argues that the agreement does not extend this period since "[a]t the end of that period any entity, wireline or non-wireline, has a right to challenge renewal and seek the license for itself." AMPS concludes therefore that the provision in the Agreement relating to the ability of the partners to assign their interests is a "valid contractual provision . . . and should be sustained."

29. We conclude that the restriction against alienation to non-wireline carriers, contained in Section 11.1 of the partnership agreement, contravenes Commission rules and policies and is contrary to the public interest. In our cellular decisions, we adopted a separate allocation for wireline and non-wireline carriers based upon a determination that it would minimize the delay inherent in comparative hearings. Our objective was to expedite cellular radio service to the public. However, we limited the duration of the separate allocation to two years in an effort to minimize any potentially anticompetitive effects stemming from the set-aside. *Reconsideration*, *supra* at pp. 72 and 73.

30. We agree with petitioners that the indefinite prohibition

[23] ICS/MCI also maintains in this regard that this prohibition constitutes an invalid restraint on alienation under the Uniform Limited Partnership Act as enacted in California. Since we find here that the public interest requires deletion of this provision, the ICS/MCI argument is moot.

against transfer or assignment of a partner's interest to a non-wireline carrier impermissibly extends the two year set-aside. The wireline carriers cannot unilaterally extend the duration of an exclusive wireline franchise in violation of Commission rules and policies. Moreover, we have determined that it is permissible for ineligible carriers to acquire minority ownership interests in eligible applicants during the two-year set aside. *See* para. 24, *supra*. Accordingly, the agreement must be amended to eliminate the following language contained in Section 11.1: "no such sale or exchange or other transfer or assignment shall, however, be made to a non-wireline carrier."[24]

Anticompetitive Conduct

31. ICS/MCI next maintains that AMPS' application should be denied because of anticompetitive conduct by another AT&T subsidiary, Pacific Telephone and Telegraph Company (PT&T). ICS/MCI argues in this regard, that there is factual evidence pending before the Commission which clearly shows that PT&T "has engaged in anti-competitive, noncompensatory, predatory pricing in connection with its rendition of mobile telephone service." Thus, asserts ICS/MCI, "before AMPS is permitted to begin construction and operation of an expensive new communication system which is destined for early transfer to the . . . [Bell Operating Companies], the FCC must conduct a thorough investigation of PT&T to ensure that it possesses the requisite qualifications to be a licensee."

32. AMPS, in response, asserts that "ICS/MCI disregards the fundamental fact that PT&T is not the applicant in this proceeding, nor is it contemplated that PT&T will be the licensee or the parent corporation of the licensee." Thus, argues AMPS, "ICS/MCI's spurious and desparate proposal . . . should . . . be dismissed" since "PT&T's character [would] be relevant only if it would seek to become a cellular license holder in its own name."

33. We reject the allegation that AMPS' application should be denied or deferred consideration due to pending allegations that Pacific Telephone & Telegraph Company has engaged in anticompetitive conduct. First, PT&T is not the cellular applicant nor will it be the licensee or parent corporation of the licensee in the future. Upon our approval of AT&T's capitalization plan, filed May 25, 1982, AMPS will be merged into AT&T Cellular Co. another wholly-owned subsidiary of AT&T. AT&T Cellular Co. will continue to be the applicant or permittee for all cellular projects until January 1, 1984.

[24] We will therefore, as explained in para. 45, *infra*., conditionally grant the requested authorizations. We note that due to the case-by-case and evolving nature of our ownership policy as discussed in paras. 24–26, *supra*, we would have no objection to a provision in the partnership agreement which would make sale or transfer of a minority ownership interest subject to any necessary regulatory policies or approvals.

At that time, with the Commission's approval, AT&T will establish seven regional cellular companies, each a wholly-owned subsidiary of one of the seven regional holding companies created in compliance with the Modification of Final Judgment.[25] Thus, in the Far West Region, the cellular company will be an affiliate of PT&T in that both the cellular company and PT&T will have common control at the holding company level. However, PT&T and the cellular company will not have common officers or common facilities and services. See Section 22.901(c). Because of this degree of separation, and because ICS/MCI has failed to give any reason why the conduct attributed to PT&T should be imputed to AMPS or any other parent or affiliate of PT&T, we will not attribute the conduct of PT&T to the cellular licensee.

34. Second, ICS/MCI's allegations about PT&T have yet to be proven in any agency or court having jurisdiction over PT&T. AMPS points out in its Reply Comments, at p. 15, that the California Public Utilities Commission has found no proof of the conduct complained of by ICS/MCI. Consequently, there is no reason to deny or condition any AMPS authorization because of alleged, unproven conduct by PT&T.

Capitalization Plan

35. ICS/MCI further maintains that AT&T's Capitalization Plan evidences that it has unlawfully subsidized its cellular activities. ICS/MCI argues, for instance, that AT&T's financial arrangements with the Bell Operating Companies "is a pure form of cross-subsidy since the monies advanced by the BOCs to AT&T's cellular activities in essence constitute an interest free loan which would be repaid in inflated (i.e., less valuable) dollars." AMPS, in reply, maintains that "ICS/MCI's comments on AT&T's Capitalization Plan for its cellular subsidiary are untimely,[26] groundless, and irrelevant to the instant proceeding." AMPS argues that ICS/MCI has mischaracterized the BOC expenses as "advances" when, in fact, such payments compensated AT&T for business functions performed for the BOCS on a centralized basis and so that they would be in a position to provide any data the Commission might request. AMPS then argues that the issue is moot. This is so, according to AMPS, because all resources now owned by AMPS will be placed in seven separate corporations that will be owned by seven regional companies upon AT&T's divestiture of all ownership interests in the Bell Operating Companies.

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[25] U.S. v. American Telephone and Telegraph Co., Civ. Nos. 74-1698 and 82-0192, ___F.Supp. ___, 47 Fed. Reg. 40,392 (D.D.C. 1982).

[26] AMPS, in this regard, asserts that ICS/MCI's comments should have been filed with the Commission when the agency invited comments on the Capitalization Plan, not six months later.

36. Allegations concerning AT&T's Capitalization Plan will be considered and resolved in a separate decision ruling on the Capitalization Plan. Since ICS/MCI's allegations concern the Capitalization Plan generally, and are not peculiar to the Los Angeles market, the findings in our decision on the plan, will control the disposition of these issues. As in our previous decisions, we will condition the authorization here upon our approval of the plan. *See, e.g., Advanced Mobile Phone Service, Inc.* (*Chicago Order*), 91 FCC 2d 512 (1982), at n. 3 and para. 18.

Financial Qualifications

37. ICS/MCI, while recognizing that "AT&T has enormous resources which can be devoted to its cellular activities," nevertheless asserts that AMPS has failed to demonstrate that it is financially qualified as required by Sections 22.913(a)(8) and 22.917 of the Commission's Rules, 47 C.F.R. §§ 22.913(a)(8), 22.917. ICS/MCI notes, in this regard, that while AMPS "states that its Capitalization Plan contains the necessary documentation that demonstrates its financial qualifications, . . . that information is not available for public inspection since AT&T asked that it be afforded confidential status." AMPS, in reply, states that the Commission has previously ruled on this contention, as well as petitioner's contention that AT&T's financial non-disclosure request failed to satisfy Section 0.457(d) of the Commission's rules, 47 C.F.R. § 0.457(d), and, therefore, ICS/MCI's arguments are moot.

38. This allegation has already been considered and rejected by the Common Carrier Bureau in an order which the Commission declined to review. *Application of Advanced Mobile Phone Service, Inc.* (*Pittsburgh Order*), CC Mimeo 1169, released December 6, 1982, at para. 16, *review denied, Advanced Mobile Phone Service, Inc.*, FCC 83–111, released March 6, 1983. We here affirm the Bureau's conclusion that AT&T obviously has sufficent resources to construct the proposed systems. We do not agree with the implication of ICS/MCI's argument that we are holding AT&T to a standard different from that applicable to all other cellular applicants. AT&T has submitted all the information required to give reasonable assurance to this Commission that it is financially qualified, notwithstanding that insignificant portions of its showing were withheld from public disclosure.[27] The financial information in the Capitalization Plan has been incorporated by reference in all of AMPS' cellular applications. That information reveals that all of AMPS' proposed systems will cost $967.9 million in the 1982–1986 period (operating losses through 1984 are taken into account) and

[27] The portions witheld are: a pro forma income statement for the years 1983–1987; a statement of funds from operations through 1987; and a market forecast. None of these is critical to an assessment of AMPS' financial qualifications.

that AT&T will contribute $897 million in equity funding and the remainder in short-term advances.[28] There can be no doubt, based on publicly-available records, that AT&T has enough resources to fund this amount. The impending divestiture of the Bell Operating Companies does not change the result because AT&T is obligated to fund the BOC's at a level sufficient to enable them to remain financially sound, and because the executives of the Regional Holding Companies have certified that they can and will continue to develop and finance cellular service.[29] Accordingly, we concur with the Bureau that AT&T and the seven Regional Holding Companies, the *smallest* of which has assets of *$16 billion*, is financially qualified.

Interconnection

39. ICS/MCI's final arguments relate to AMPS' interconnection proposal. Recognizing that "the Commission has accepted this proposal in other proceedings," petitioner again expresses concern "that such arrangements will not be forthcoming "because it has already experienced difficulties with wireline carriers in the Los Angeles market, which have "been unreasonably slow in responding to requests for service." In short, ICS/MCI asserts that while it "believes that the interconnection proposal of AMPS is inadequate in fundamental respects, these deficiencies are accentuated by the inability of AMPS to insure competing carriers that they will receive the necessary interconnection arrangements throughout the [Los Angeles] SMSA."

40. We affirm the Bureau's rejection of this argument. In the *Pittsburgh Order*, *supra* at para. 13, it was determined that a sufficient interconnection proposal is described in two documents submitted by AT&T, and that both AT&T and AMPS are presently participating with many nonwireline applicants, among other parties, in Commission meetings to establish reasonable interconnection standards. Moreover, we emphasize that if reasonable interconnection arrangements have not been formulated by the time AMPS files an application for a license to operate its cellular system, any grant to AMPS will be an conditioned upon its providing reasonable interconnection.[30]

Ordering Clauses

41. Accordingly, IT IS ORDERED, pursuant to Section 22.29 of

[28] Because of the wireline agreements in 18 of the 30 largest markets, AMPS' funding requirements will be considerably less than the $967.9 million originally contemplated.

[29] Statements of the Regional Holding Company Presidents were submitted with a letter dated March 11, 1983, to the Chief, Common Carrier Bureau as a supplement to the Capitalization Plan.

[30] 89 FCC 2d at 81–82.

the Commission's Rules, that the Joint Request for Approval of Limited Partnership filed by Advanced Mobile Phone Service, Inc., GTE Mobilnet of Los Angeles, Incorporated, ConTel Mobilcom, Inc., United States Cellular Corporation and its parent Telephone and Data Systems, Inc. IS GRANTED and the accompanying November 2, 1982 Limited Partnership Agreement is APPROVED as consistent with the public interest, convenience and necessity.[31]

42. IT IS FURTHER ORDERED that the amendment to the Advanced Mobile Phone Service, Inc. application is ACCEPTED, that the amendment is exempted from the cut-off provisions under Section 22.31(e)(3) and (4) and that the amended AMPS application, File No. 26030-CL-P-(24)–82, IS GRANTED, conditioned upon the Commission's action on the AT&T Cellular Capitalization Plan submitted on May 25, 1982, as provided by Section 22.901(d)(3) of the Commission's rules.

43. IT IS FURTHER ORDERED that the request for withdrawal of the applications filed by GTE Mobilcom of Los Angeles, Incorporated, File No. 26053-CL-P-(34)–82, and ConTel Mobilcom, Inc., File No. 26038 CL-P-(6)–82 IS GRANTED and the applications are DISMISSED.

44. IT IS FURTHER ORDERED that the joint request for withdrawal of the application filed by Telephone and Data Systems, Inc. (TDS) and it's subsidiary, Cellular Corporation of Indiana, Indianapolis, Indiana, IS GRANTED and the application File No. 26131-CL-P-(9)–82, and Petitions to deny filed against them ARE DISMISSED.

45. IT IS FURTHER ORDERED that the authorization is conditioned upon AMPS filing an amendment to the limited Partnership Agreement which eliminates the language contained in Section 11.1 of the Agreement, imposing restraints on the alienation of partnership interests.[32]

46. IT IS FURTHER ORDERED that the authorization does not include any right to interference protection in any areas outside the Los Angeles SMSA, and further conditioned upon AMPS coordinating with future licensees of the Ventura SMSA, and upon providing interference free operation in these areas.

47. IT IS FURTHER ORDERED that the authorization is conditioned upon AMPS obtaining the appropriate antenna structure clearances.

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[31] In taking this action today, we are establishing the precedent for consideration of other wireline agreements. We expect the Chief, Common Carrier Bureau, to dispose of other agreements under delegated authority.

[32] The Commission will withhold issuance of AMPS' authorization until the amendment is received by the Mobile Services Division, Common Carrier Bureau. We also remind the partners that, pursuant to Section 212 of the Communications Act, officers or directors of more than one carrier are required to have authorizations to hold interlocking directorships.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Wireline Cellular Applicant Settlement Agreement in the Los Angeles, California, Standard Metropolitan Statistical Area.

I write separately here to emphasize that this Commission has now twice determined that settlements by mutually-exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC in accordance with this statutory mandate. In reaching these determinations we have carefully and fully balanced any competing antitrust values of maintaining "competition" in cellular system applications with the demonstrated public interest in the rapid and efficient deployment of cellular technology and service. As we have now also repeatedly emphasized, while "competition" is an integral part of our public interest standard, it is not the whole of our statutory mandate: "[A]gencies are not strictly bound by the dictates of [the antitrust] laws . . .; rather, they are entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry. The agency's determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry." *United States* v. *FCC* (SBS), 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc) (citation omitted). We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement—and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation—enjoy the full measure of this Commission's approval.

March 31, 1983

STATEMENT OF COMMISSIONER ANNE P. JONES CONCURRING AND DISSENTING IN PART

IN RE: Cellular wireline settlement agreement in the Los Angeles, California, Standard Metropolitan Statistical Area

This order approves another part of the web of settlements by wireline carriers seeking to provide cellular communications service. While I concur in the result of the decision, which will make cellular service available in Los Angeles in the near future, I specifically dissent from its denial of the Department of Justice's very reason-

able request that this agency directly consider the public interest impact of its rhetoric encouraging cellular settlements.

As I have indicated previously, I do not believe it appropriate for this agency to adopt a "private settlement" procedure for choosing cellular licensees. I see no reason to believe that collusion among competing applicants serves the public interest. If the comparative hearing process ostensibly adopted for cellular applications is too slow, the Commission should further streamline that procedure or eliminate it in favor of a faster process. It should not follow a policy of de facto abdication of its duty to choose the licensee.

COMSAT
Corporate Organization
Satellite Communications

Petitions for reconsideration or clarification of the Commission's *Memorandum Opinion and Order* (adopted August 5, 1982) denied except to the extent indicated therein.
-COMSAT
CC Docket No. 80-634

FCC 83-121

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Changes in the corporate structure and operations of the Communications Satellite System	CC Docket No. 80-634

MEMORANDUM OPINION AND ORDER

(Adopted March 31, 1983 Released April 20, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT.

I. *Background*

1. On August 5, 1982, we adopted our Memorandum Opinion and Order in the above-captioned proceeding, *Communications Satellite Corporation*, 90 FCC 2d 1159 (1982) (hereinafter *Structure*). We now have before us a Petition for Reconsideration or Clarification of this order filed on October 20, 1982, by Western Union International, Inc. (WUI) and a Petition for Partial Reconsideration filed on October 18, 1982, by RCA Global Communications, Inc. (RCA Globcom). Also before us are oppositions to these petitions submitted on November 17, 1982, by the Communications Satellite Corporation (Comsat) and Aeronautical Radio, Inc. (ARINC). In addition, on November 26 and November 29, 1982, respectively, WUI and RCA Globcom filed replies to the Comsat and ARINC oppositions.

2. In the *Comsat Study*,[1] we undertook a comprehensive examination of Comsat and its operations. In that study, we noted that

[1] Communications Satellite Corporation, 77 FCC 2d 564 (1980) (hereinafter Comsat Study).

Comsat had in recent years begun to engage in activities other than its traditional statutory INTELSAT/INMARSAT functions and we found a number of areas where those new activities might create conflicts with its appropriate discharge of those statutory functions. On balance, though, we found that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT business activities so long as such participation is not inconsistent with its statutory responsibilities. We did, however, identify a number of specific changes in Comsat's structure and operations we felt should be made. Following that order, Comsat voluntarily reorganized itself to separate its INTELSAT and INMARSAT operations from its other functions.

3. In the *Structure* order which followed, we again affirmed that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT business activities so long as such participation is not inconsistent with its statutory responsibilities. We also said that Comsat's participation in all present and future non-INTELSAT/INMARSAT activities would be through its subsidiaries only; the parent organization would be limited to INTELSAT/INMARSAT functions.[2] We found that Comsat's reorganization generally conformed to this approach. However, in reviewing Comsat's reorganization, we found several areas where we believed Comsat's efforts had not gone far enough to answer the concerns we stated in the *Comsat Study*.These deficiencies concerned Comsat's accounting for research and development, its accounting for shared administrative and support services and its method of public dissemination of INTELSAT/INMARSAT information. We directed Comsat, within 90 days of the release of the order, to file with us reports explaining how it intended to establish mechanisms to remedy these deficiencies.[3] We stated that if Comsat were unable to implement appropriate accounting and information flow control mechanisms, then we would consider whether further structural separation is warranted.

II. *Summary of Petitions*

4. RCA Globcom seeks partial reconsideration of the *Structure* order in two respects. First, it requests us to modify the *Structure* decision to require that Comsat provide all communications services to non-carriers, including basic INTELSAT satellite transmission capacity at the earth stations[4], exclusively through a retail subsid-

[2] We use the terminology "Comsat parent" in this order to refer to that part of the parent company which performs certain international common carrier functions and related duties with respect to the INTELSAT and INMARSAT systems. This entity is called the World Systems Division.

[3] Two extensions were granted. Comsat filed a report on information flow on December 13, 1982 and a report on allocation of shared services and capitalization of Comsat Labs on January 24, 1983.

iary. RCA Globcom wants this modification to remain in effect at least until we have concluded our inquiries in CC Dockets Nos. 82–540 and 82–548 into the right of other carriers to have direct access to INTELSAT space segment and independent ownership of U.S. earth. stations that operate with the INTELSAT system.[5] Second, it requests that, during the pendency of these proceedings, we establish adequate controls over rates to be charged by the subsidiary.

5. WUI seeks reconsideration or clarification of the order in six respects. First, it asks us to require Comsat to provide all non-carrier services through a separate subsidiary, irrespective of whether those services are provided at customers' premises or at earth stations. Second, it requests that we afford WUI and the other international service carriers access to INTELSAT information by granting them observer status at INTELSAT meetings. Third, it contends that we should restrain Comsat from serving end users until Comsat remedies the problems identified in the *Structure* order. Fourth, it argues that we do not have power under the Communications Satellite Act of 1962, 47 U.S.C. §§701–744 (1976), to authorize or permit Comsat to engage in any activities other than those which are not intimately connected with, and directly and substantially in furtherance of, its limited statutorily mandated INTELSAT and INMARSAT missions. Fifth, it argues that our proposed structural and operational changes to Comsat will not adequately preserve competition or protect the public interest. Finally, WUI requests that we immediately grant its pending requests for: (1) cost-based access to INTELSAT space segment rates; (2) unbundled rates for the space-segment and earth-segment components of INTELSAT service; and (3) independent access and operational capability at the U.S. INTELSAT earth stations.

6. In the following sections we shall address each argument raised by RCA Globcom and WUI. At the same time, we shall consider matters raised by the responsive pleadings filed by the parties.

III. *Discussion*

A. *Applicability of separate subsidiary requirement to the provision of INTELSAT transmission capacity.*

1. Arguments of the parties on separate subsidiary issue

7. The parties to this proceeding are polarized on the issue whether Comsat should be required to provide INTELSAT transmis-

[4] The Structure order used the term "basic transmission capacity" to refer to INTELSAT transmission capacity. However, in order to avoid any possibility of confusion with the definition of "basic" in other Commission proceedings, we will henceforth refer to this capacity as INTELSAT transmission capacity.

[5] INTELSAT Satellite Facilities, 90 FCC 2d 1446 (1982) (hereinafter Direct Access); U.S. Earth Stations, 90 FCC 2d 1458 (1982) (hereinafter Earth Station Ownership)

sion capacity to non-carrier users through a separate subsidiary, rather than through the parent. Both WUI and RCA Globcom argues that the service should be provided through a separate subsidiary, at least until we resolve the *Direct Access* and *Earth Station Ownership* inquiries. Comsat and ARINC disagree.

8. WUI argues that our action in the *Authorized User* order[6] was contrary to our pronouncements in the *Structure Order*. WUI sees possible contradictions in two areas - the definitions of "monopoly" and "competitive" services and the determination of which arm of Comsat would provide each type of service. As to the first point, WUI claims that the Commission recognized in *Authorized User* that provision of "basic" transmission capacity to non-carriers is a "competitive" service.[7] WUI cites the following language in the decision as the basis for its claim: "Even if Comsat elects to limit itself to its current role of providing basic satellite transmission capacity at U.S. earth stations, affording customers the opportunity to deal directly with Comsat will impose competitive pressures on the existing carriers." 90 FCC 2d at 1142. In addition, WUI argues that competition has already developed between Comsat and WUI in the provision of "basic" transmission capacity to DOD at earth stations in Hawaii and Guam. WUI states that such competition will divert leased channel revenues from the international record carriers. WUI believes, however, that the definition of a "competitive" service as used in the *Structure* order may not encompass the provision of INTELSAT transmission capacity. WUI notes that the *Structure* order defines "competitive" as referring to all existing and future non-INTELSAT/INMARSAT activities in which Comsat engages. 90 FCC 2d at 1172 n.9. WUI states that it is unsure whether or not the provision of "basic" transmission capacity would be classed as an INTELSAT or a non-INTELSAT activity within the meaning of this definition. WUI concludes that if we meant "basic" transmission capacity to be an INTELSAT monopoly activity, such a result would be inconsistent with our pronouncements in *Authorized User*.[9]

9. The other inconsistency between the *Authorized User* and

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[6] Authorized Users Policy, 90 FCC 2d 1394 (1982), *review pending sub nom.* RCA Global Communications, Inc. v. FCC, No. 82-1972 (D.C. Cir., filed August 20, 1982), *case consolidated with* ITT v. FCC, Nos. 79-1046 *et al.* (D.C. Cir. filed January 12, 1979) (hereinafter Authorized User).

[7] In Authorized User we defined "basic transmission capacity" as a two-way communications link–called a half circuit–between a U.S. earth station and an INTELSAT satellite. Provision of "basic" or INTELSAT transmission capacity does not include the making of additional service arrangements including those with a U.S. domestic carrier for connecting circuits to the U.S. earth station and with a foreign telecommunications entity for the foreign satellite half circuit and the necessary connecting links within the foreign country. 90 FCC 2d at 1402-03.

[9] Similarly, WUI states that if we intended by this definition to exclude from competition the provision to non-carrier users of "basic" transmission capacity,

Structure orders, WUI alleges, relates to which subdivision of Comsat we directed to provide competitive services. WUI reads the *Structure* decision as restricting the parent to monopoly INTELSAT/INMARSAT activities and allowing competitive activities only in the subsidiaries. WUI notes, however, that the *Authorized User* order directs the parent to lease INTELSAT transmission capacity to non-carriers. Since, WUI argues, the provision of INTELSAT transmission capacity is competitive with IRC leased-channel service[8], WUI concludes that our *Authorized User* order thereby directs the Comsat parent to provide a competitive service in conflict with the limitation set out in the *Structure* decision. Therefore, WUI alleges these companion orders have this additional inconsistency.

10. RCA Globcom does not argue that the *Structure* order contradicts the *Authorized User* order, but that the latter order is wrong in that, by allowing the Comsat parent to mix competitive and monopoly activities, it fails to protect fair competition and important user interests.[10] Since it believes that *Authorized User* is incorrect, it asks us to change the *Structure* order to bring it into conformity with our alleged earlier recommendations in the *Comsat Study*, *supra*, by requiring Comsat to provide all communications services to non-carrier users, including INTELSAT satellite transmission capacity, exclusively through its "retail" subsidiary. RCA Globcom Petition, p. 8.

11. RCA Globcom states that, absent such safeguards, the actions we took, which were purportedly taken to foster competition, will have the opposite effect of giving Comsat a *de jure* monopoly over the provision of "basic" transmission capacity to users at the earth stations long before we have had a chance to determine whether INTELSAT services should continue to be provided on a monopoly basis. This monopoly is accentuated, RCA Globcom argues, because *Authorized User* directs the Comsat parent to lease INTELSAT satellite transmission capacity to carriers and to non-carriers at the same rate. It believes that such a result is directly contrary to the thrust of the *Comsat Study* which it asserts envisions that a subsidiary provide such capacity to non-carriers. RCA claims that it cannot engage in meaningful price competition under such circumstances and that, as a result, a considerable portion of its and the other international service carriers' revenues are at risk. Also, RCA Globcom avers that important consumer interests will be jeopardized by our policy. It argues that consumers may construct their own

then the *Structure* order is also "internally inconsistent and totally at odds with reality." WUI Petition, p. 6.

[8] *See* para. 8, *supra*.

[10] Nevertheless, RCA Globcom contends that it is not challenging the *Authorized User* decision, but that it merely seeks "safeguards to preserve the *status quo* while the Commission resolves the claims of other carriers that they should not have to use Comsat as a middleman for access to INTELSAT." RCA Globcom Petition, p. 2.

domestic facilities near the INTELSAT earth stations and, thus, become locked into Comsat's monopoly service for long periods of time. Finally, it claims that there will be a substantial diversion of traffic caused by the Comsat parent's entry into the "retail" market and this diversion will idle existing facilities, and shift those costs to users of remaining facilities.

12. In its opposition, Comsat asserts that the petitioners' contention that we should not have permitted the Comsat parent—as opposed to a Comsat subsidiary—to provide "basic" transmission capacity to non-carrier entities is improperly raised here. Comsat argues that the petitioners should have raised their arguments in the *Authorized User* proceeding since that is where we determined that the Comsat parent should provide such "basic" capacity. Comsat contends that even if the petitioners' arguments of inconsistency and of lack of promotion of competitive policies were valid, the relief that RCA Globcom and WUI seek is not a change in the *Structure* order to conform to *Authorized User*, as they assert, but a change in the *Authorized User* order to conform to *Structure* —relief which cannot appropriately be granted in this proceeding.

13. Although Comsat raises this procedural point as a threshold issue, it also addresses the substance of the petitioners' arguments. In so doing, it disputes the petitioners' contentions of inconsistency among the *Authorized User*, the *Structure* and the *Comsat Study* proceedings. It reads the *Comsat Study* and *Structure* proceedings as limiting the Comsat parent to performing jurisdictional monopoly—defined as INTELSAT/INMARSAT—activities while allowing the subsidiaries to carry out all other ventures. Further, it contends that it is the *Authorized User* proceeding, not the *Comsat Study* or *Structure* proceedings, which defined the contours of Comsat's INTELSAT jurisdictional monopoly activities. First, Comsat argues that the *Authorized User* decision clarified that the provision of "basic" satellite capacity is an INTELSAT jurisdictional monopoly activity. Second, Comsat points out that in *Authorized User* we interpreted the the term "authorized users" in the Satellite Act to include non-carrier entities. Comsat concludes that we thus found that non-carrier entities are entitled to obtain "basic" INTELSAT satellite capacity directly from Comsat. Comsat concludes that the provision of such satellite capacity to non-carriers is a jurisdictional monopoly activity and that it should therefore be provided by the parent consistent with the requirements of the *Structure* order.

14. ARINC, in its opposition, states that RCA Globcom's and WUI's petitions are nothing but attempts to attack collaterally the Commission's determination in *Authorized User* that users should be permitted to acquire satellite capacity from Comsat on the same terms and conditions as the international record carriers. ARINC contends that we should not further delay the public benefits which

we have found will accrue from permitting non-carrier users to obtain "basic" INTELSAT capacity directly from Comsat.

15. ARINC also finds no inconsistency among the Commission's decisions. ARINC notes that our *Structure* order defines "competitive" to include "existing and future non-INTELSAT/INMARSAT activities engaged in by Comsat." 90 FCC 2d at 1172 n.9. ARINC asserts that the provision of "basic" satellite capacity is an "INTELSAT activity" since Comsat currently obtains the space-segment and earth-station services it provides users as a result of its role as the United States signatory to INTELSAT and that the provision of such capacity therefore does not fall within the scope of "competitive" services as that term is used in the *Structure* order. Further, since, at present, Comsat is the only entity authorized to acquire satellite circuits directly from INTELSAT, ARINC argues that the provision of this capacity to Comsat's customers, such as tht international record carriers (IRCs), DOD, ARINC, and others, cannot be deemed "competitive" even in the ordinary sense of the word. ARINC contends that the mere desire of the IRCs to become competitors in providing such capacity does not in and of itself change the nature of the service from monopoly to competitive.

16. RCA Globcom in its reply disputes Comsat's procedural arguments and contends that we can grant the relief sought in either the *Authorized User* or the *Structure* proceeding. RCA also reasserts its view that the provision of "basic" capacity is "competitive" with the IRCs' leased channel services and that Comsat's position that "basic" INTELSAT transmission service is "jurisdictional" is irrelevant to the issue involved, since both INTELSAT transmission and end-to-end services are "jurisdictional" to the extent that they fall within Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–224 (1976). It further states that equality of competitive opportunity can be achieved only if the Comsat parent is prohibited from providing either type of service directly to non-carrier users.

17. WUI in its reply claims that Comsat's opposition is essentially procedural and not helpful to the Commission's resolution of the substance of the issues. WUI notes that Comsat did not deny that the *DOD Hawaii-Guam* [11] case demonstrated that Comsat and WUI were "competitors" for DOD's "private line" business at the earth stations. [12] WUI Reply, p.3 WUI also faults ARINC's opposition for failing to justify its claim that the Commission's interrelated satellite orders of August 5, 1982 are clear and complete.

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[11] Western Union International, Inc. v. Communications Satellite Corporation, CC Docket No. 81–356 (released December 10, 1981) (hereinafter, DOD Hawaii-Guam)

[12] We are not certain what WUI means by the term "private line" in this connection. We assume that WUI is referring to IRC leased channel service. *See* 90 FCC 2d at 1397 n.3.

2. Discussion of separate subsidiary issue

18. As an initial procedural matter, we question whether the relief sought appropriately may be granted in this proceeding. We shall first address WUI's arguments. WUI does not argue with our findings in *Structure* that the Comsat parent shall provide jurisdictional monopoly services and the Comsat subsidiary(ies) shall provide other than jurisdictional monopoly services.[13] Rather, WUI disagrees with our treatment in *Authorized User* of the provision of INTELSAT transmission capacity to non-carriers as a jurisdictional monopoly service. Therefore, WUI is really asking us to change our definition in *Authorized User*, not in *Structure*.

19. Similarly, RCA Globcom argues that the relief it seeks is necessary because our decision in *Authorized User* is directly contrary to the thrust of the *Comsat Study*. RCA Petition, p. 6. Again, even were we to accept RCA Globcom's argument, the appropriate relief would be a modification of the *Authorized User* decision and not the *Structure* decision. The *Structure* decision does not even mention the provision of INTELSAT transmission capacity; it merely states that activities in furtherance of Comsat's INTELSAT functions are to be provided by the parent and non-INTELSAT activities by the subsidiary(ies). The *Authorized User* decision clarifies the status of the provision of INTELSAT transmission capacity as an INTELSAT activity regardless of whether it is provided to carriers or directly to non-carrier users. It is this latter interpretation with which RCA Globcom takes issue here and for which it seeks relief. As a result, RCA Globcom is similarly seeking relief which cannot appropriately be granted in this proceeding.

20. Although we could dismiss this aspect of the petitions on procedural grounds, we believe that the petitioners have misconstrued our *Structure* and *Authorized User* orders, as well as the nature of the service Comsat will be providing, and that it would be helpful for us to clear up those misunderstandings. First, we will discuss the allegations of inconsistency and, second, the allegations of unfairness. The petitioners have argued that our orders are inconsistent in that they could allow the Comsat parent to engage in competitive activities which we have found it should not engage. The petitioners have each alleged a different inconsistency. WUI contends that the *Structure* decision is inconsistent with the *Authorized User* decision, while RCA Globcom seems to be contending that both the *Structure* and *Authorized User* decisions are inconsistent with the *Comsat Study*.

21. As noted in paras. 8 and 9, *supra*, WUI believes that our

[13] Jurisdictional monopoly services are those granted to Comsat by virtue of its unique roles under the Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744 (1976). They are not necessarily delineated by economic forces or theories, such as those arising from a natural monopoly position.

Authorized User policy directed the Comsat parent, rather than a subsidiary, to compete for what WUI characterizes as the "private line" business of larger users at the U.S. earth stations. WUI reasons that since it and other carriers intend to compete with Comsat for this "private line" business the provision of such service must then be a competitive and not a monopoly activity. It follows, argues WUI, that to be consistent with *Structure*, a Comsat subsidiary, rather than the parent, should have been required to provide this service.

22. We disagree with WUI's analysis. The *Authorized User* order did not direct, or even allow, the Comsat parent to offer "private line" service to large users. Rather, it directed the Comsat parent to make available to all users only INTELSAT satellite-transmission capacity at U.S. earth stations. Nothing in the *Authorized User* decision alters the fact that Comsat is currently the only entity with access to this INTELSAT capacity. Because of Comsat's unique position, the provision of INTELSAT capacity is effectively a monopoly service. The nature of this monopoly service, which had previously been supplied primarily to carriers, does not change because Comsat may now supply it directly to non-carriers, who are also potential customers of end-to-end carriers. Since in either case the provision of INTELSAT satellite capacity is essentially the same service, it retains its monopoly characteristics, independent of the nature of the buyer. Further, the Comsat parent realizes no additional profit by providing capacity directly to non-carriers, than by providing the same capacity indirectly to non-carriers through "middlemen" carriers who put together an "end-to-end" service. Therefore the Comsat parent cannot be said to be competing with the end-to-end carriers for "private line" service to non-carrier users since Comsat is indifferent financially as to whether it leases capacity directly or indirectly to these users.

23. Nowhere in the *Authorized User* order did we state, or even imply, that the provision of INTELSAT transmission capacity is a competitive activity. We did recognize that the provision of end-to-end service is a competitive activity when we stated that Comsat's entry into the end-to-end market would increase competition in that market.[14] We did not treat the provision of INTELSAT capacity in a similar fashion. Instead, we distinguished between a competitive activity and an activity which only exerted "competitive pressures." We reasoned that provision of INTELSAT capacity to non-carrier users does not include services traditionally provided by end-to-end carriers. Instead we said that a user must make its own communications arrangements for the facilities necessary to transmit its

[14] ". . . . our decision permits Comsat to provide additional end-to-end sevices directly to the pulic. Although Comsat has expressed no present intention to do so, we find that the industry would benefit from entry of a new competitor such as Comsat which has the resources and experience to play a major role in providing satellite services to the public." 90 FCC 2d at 1420.

message between its office and a U.S. earth station, and must also make its own arrangements with a correspondent for the foreign end of the circuit. Under this scheme, the existing carriers would not be competing with Comsat to serve non-carrier users, although they would be under "competitive pressures" to reduce their end-to-end rates. The competitive pressures arise because of the possible differences in the charges set by carriers to provide the domestic and foreign segments of international service with the costs to users of making their own domestic and foreign arrangements. Comsat's provision of INTELSAT capacity is the same in either case. Further, pursuant to Comsat's *Authorized User* tariff, this INTELSAT satellite capacity is available to carriers and non-carriers at the same rate and on the same terms and conditions. Thus, giving non-carrier users the option of dealing directly with Comsat for monopoly satellite capacity permits these users to decide whether they can arrange a better deal for the additional facilities and services necessary to complete an end-to-end service than that offered by the existing "middlemen" carriers. The availability of this option to users does not make the provision of INTELSAT transmission capacity "competitive" with the provision of end-to-end service, because INTELSAT capacity is an input to end-to-end service, not a substitute for it.[16]

24. The competitive/monopoly distinction in the above decision is also consistent with that in our *Structure* order. In the *Structure* order we defined "competitive" as follows: "We use the term competitive in this document to refer to existing and future non-INTELSAT/INMARSAT activities engaged in by Comsat." 90 FCC 2d at 1172, n.9. Therefore, non-competitive refers to existing and future INTELSAT/INMARSAT activities engaged in by Comsat. Looking at the INTELSAT side, we observe that the furnishing of INTELSAT transmission capacity—defined as the provision of INTELSAT half circuits—is clearly an INTELSAT activity, and thus "non-competitive" within the meaning of the *Structure* dichotomy.[17]

25. As we have indicated, the fact that Comsat's provision of INTELSAT capacity is non-competitive does not change simply because Comsat offers it directly to non-carriers as well as to carriers. Under current policy, Comsat is the only entity authorized

[16] When we indicate that our Authorized User decision has not provided for direct competition in the provision of INTELSAT capacity (earth segment and space segment) between the Comsat parent and the end-to-end carriers, we do not imply that this decision has not altered the structure of the market. It has, of course, intentionally done so. But the "competition" it creates is among the end-to-end carriers who are competing both with each and with potential customers for the "packaging" type functions required to put together an end-to-end service.

[17] We are not taking issue with WUI's assumption that "private line" or "leased channel" service is competitive. Indeed, the Authorized User decision found that Comsat can provide "leased channel" service only through a subsidiary. *See* 90 FCC 2d at 1421.

to participate in INTELSAT and is therefore the only entity who can supply INTELSAT capacity in the United States. We, therefore, recognize that competition in the form of additional suppliers of INTELSAT capacity is virtually impossible under current INTELSAT earth station and space segment access policies.[18] In fact, one of the reasons we have instituted the inquiries in CC Dockets Nos. 82–540 and 82–548 is to gauge the possibility of competition in the provision of INTELSAT capacity. Should we find such additional competition feasible and desirable, we can take any actions to implement that finding—including further changes to Comsat's corporate structure and operations—at that time. Until such time, however, we find no public interest benefit to be gained from trying even temporarily to make the provision of INTELSAT capacity "competitive" by inserting a layer of carrier middlemen between the sole supplier of such capacity, Comsat, and its non-carrier customers. Such a scheme would only produce inefficiency as far as non-carrier users are concerned. The benefits of the *Authorized User* policy are primarily in the "add-on" category; users can now benefit if they can perform the services added by end-to-end carriers to Comsat's INTELSAT service more efficiently than the carriers themselves perform these services.

26. Therefore, we reject WUI's arguments that the *Authorized User* decision improperly directed the Comsat parent to provide INTELSAT transmission capacity. Such provision is a monopoly INTELSAT activity which the *Structure* decision correctly relegated to the parent company.

27. RCA Globom makes a somewhat different argument concerning inconsistencies. RCA Globcom recognizes that both the *Authorized User* and the *Structure* decisions provide that the Comsat parent lease INTELSAT transmission capacity at U.S. earth stations to non-carrier users as well as to carriers. However, RCA Globcom argues that such a policy is inconsistent with the policy of the *Comsat Study*. We do not find this argument persuasive. The recommendations in the *Comsat Study* were clearly only tentative findings pending completion of a notice and comment rulemaking proceeding. All of the findings in the *Structure* decision are not necessarily present in the *Comsat Study*. Therefore, resolution of this issue is not relevant to the instant reconsideration. Nevertheless, in the interests of clarity, we shall address RCA Globcom's argument to determine if the *Comsat Study* recommendation differs from the procedures adopted in the above decisions.

28. RCA Globcom cites the following language in the study:

> The structural changes we describe in this Report would establish a framework to locate all of Comsat's jurisdictional monopoly activities with [the

[18] However, some form of competition is feasible through the offering of services over substitutable media, such as coaxial or fiber optic submarine cable.

> Comsat parent] Comsat Global . . . . [These] jurisdictional monopoly activities will be isolated from activities in the competitive environment in which the corporation could engage through its Comsat National subsidiary. COMSAT Global would be required to sell INTELSAT half-circuits including space segment and ground segment (earth station services), to all competitive retailers on fair and equal terms pursuant to tariff. . . . [the Comsat competitive subsidiary] Comsat National could enter the competitive retail market for provision of international satellite services directly to end-users. 77 FCC 2d at 750 (footnote omitted)[19]

RCA Globcom apparently believes that our failure to include in this paragraph the lease of INTELSAT half circuits to non-carriers was intended to indicate that the Comsat parent is not to offer them.[20] We disagree. First of all the focus of this sentence was simply to make it clear that when Comsat provided this capacity to the end-to-end carriers it had to make it available on fair and equal terms pursuant to tariff. Moreover, the *Comsat Study* was adopted well before we issued our *Authorized User* order and, thus, could not dispose of matters which were still at issue in the then pending *Authorized User* rulemaking. We note, however, that the *Comsat Study* cited (in a footnote to the same paragraph quoted by RCA Globcom) proposals in the *Authorized User-NPRM* [21] which were intended to allow non-carrier entities to obtain INTELSAT half circuits (what *Authorized User* called "basic" INTELSAT transmission capacity) for their own use.[22] The *Comsat Study* further recognized that this NPRM proposed to treat these non-carrier entities as "authorized users" with the authority to acquire space segment directly from Comsat's monopoly arm (i.e., the parent).[23] It is thus apparent that when we decided the *Comsat Study* we were aware of the fact that the Comsat parent would likely be authorized to deal directly with non-carrier users. Therefore, we conclude that these *Comsat Study* recommendations are not inconsistent with both the *Authorized User* and *Structure* orders.

29. Finally, both petitioners make arguments based on equity for preventing the Comsat parent from offering capacity to non-carriers.

[19] Comsat Global was used to refer to the parent company and Comsat National to a subsidiary.

[20] RCA Globcom also believes that the Commission's use of the term "jurisdictional" in this quotation is irrevelant to a determination of whether basic service should be provided by the parent or by a subsidiary. RCA Globcom believes that "jurisdictional" means all services subject to Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–224 (1976). We disagree with this interpretation. The quotation speaks of "jurisdictional monopoly" activities, not merely "jurisdictional" activities. As indicated in footnote 12, *supra*, by "jurisdictional monopoly" we were referring to Comsat's role under the Communications Satellite Act of 1962, 47 U.S.C. §§ 701–744 (1976). A part of this role is to provide INTELSAT half circuits—"basic" transmission capacity—to authorized users.

[21] Aeronautical Radio Inc., *et al.*, 77 FCC 2d 535 (1980) (hereinafter Authorized User-NPRM)

[22] 77 FCC 2d 750 n.245.

[23] 77 FCC 2d 752.

They claim that allowing Comsat to lease INTELSAT capacity to non-carrier users will allow Comsat to capture the major share of this market before we have had a chance to decide the issues of direct access and independent earth station ownership. They contend that Comsat's "basic" INTELSAT service customers will be permanently lost to them because of the timing advantage Comsat would have. Further, they contend that traffic will be diverted from their private line services to Comsat's INTELSAT transmission service.

30. We do not agree with these bleak predictions of future harm. If the IRCs and other carriers are permitted at some future time to compete for some or all aspects of the provision of INTELSAT satellite capacity they should be able with superior price and/or service to attract Comsat's customers. There may be some cases in which Comsat has received a relatively long term commitment from a customer so that the customer is not immediately in a position to obtain competitive services from these carriers. We believe, however, that such situations will constitute a small share of the market. As to diversion of traffic from IRC private line service to Comsat's INTELSAT transmission service, we have recently addressed this issue in our order authorizing Comsat to provide INTELSAT transmission capacity directly to non-carriers. In that order, we found that the conclusions of the RCA submitted traffic and revenue diversion study were speculative and that any diversion of traffic that may occur would not likely to be so substantial as to threaten the IRCs' ability to provide service to the public.[24] Therefore, we see no reason to withhold the benefits of reduced costs to those customers who can efficiently use INTELSAT satellite capacity by providing themselves the services added by end-to-end carriers. We find that the benefit of this customer choice outweighs the above speculative detriment to a framework for the competitive provision of INTELSAT capacity that may result from future Commission actions.

B. *Commission measures to ensure that the separate subsidiary establishes just and reasonable charges.*

31. RCA Globcom addressed ways it believes the separate subsidiary approach in the *Structure* decision should be strengthened to promote competition. RCA Globcom contends that merely requiring Comsat to operate through a separate subsidiary in all its "retail" ventures will not, without supplemental safeguards, adequately protect other carriers from anti-competitive abuses or avoid burdening INTELSAT ratepayers while the Commission is resolving the *Direct Access* and *Earth Station Ownership* proceedings. It asks us to establish additional procompetitive safeguards to assure that

[24] Communications Satellite Corporation, FCC 83-41 (released February 2, 1983). *See also* Authorized User, 90 FCC 2d at 1415-19.

the subsidiary establishes lawful charges, free of any cross-subsidization or misallocation of costs resulting from its corporate affiliation with the parent company. It argues that such safeguards should be established by modifying the *Structure* order in three respects. First, it asks us to affirm that the subsidiary must have separate officers, facilities, advertising and marketing, records and books of account, procurement, and operating personnel from the parent. Second, it requests us to scrutinize carefully Comsat's response pertaining to changes in allocation of common costs ordered by the *Structure* decision. Finally, it requests us to require the Comsat subsidiary to justify any rate initiatives on the basis of fully allocated costs.

32. Comsat, in its opposition, contends that RCA Globcom's argument is not germane to the order under reconsideration. Comsat states (1) that the Commission has already approved of Comsat's organizational changes, (2) that the Commission has already made clear that it would scrutinize Comsat's allocation of costs, and (3) that once the *Structure* issues are resolved by the Commission, there is no reason to treat the rates of a Comsat subsidiary differently from those of other carriers. ARINC's opposition avers that RCA Globcom's argument is not novel and was adequately considered by the Commission in Dockets Nos. 80-170 and 80-634.

33. We shall address RCA Globcom's contentions in the same order as RCA Globcom presents them. First, to the extent that the *Structure* order only implicitly described the structural separation required between the Comsat parent and its competitive subsidiaries, we shall now state these separation requirements more explicitly. We affirm the *Structure* conclusion that Comsat's current organization is generally adequate. Under Comsat's current structure, the parent has separate officers, records and books of accounts, and operating personnel from the subsidiaries. The parent and subsidiaries also provide their own facilities and their own financial, personnel, procurement, advertising and marketing services, except for sharing of certain corporate administrative support services and the laboratories. We said in the *Structure* decision that we would permit this limited sharing of resources if Comsat submitted a plan to ensure proper allocation of common costs associated with such sharing. We also said that if Comsat is unable to establish appropriate accounting and information control mechanisms, then we would consider whether additional structural separation is warranted. We have not as yet completed evaluation of Comsat's plans and therefore have not made a final decision as to the required degree of separation. We also note that we have required Comsat to provide us with 90 days notice if it intends on its own initiative to alter the current structure of the company. If we should receive such notification, we shall determine at that time if the new proposed structure adequately addresses our goal of maximal separation of

competitive and regulatory activities and properly handles the allocation of any justifiable common costs.

34. Second, we have already instructed the Chief, Common Carrier Bureau, to assess the proposals submitted by Comsat to remedy the problems we raised in the *Comsat Study* and the *Structure* orders and to apprise Comsat of any deficiencies found. 90 FCC 2d at 1198. These proposals relate to deficiencies in Comsat's allocation of research and development costs among regulated and unregulated accounts, its accounting for its labs, its accounting of shared administrative and common costs, and its procedures for use and dissemination of technical data generated by INTELSAT and INMARSAT funded work. We direct the Bureau to scrutinize carefully these proposals in order to assure that our policies are effectively implemented.

35. Finally, we note that no Comsat subsidiary has yet filed an application for authority to provide any end-to-end communications service between the United States and overseas points and that there is no tariff covering such service. Hence, only fears that such filings devoid of cost justification might be forthcoming have been cited. We believe that our rules adequately address such fears. For example, if an existing Comsat subsidiary were to file a tariff for such a service, it would be subject to Section 61.38 of the Commission's Rules and Regulations, 47 C.F.R. § 61.38 (1981). In particular, Section 61.38(a) requires that economic data and information be submitted to support a tariff request for a new service. Therefore, we will be in a position to determine if the tariff is justified and we conclude that no additional rules are required to satisfy WUI's request.

C. *Observer status at INTELSAT meetings*

36. WUI cites the Commission's finding in *Structure* that Comsat has an advantage over competitors by reason of its access to information flow from INTELSAT. It believes, though, that our proposed remedy in that order under what it terms the "Freedom of Information Act" is cumbersome and does not offset Comsat's lead time advantages. It restates its earlier proposal to allow the international carriers observer status at INTELSAT meetings. It asks that we instruct Comsat to advocate this position before INTELSAT. Comsat, in its opposition, states that this matter has already been fully briefed by the parties and fully considered by the Commission. It argues that WUI presents no new facts or analysis here.

37. First, we also affirm our conclusion in the *Comsat Study* that the INTELSAT Agreement does not explicitly provide for attendance of private corporations or entities as observers at INTELSAT meetings. On the issue of whether or not such attendance is implicitly permitted by the INTELSAT Agreement, the Department of State would be the appropriate agency to render an interpretation

on this point. In any case, we believe that carrier attendance at meetings is not necessary at this time to offset possible advantages that Comsat may gain as signatory. In the *Structure* order, we have directed Comsat to broaden public access to INTELSAT Board of Governor's documents consistent with requirements imposed on us by the Freedom of Information Act. We have also prohibited Comsat from releasing these documents to its subsidiaries before release to the public. We believe these measures should be sufficient to satisfy any concerns about possible lead time advantages Comsat's subsidiaries may have over competitors. However, we have not permantently foreclosed consideration of carrier observer status should future conditions warrant and should the Department of State issue an opinion that some form of private participation is implicitly permitted by the Agreement.

D. *Restraint on Comsat's service to users pending resolution of structure issues*

38. WUI has asked that we restrain Comsat from serving end users unless and until Comsat remedies the problems set forth in the *Structure* order. It argues that Comsat could be competing for "earth station forward" services [25] with WUI and others for an indefinite period of time, during which period Comsat could continue to misuse its monopoly powers and to misallocate costs—all to the detriment of its carrier competitors. Comsat states in its opposition that this complaint is wholly frivolous and does not warrant substantive response.

39. We find that WUI's concerns have already been adequately addressed by our *Authorized User* order. In that order, we distinguished between two types of international service Comsat may offer to users through the INTELSAT system. The first type is the provision of INTELSAT capacity." As we have earlier indicated, this service is currently provided on a monopoly basis. Therefore, we see no need to condition the offering of this service to users on the implementation of competitive safeguards contained in the *Structure* order.[26] The second type is the provision of so called "end-to-end" communications service between the United States and overseas points. This type of service, should Comsat choose to initiate it, would be provided by a subsidiary on a competitive basis. The *Authorized User* order states that as a condition of providing this latter service, Comsat must comply with the requirements set forth

[25] WUI does not define "earth station forward" service. Notwithstanding, we shall address WUI's argument giving the term its broadest possible interpretation in this INTELSAT context.

[26] *See* Paragraph 108 of the Authorized Users order in which we required Comsat to file for appropriate amendments to its Section 214 authorizations and its FCC Tariff No. 101.

in the *Structure* decision. 90 FCC 2d at 1435. We see no reason to change this requirement. Therefore, before any Comsat subsidiary is authorized to provide any international communications service through INTELSAT, we will verify that Comsat has made sufficient changes in its accounting, cost allocation and information flow procedures which satisfy the concerns we expressed that decision.

E. *Restrictions on Comsat's business activities*

40. WUI argues that, as a matter of law, all of Comsat's activities must be intimately connected with, and directly and substantially in furtherance of, its statutorily mandated and limited INTELSAT and INMARSAT missions. It avers that the Commission may not legally authorize or permit Comsat to expand beyond these activities into regulated or unregulated markets. In its opposition, Comsat contends that this argument has been fully briefed by the parties and fully considered by the Commission. It believes that WUI has presented no new facts or analysis here.

41. WUI has presented no new facts or analysis to support changing our prior findings. In the *Structure* order, we affirmed our *Comsat Study* determination that no legal bar exists to Comsat's participation in non-INTELSAT/INMARSAT business so long as such participation is not inconsistent with Comsat's statutory responsibilities under the 1962 Satellite Act or its Articles of Incorporation. We also affirmed in the *Structure* order our prior determination in the *Comsat Study* that as a matter of law and regulatory policy Comsat should not be limited to its INTELSAT/INMARSAT roles. We reasoned that Comsat's involvement in diversified satellite-related activities would contribute to the overall development of satellite communications technology and would therefore serve the public interest. We do not believe WUI has shown anything to justify changing those determinations.[27]

F. *Adequacy of structural and operational changes*

42. WUI argues that the Commission's proposed structural and operational changes to Comsat will not be adequate either to preserve competition or to protect the public interest. It avers that the the Comsat parent and subsidiary(ies) will have both the incentive and the ability to engage collusively in anticompetitive activities, conflicts of interest and cross-subsidization schemes. Neither Comsat nor ARINC addressed this contention in its opposition.

43. WUI does not specify what relief it seeks were we to agree with its contentions. It merely states that it disagrees with certain

[27] *See also* Application of Satellite Television Corporation for Authority to Construct an Experimental Direct Broadcast System, FCC 82-427, at 9-15 (released October 13, 1982).

concepts in the *Structure* order. This bare statement of disagreement is not sufficient to conform to the requirements of our Rules and Regulations. Section 1.429(c) of the Rules requires that the petition for reconsideration shall state with particularity the respects in which petitioner believes the action should be changed. WUI has not stated how it would want to have the *Structure* order changed to satisfy its concerns. In any event, we adhere to our earlier view that our required structural and operational safeguards are adequate. Therefore, we deny this aspect of WUI's request.

G. *Acceleration of the Commission's schedule for other matters*

44. WUI argues that the Commission should immediately grant its requests for: (1) "cost-based" access to INTELSAT space segment rates; (2) unbundled rates for INTELSAT space segment and earth station segment components; and (3) independent access and operational capability at U.S. INTELSAT earth stations. WUI contends that deferral of these matters will irreparably harm WUI through customers and revenues lost to Comsat and severely abridged operational flexibility at U.S. INTELSAT earth stations. Comsat states in its opposition that this complaint is wholly frivolous and does not warrant substantive response.

45. We find that WUI has presented no new facts or analysis to support our changing our prior findings in the *Authorized User* proceeding. 90 FCC 2d at 1432–35. See also *Communications Satellite Corporation*, *supra*, n.20. We have considered WUI's contentions of unfairness in paras. 29 and 30, *supra*, and have found that WUI will not be irreparably harmed from revenues lost by a policy allowing customers to provide their own arrangements in lieu of paying "middlemen" end-to-end carriers for their services. We also have fully addressed WUI's contentions in the *Authorized User* proceeding and have found that there is no direct connection between the policies we announced in that proceeding and our inquiries into potential changes in earth-station ownership and INTELSAT access policies. In general, by permitting Comsat to offer end-to-end services through a subsidary, we have established a mechanism to strengthen competition in the provision of communications services. This mechanism for strengthened competition is present regardless of the outcome of the earth-station ownership and INTELSAT access inquiries. The possibility that these inquiries may ultimately result in additional competition in a different market (e.g., provision of INTELSAT capacity) does not make resolution of these inquiries a prerequisite for the actions that we have taken in the *Authorized User* proceeding. In particular, as to the earth-station-ownership issue, we said that our current ownership policy does not prevent the carriers from competing with a Comsat subsidiary for end-to-end services. The ability to compete results from the requirement that ESOC make earth station facilities and services available to other

carriers on the same reasonable and non-discriminatory terms available to the Comsat subsidiary. As to the INTELSAT access issue, we similarly found that carriers would be able to compete with a Comsat subsidiary for end-to-end services adequately through their ability to obtain INTELSAT half circuits from Comsat at the same reasonable and non-discriminatory rates charged a Comsat subsidiary. Finally, as to the unbundling aspect, we found no reason to require immediate tariff unbundling of space and earth segment rates since we had not yet decided which entities may individually own earth stations or obtain direct access to INTELSAT. WUI presents no new facts or arguments here. We, therefore, affirm our findings in the *Authorized User* proceeding.

IV *Ordering Clauses*

46. ACCORDINGLY, IT IS ORDERED, that the Petitions for Reconsideration or Clarification filed by Western Union International, Inc. and RCA Global Communications, Inc. are DENIED, except as indicated in paragraph 33 herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

March 31, 1983

Separate Statement
of
Commissioner Anne P. Jones
Concurring and Dissenting in Part

In Re: Changes in the corporate structure and operation of the Communications Satellite Corporation (CC Docket No. 80–634)

When the Commission issued the Memorandum Opinion and Order for which reconsideration is sought here, I dissented because I was not convinced of the correctness of the Commission's position on two threshold points. I take this opportunity to state my position on those points and thereby explain my dissent.

First, I was and am not persuaded that it is the proper function of this Commission to bless Comsat's diversification into non-INTELSAT/INMARSAT business activities. As indicated in the Comsat Study, the Notice of Proposed Rulemaking in this proceeding, and the August MO&O, entry by Comsat into such activities involves substantial risk of behavior by Comsat detrimental to its competitors, its rate-payers, and its statutory INTELSAT/INMARSAT functions. In view of this risk, I believe the Commission was quite correct in suggesting in the Study and the Notice that Congress should address in further legislation the scope of Comsat's authority, if any, to engage in non-INTELSAT/INMARSAT activities.

My second concern relates to the Commission's decision to rely

entirely on structural safeguards and existing statutory filing requirements to monitor entry by Comsat into non-INTELSAT/INMARSAT activities. In this regard, it seems to me well arguable that repeated references in the Comsat Study and the Notice of Proposed Rulemaking to the possibility that particular proposed activities by Comsat might conflict with its INTELSAT/INMARSAT activities implied that the Commission would establish some monitoring mechanism to guard against such conflict. It is therefore also arguable that the Commission's decision not to establish *any* monitoring mechanism, but to rely instead entirely on structural safeguards and existing filing requirements, was not fairly within the scope of this rulemaking as required by notice and comment provisions of the Administrative Procedure Act (5 U.S.C. § 553).

I concur in the present Memorandum Opinion and Order insofar as it denies reconsideration of the structural and operational limitations imposed last August. In my judgment those limitations should be retained, despite my own doubts that they, or any other limitations within the power of this Commission to impose and enforce, will or can achieve their purpose.

I understand the argument reflected in paragraph 41 of this MO&O that entry by Comsat into diversified, unregulated, satellite-related activities may contribute to the overall development of satellite communications technology and thereby serve the public interest. But I am not persuaded by that argument.

For one thing, I am not convinced that whatever contribution ComSat's entry into unregulated activities may make to overall development of satellite communications technology could not or would not be made by others.* And even assuming *arguendo* that ComSat is uniquely able to make such contributions, it is not clear that the possibility of its doing so outweighs the dangers which the limitations imposed on it in this proceeding are intended to prevent. And finally, it seems to me that the unhappy history of this Commission's efforts to police the boundary between regulated and unregulated activities of communications common carriers strongly suggests that such efforts are expensive, frustrating, and frequently vain.

It is with some reluctance that I conclude that a company with ComSat's resources and energy should be confined to statutorily mandated, regulated activities. However, I am even more reluctant to approve the creation of yet another partly regulated, partly unregulated telecommunications company, with all the dangers and

* As I noted in dissenting from the Commission's approval of ComSat's entry into the manufacturing and marketing of shipboard earth stations and into direct satellite broadcasting, there is no shortage of other entrants or would-be entrants into these businesses. See 90 F.C.C. 2d 505 and FCC 82-427 (released October 13, 1982)

regulatory problems such companies generate, without a much more convincing case for doing so than has in my judgment been made in this proceeding. I therefore again dissent from the basic decision to permit ComSat to engage in unregulated activities, regardless of the structure through which it does so.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON
re:
COMSAT STRUCTURE RECONSIDERATION

In the Comsat Structure and Authorized User decisions we have taken another step in establishing the framework for introducing additional competition in the provision of international telecommunications services. In the Comsat Structure decision we have followed the recommendations of our Comsat Study to require the separation of Comsat's monopoly (Intelsat/Inmarsat) services from its other activities. We have thus required the establishment of separate subsidiaries and the institution of appropriate accounting techniques to preclude Intelsat ratepayers from subsidizing non-Intelsat endeavors. In Authorized User we authorized Comsat to provide Intelsat capacity directly to users through its jurisdictional arm, the World Systems Division, and to provide end-to-end services through a separate subsidiary.

These and other decisions have permitted Comsat to enter new markets and to compete with other carriers. For example, Comsat may now directly compete with the international record carriers, Western Union, direct broadcast satellite providers and AT&T. Additionally, as in the Authorized User decision, we can modify the structure of a market so that all service providers will have an incentive to establish rates closer to cost. Yet Comsat remains a monopoly service provider of international earth station facilities and the Intelsat space segment. I anticipate, at least for reasons of equity, that the Commission will consider in the not too distant future the outstanding NOIs on earth station ownership and direct access. While considerations unique to international services and facilities must be recognized, the introduction of additional competition in the provision of international satellite services may provide the same public benefits that augmented competition has produced domestically, i.e., additional service offerings, greater efficiencies and lower rates.

Common Carrier, Specialized Services

Notice of Proposed Rulemaking adopted seeking public comment on whether the divested BOCs should be required to offer enhanced services or CPE through a separate subsidiary.
–Customer-Provided Equipment
CC Docket No. 83–115

FCC 83-71

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies	CC Docket No. 83–115
North American Telecommunications Association	ENF- 83–5
Petition for Declaratory Ruling on the requirements for sale of customer premises equipment by the Bell Operating Companies	

NOTICE OF PROPOSED RULEMAKING

(Adopted: February 17, 1983; Released: March 4, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT.

I. *INTRODUCTION AND BACKGROUND*

1. We hereby give notice of a proposed rulemaking, pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, to determine whether and to what extent the structural separation conditions established in the Second Computer Inquiry (Computer II)[1] and the cellular communications systems proceedings[2] should be applicable to the Bell Operating Companies (BOCs) following their

[1] 77 FCC 2d 384 (*Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration*), *further recon.*, 88 FCC 2d 52 (1981), *aff'd sub nom.*, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA*).

[2] Cellular Communications Systems, 86 FCC 2d 469 (1981), *recon.*, 89 FCC 2d 58, *recon.*, 90 FCC 2d 571 (1982), *appeal pending sub nom.* Millicom v. FCC, No. 81-1404 (D.C. Cir.).

divestiture from the American Telephone and Telegraph Company (AT&T) in accordance with the 1982 Consent Decree.[3] This proceeding will also treat the North American Telecommunications Association's (NATA's) Petition for Declaratory Ruling on the requirements for sale of customer premises equipment by the divested BOCs.

2. In Computer II, the Commission found that the provision of enhanced services and customer premises equipment (CPE) was not subject to regulation under Title II of the Communications Act of 1934, as amended, 47 U.S.C. §157, *et seq.* The Commission ordered communications common carriers to separate the offering of enhanced services and CPE from regulated communications offerings. The Computer II rules and policy prescribe two different sets of requirements for how carriers participate in the provision of CPE and enhanced services. AT&T is permitted to engage in these activities only through a separate subsidiary and subject to specific structural, accounting, and information flow requirements. Common carriers other than AT&T need not form separate subsidiaries but must maintain separate books of account for CPE and enhanced services. If these carriers use their own transmission capacity for their enhanced service offerings, they must obtain that capacity pursuant to the terms and conditions embodied in their tariffs.

3. AT&T has chosen to enter the unregulated CPE and enhanced services market through a single, national separate subsidiary, American Bell Inc. (AmBell). On June 10, 1982, the Commission approved AT&T's capitalization plan for AmBell's provision of enhanced services. *Memorandum Opinion and Order*, 90 FCC 2d 404. On November 4, 1982 and December 29, 1982, the Commission approved requests by AT&T to further capitalize AmBell to provide new CPE and Picturephone Meeting Service (PMS). *Memorandum Opinion and Order*, FCC 82-496, released November 10, 1982; *Memorandum Opinion and Order*, Mimeo No. 1600, released December 30, 1982. AmBell now provides new CPE and enhanced services on an unregulated basis. The BOCs currently provide local exchange, some toll services and embedded CPE. On January 21, 1983, AT&T requested the Commission to approve the capitalization of AmBell to accept the transfer of the BOCs' embedded CPE to be offered on an unregulated basis. We are currently reviewing that request.

4. On January 8, 1982, AT&T and the Department of Justice entered into a proposed consent agreement to settle the Department's antitrust action against AT&T. In an August 8, 1982 opinion (Opinion), the presiding judge conditioned his acceptance of the consent agreement on AT&T and the Department of Justice agreeing to several specific modifications. On August 24, 1982, the judge

[3] United States v. Western Electric, Civil Action No. 82-0192, slip op., released August 24, 1982 (D.D.C.).

entered the Consent decree incorporating the terms of the consent agreement and the court's modifications.

5. The Consent Decree requires the divestiture of AT&T's local exchange services.[4] This is to be accomplished by means of (1) the transfer from AT&T to the BOCs of sufficient facilities, personnel, systems and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications, exchange access and printed directory functions, (2) the separation within the BOCs of all facilities, personnel and books of account between those relating to local exchange exchange access, and printed directory functions and those relating to other functions and (3) the spin off to the shareholders of AT&T of the ownership of the separated portions of the BOCs providing local exchange, exchange access, and printed directory services.[5]

6. The Consent Decree permits the ownership of individual BOCs, after divestiture, to be consolidated into one or more companies. In addition, the BOCs may support and share the costs of an organization for the provision of engineering, administrative and other services on a centralized basis. The BOCs also shall provide through a centralized organization a single point of contact for BOC coordination to meet the requirements of national security and emergency preparedness. Until September 1, 1987, AT&T and its subsidiaries, Western Electric (Western) and the Bell Telephone Laboratories (BTL) shall provide on a priority basis all research, development, manufacturing and other support services to enable the BOCs to fulfill the requirements of the Consent Decree.

7. The divested BOCs are required to provide to interexchange carriers and information service providers[6] exchange and exchange access services on an unbundled, tariffed basis that is equal in type, quality and price to that provided AT&T. The BOCs shall not discriminate between AT&T and others in (1) the procurement of products and services, (2) establishment and dissemination of technical information and procurement and interconnection standards, (3) charges for or interconnection and use of BOC telecommunications service and facilities and (4) provision of new services or

[4] The term "local exchange service" as used in the Consent Decree has a significantly different meaning than it does in traditional common carrier parlance, encompassing a much broader area of operations. The term LATA (local access and transpart area) is generally used in place of "exchange" for this reason.

[5] The Consent Decree does not require the divestiture of Cincinnatti Bell Inc. or Southern New England Telephone, in which AT&T holds minority interests. In a separate action also taken today, we are determining the applicability of the structural separation requirements to these two companies.

[6] An "information service" is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications except that such service does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. Consent Decree, Section IV. J.

the planning of construction or modification of facilities for exchange access.

8. According to the January 8 consent agreement between the Department of Justice and AT&T, the BOCs were not to (1) provide interexchange telecommunications services or information services, (2) manufacture telecommunications products or customer premises equipment or (3) provide any other product or service except exchange telecommunications and exchange access service that is not a natural monopoly service actually regulated by tariff. The presiding judge's August 11 modifications, inter alia, eliminated the agreement's prohibition on marketing of CPE by the BOCs. AT&T, however, will retain embedded CPE and all related assets. In brief, the divested BOCs will provide local exchange communications and exchange access in a regulated environment and may provide CPE in the competitive market once embedded CPE is transferred from the BOCs. The court noted its expectation that the BOCs would secure CPE from a number of suppliers. *Opinion*, *supra*, at 112, note 249. Nevertheless, it was silent concerning the relationship of the BOCs to Western Electric in its role of CPE manufacturer and to AmBell, AT&T's domestic retailer of CPE.

9. According to AT&T's Plan of Reorganization filed with the District Court on December 16, 1982, and subject to the court's approval, seven regional holding companies will hold all of the stock of the BOCs and each BOC will be wholly owned by a regional holding company. The regional companies will be independent of one another and of AT&T. Stock in each of the regional holding companies will be distributed to AT&T shareholders in amounts proportionate to their ownership in AT&T. Regions will be geographically contiguous. Each region will offer service to approximately the same number of customers and include approximately the same value of assets, number of employees and network access lines as each of the other regions. *See* Appendix A. Each regional company will hold one share of voting common stock in a Central Staff organization and appoint one member of the Central Staff's board of directors. The Central Staff management will be under the direction of a chief executive officer selected by the board of directors.

10. The Central Staff will augment BOC capabilities with centralized resources necessary to offer exchange services. Initially, it will consist of more than 8800 employees and associated facilities, systems and rights to technical information. Among the assets to be transferred to the Central Staff are centrally developed AT&T computer systems, including network operations systems, procurement related systems, business information systems, other administrative systems and systems for solving technical or engineering management problems, including central office engineering maintenance, facility engineering, fundamental network planning and distribution of services planning.

11. In addition, AT&T will transfer to the Central Staff the personal and assets associated with functions and services relating to the procurement of network facilities which have been performed centrally for the BOCs by AT&T. It will also transfer to the Central Staff personnel and assets associated with other technical functions and services which the staff will perform on a centralized basis for all the regional companies. These functions and services include: (1) the planning, engineering and operation of network facilities; (2) the design of network configurations; (3) specification of performance standards and generic equipment standards; (4) research in communications technology; and (5) performance of central office engineering, records maintenance and installations.

12. In brief, it appears that the Central Staff will perform for each of the regional companies a broad range of functions pertaining to design and operation of exchange networks. Moreover, the Central Staff's board of directors will have the power to increase or reduce the Central Staff offering of services to the BOCs. The Plan of Reorganization appears to give the regional companies the latitude to allow the Central Staff to engage in CPE-related activities.

13. On November 30, 1982 NATA filed a Petition for Declaratory Ruling seeking a determination as to the structure under which the divested BOCs may offer CPE. NATA argues that after divestiture the BOCs will retain sufficient power that each independently would be able to "destroy" competition within its service region and thereby hinder competition nationally. NATA concludes that this power is so great that it can be properly limited only by conditioning the BOCs' participation in the provision of CPE with a separate subsidiary structure. As in NATA's petition, the principal issue in this proceeding is whether the Computer II structural separation requirements should apply to the divested BOCs. We discuss this matter below, and we invite public comments. In addition, we also seek comment on whether the structural separation requirements adopted pursuant to the cellular proceedings should apply to the divested BOCs. Finally, we invite comment on whether, if we determine to maintain some structural separation, the Computer II or cellular separation requirements should be modified to accommodate the BOCs' changed circumstances.

II. *DISCUSSION*

14. In Computer II we required that all carriers separate their provision of enhanced service and CPE from the common carrier offering of basic transmission capacity. While we imposed structural separation requirements only on AT&T, all carriers owning transmission facilities are governed by this requirement. Enhanced services and CPE may only be offered on a non-tariffed basis

separate from the carrier's tariffed offering of transparent basic transmission.[7]

15. The Consent Decree permits the BOCs to offer any services that fall within the definition of exchange telecommunications services but not information services.[8] It is not clear that the scope of "information service" is congruent in all respects with our Computer II definition of enhanced services.[9] The BOCs may be of the opinion that there are certain enhanced services that they could provide under Computer II which would not be barred under the Consent Decree.[10] This would appear to be the case if, for example, an enhanced service constituted a telecommunications service as defined by the Decree. The BOCs are requested to state whether they intend to offer enhanced services as that term is defined in our Computer II decisions. Interested parties are invited to file comments on what structural separation requirements, if any, should govern the divested BOCs' provision of enhanced services. If structural separation is not required, comments are sought on whether any other specific requirements should govern the BOCs' provision of enhanced services in addition to those general requirements currently applicable to all carriers.

16. Unlike enhanced service, it is clear that divested BOCs may compete in the provision of CPE. Accordingly, we seek comment on the structure under which the divested BOCs should be permitted to offer CPE consistent with Computer II.

17. In our Computer II decisions, we stated that the primary

[7] To date we have only mandated the detariffing of new CPE. The manner and timing for the detariffing of embedded CPE is at issue in the *Implementation Proceeding*, 89 FCC 2d 694 (1982).

[8] Under Section IV(o) of the decree "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission." *Also see* note 6, *supra*, for the Consent Decree's definition of "information service."

[9] Section 64.702(a) of the Commission's Rules and Regulation states the following:

> . . . the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

[10] *Compare* Response of the United States to Public Comments on Proposed Modification of Final Judgment, May 20, 1982 at 49-50 (Department of Justice states that the BOCs would not be able to provide Custom Calling Services II) *with* AT&T, 88 FCC 2d 1 (1981) (the Commission finds Custom Calling Services II to be an enhanced service).

benefits of structural separation are protection for the regulated ratepayer against cross-subsidy and protection for the general public against such anticompetitive activities as denial of network access and predatory pricing of unregulated offerings. *Final Decision* at 463. We recognized, however, that structural separation is not without its costs. These costs may include the capital costs of separation, economic inefficiencies, increased business risks and, for smaller carriers, more limited access to capital markets. *Id.* at 466. Because we did not wish to risk depriving the consumer of the benefit of a firm's entry into the competitive market, we chose to apply the separate subsidiary requirement only where essential to assure the objectives of the Act. *Reconsideration* at 72. We relied on four decisional factors in identifying the structural mechanism's applicability. They were:

> (a) a carrier's ability to engage in anticompetitive activity through control over "bottleneck" facilities, i.e., local exchange and toll transmission facilities, on a broad national geographic basis; (b) a carrier's ability to engage in cross-subsidization to the detriment of the communications rate payer; (c) the integrated nature of the carrier and affiliated entities, with special emphasis upon research and development and manufacturing capabilities that are used in conjunction with, or are support by, communications derived revenues; and (d) the carrier's possession of sufficient resources to enter the competitive market through a separate subsidiary.

Id. Below, we will discuss the above decisional factors with respect to the BOCs as a starting point for analysis of whether we will require a separate subsidiary structure for the BOCs.

18. *Control of Bottleneck Facilities.* We stated in the *Final Decision* at 468 that "the importance of the control of local facilities . . . cannot be overstated." With the passage of time, "the access bottleneck nature of the telephone local loop will take on greater significance." *Id.* Pursuant to the Consent Decree, each BOC will own substantial interexchange toll facilities within that company's post-divestiture service area, i.e., LATA. In addition, each BOC will be the dominant provider of exchange and exchange access service.

19. To warrant the application of a separate subsidiary requirement, control of bottleneck facilities must be on a "broad national geographic basis." *Reconsideration* at 72. Because the enhanced services and CPE markets are likely to be national in scope, a carrier is "unlikely to gain any significant competitive advantage by restricting the access of its competitors to a very limited network of underlying facilities." *Final Decision* at 468. Thus, a predicate for structural separation is sufficiently broad geographic control to permit effective anticompetitive practices. Table 1 indicates the service territories of each of the regional companies. In addition, the regional companies will perform, through their Central Staff, numerous network and central office functions including planning, design, engineering, operations, research and specification of standards. *See* para. 10–12, *supra*.

Table 1

Service Territories of the BOCs by Region*

Region	Population in BOCs' Service Territories	
	% of population of states in which BOCs are located	Number (millions)
Northeast	92	25
Mid-Atlantic	84	27
Southeast	70	30
Midwest	74	30
Southwest	76	21
Mountain and Great Plains	78	22
Far West	78	20

* Based on 1981 BOC configurations.
Source: Plan of Reorganization, pp. 456–60.
See generally Appendix A of this Notice.

20. Even if the divested BOCs were deemed to control bottleneck facilities on a broad national geographic basis, it is not clear that such control is sufficient to unfairly advantage the BOCs' untariffed, unbundled offering of CPE. First, the Commission's Part 68 registration program may provide ample assurance that independently produced CPE will obtain network interface equal to that of the carrier's products. Secondly, while carriers can manipulate the release of information concerning changes in network interface specifications, Computer II requires that information that would affect the manner in which CPE is connected to the network must be disclosed by all carriers owning basic transmission facilities to all interested persons on the same terms and conditions. *Final Decision* at 246; *Reconsideration* at 95. *See also* note 3, *supra*. These provisions apply regardless of whether the carrier is subject to separate subsidiary requirements.

21. *Ability to Cross-Subsidize*. Effective cross-subsidization of entry into the CPE market requires a large monopoly revenue base. *See Final Decision* at 468. Even if the BOCs' activities are limited to exchange and exchange access service, each of the divested BOCs will retain a monopoly revenue base. *See* Table 1, *supra*. Nevertheless, application of separate subsidiary requirements to the BOCs

would be unnecessary if accounting methods could prevent cross-subsidization. This is among the purposes of conventional rate and service tariffing and of the separate books of account that Computer II requires of independent telephone companies. The control of cross-subsidy by accounting techniques is aided by the fact that there are few common equipment costs in the CPE and local exchange businesses. Equipment costs, however, do not exhaust the possible commonalities of the two lines of business. Under the Plan of Reorganization, the BOCs have the opportunity to intermingle network-related and CPE-related costs of, as examples, marketing, installation, maintenance, research and development as well as the Central Staff's general administrative, management and other overhead costs.

22. *Integration of Operations.* The third factor in determining the applicability of the structural separation requirements is the extent of integration of the carrier's activities with the activities of non-carrier affiliates. *Reconsideration* at 72. In our Computer II decisions, we were also concerned about the opportunities for cross-subsidization present in research, development and manufacturing activities that are supported by ratepayer revenues.

23. The extent of this concern is reduced by the terms of the divestiture which prohibit the BOCs' manufacture of CPE and telecommunications equipment. Under the Consent Decree, the BOCs may not control or be affiliated with a manufacturing operation. The consequent need to rely on unrelated manufacturing entities will diminish the BOCs' opportunities for cross-subsidization of CPE with network equipment requirements. In addition, AT&T states that the BOCs will make their own procurement decisions as they have in the past. Plan of Reorganization at 374.[11] On the other hand, the Plan of Reorganization states that the Central Staff will participate in the product selection and purchasing process to the extent that the Staff will provide the regional companies with advice and assistance in the form of technical evaluations of products or services. *Plan of Reorganization* at 376. The Central Staff will also provide to the regional companies procurement support functions including purchased products engineering, quality assurance, advice on disposition of surplus, technical information resource management and training. *Id.* at 379. The extent of this centralized, procurement-related involvement in the purchase of network CPE may have an important impact on the independence of individual BOC procurement decisions.

24. Also, the BOCs will remain integrated to the extent that they will conduct telecommunications research and development on a centralized basis. There is no explicit bar to the BOCs' conduct of

[11] For a discussion of AT&T procurement practices, see *Report and Order and Notice of Inquiry, CC Docket No. 80-53*, FCC 80-699, released July 28, 1981.

CPE research and development on a similarly centralized basis. The BOCs' treatment of network R&D costs and CPE R&D costs, if any, cannot now be predicted.

25. *Resources.* In determining the extent of the separate subsidiary structure's applicability, we expressed concern that "the costs of separation are borne disproportionately by smaller companies due to indivisibilities. . . , and that these ". . . additional costs may foreclose entry into the enhanced service or CPE market for some carriers." *Reconsideration* at 74. Thus, we conclude that the disparity in size between AT&T and the independent telephone companies "leads to the result that the benefits of structural separation for AT&T are greater than the costs, while this calculus is reversed for the independent telephone companies." *Id.* As stated above, each of the regional companies is as small as as the largest of the independents, all of which were exempted from structural requirements.

III. *ISSUES FOR COMMENT*

26. We have noted various factors considered by this Commission in the course of Computer II. Other factors may be relevant in considering whether the divested BOCs should be subject to structural separation requirements. Accordingly, parties are invited to comment on any other factors deemed relevant for our consideration in reaching a final determination on this subject. In addition to the foregoing, we specifically seek comments on the following:

a) Wheter a divested BOC should be subject to a separate subsidiary requirement for the provision of enhanced services.

b) Whether a divested BOC should be subject to a separate subsidiary requirement for the provision of CPE.

c) Whether a divested BOC should be subject to a separate subsidiary requirement for the provision of cellular communications services.

d) If structural separation is required for the BOCs' provision of either enhanced services, CPE, or cellular communications services or all of these what separation requirements should govern the relationship between the subsidiary and affiliated entities in each case?

27. With the proceeding commenced today, we seek to determine whether, following divestiture, the structural separation requirements prescribed by Section 64.702 of the Commission's Rules should be applied to the Bell Operating Companies. Also, in the course of this proceeding, we will consider, if any structural changes are necessary, whether changes are required to accommodate distinctive characteristics of the divested BOCs' size, operations, structure, role in the communications industry, relationships among themselves or with any other affiliate including the Central Staff, their relationships with AT&T or any of its affiliates or subsidiaries, or any other pertinent characteristics that may or may not appear in the above

discussion. We invite members of the public to give the above matters their carefully considered comment.

IV. *REGULATORY FLEXIBILITY ACT CERTIFICATION*

28. Pursuant to Section 605(b) of the Regulatory Flexibility Act (RFA), we hereby certify that this proceeding does not address a "proposed or final rule" that will "have a significant economic impact on a substantial number of small entities." The pertinent definition of "small entity" is "small business" which has the same meaning as "small business concern" under Section 3 of the Small Business Act. That section defines a small business concern as "one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632. At present, the BOCs are wholly owned facilities of the world's largest corporation. The divested BOCs will be wholly owned affiliates of regional companies, each one of which is in the top 30 of the Fortune 500. Each of the BOCs holds a legal monopoly for its authorized service area. Thus, a BOC is not a "small entity" within the meaning of Section 605(b) of the RFA.

29. In addition, no rules that may arise out of this proceeding will impose any regulatory requirements on, require any action by or cause any direct impacts on any entities other than the BOCs. Thus, because the rules that are the concern of this proceeding are being considered only for application to large entities, the BOCs, there is no danger of violating the RFA's purpose of assuring that "laws and regulations designed for application to large scale entities [are not] applied uniformly to small businesses." 5 U.S.C. § 601 note. To the extent this proceeding is designed to determine whether BOC operations are likely to be of a scale requiring structural separation, it shares with the Regulatory Flexibility Act the purpose of fit [ing] regulatory and informational requirements to the scale of the businesses . . . subject to regulation." *Id.*

V. EX PARTE CONTACT REQUIREMENTS

30. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forth coming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any

previously filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, and a copy must be provided to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.231.

31. Pursuant to applicable procedures set forth in § 1.415 of the Commission's rules, interested parties may file comments on or before April 4, 1983, and reply comments on or before May 4, 1983. All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding. The Commission may also consider any other relevant information brought to its attention.

32. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*. In accordance with the provision of § 1.419 of the Commission's Rules, an original and 5 copies of all comments, replies or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in this proceeding may do so by submitting one copy of their comments, without regard to form, provided that Common Carrier Docket No. 83–115 is specified in the heading. Such informal participants who desire that responsible members of the staff receive a personal copy may file an additional five copies. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room, Room 239, 1919 M Street, N. W. in Washington, D. C.

VII. *ORDERING CLAUSES*

33. Accordingly, IT IS ORDERED, That pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, 214, 220, 221 and 403 of the Communications Act of 1934, as amended, Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, and Sections 1.411 *et seq.* of the Commission's Rules, 47 C.F.R. § § 1.411 *et seq.* there is HEREBY INSTITUTED a notice of proposed rulemaking concerning the matters described herein including those raised by the Petition for Declaratory Ruling filed November 30, 1982 by the North American Telecommunications Association. Members of the public

are notified that any policies that may be established in this proceeding may be embodied in the Rules and Regulations of the Commission.

34. IT IS FURTHER ORDERED, That all interested persons MAY FILE comments on the matters discussed herein on or before April 4, 1983. Reply comments shall be filed on or before May 4, 1983.

35. IT IS FURTHER ORDERED, That the Secretary shall cause this Notice of Inquiry and Proposed Rulemaking to be published in the Federal Register.

36. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* to the Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.*) (1980).

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Policy and Rules Concerning the Furnishing of Customer Premises Equipment by the Bell Operating Companies

As I have frequently stated, the time has come to unshackle the Bell Operating Companies (BOCs).[1] On January 1, 1984 these companies will be divested from AT&T by the terms of the Modification of Final Judgment (MFJ) approved by Judge Greene.[2] Divestiture will completely change the environment in which the BOCs and the regional holding companies (RHCs) operate. In this new, competitive environment, the imposition of a separate subsidiary requirement on the BOCs makes no sense and would be contrary to the public interest. The soon-to-be divested BOCs already face the prospect of grievous restrictions mistakenly imposed on them in the MFJ. Any additional restrictions imposed by this Commission would only serve to compound this error.

In determining what, if any, regulatory structures are necessary in the post-divestiture telecommunications world, the Commission should be guided by the principle that all competition should be full and fair. In addition, we must recognize that if the quality of this country's basic telecommunications infrastructure is to remain high,

[1] *See e.g.*, Statement of Commissioner Joseph R. Fogarty before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce (December 1, 1982); Memorandum from Commissioner Fogarty to the Commission, November 1, 1982 [Fogarty Memorandum].

[2] *See*, Modification of Final Judgment, *United States v. Western Electric Co.*, Civil Action No. 82–0192 (D.D.C., entered August 24, 1982).

it is crucial that the BOCs be able to provide new competitive services and customer premises equipment (CPE). To limit the operating companies to the provision of basic service and equipment by judicial fiat, or to unduly burden their offerings by overregulation, will deny to the American public the benefits of securing universal, high quality, low cost sophisticated services and equipment integrated into the local loop technology of the telephone exchange. Even worse, such restrictions will deny these benefits to Americans at a time when many foreign countries are striving to upgrade their telecommunications networks in exactly this fashion. The choice of whether to form a separate subsidiary should be left to the business judgment of the companies involved. No one will benefit if the BOCs are forced to start the game from twenty yards behind the goal line simply because they were once part of the Bell System.

As a first step, this Commission should make clear that the *Computer II* [3] separate subsidiary requirement does not apply to the divested BOCs. In a single stroke, the MFJ has changed the factual basis upon which the *Computer II* rules were imposed on AT&T and the BOCs, by virtue of the affiliation with AT&T. In fact, after divestiture, the separation requirement is not technically applicable to the BOCs.

It must be remembered that the Commission initially imposed the structural separation condition on AT&T because it perceived a substantial threat to the communications ratepayer and concluded that other regulatory tools would not suffice.[4] In doing so, we concluded that the relevant market was national in scope and that no significant competitive advantage could be gained based on a limited network of underlying facilities.[5] Under these circumstances, the Commission found that only AT&T had sufficient market power to engage in effective anticompetitive activity on a national scale and only AT&T possessed sufficient resources to enter the competitive market through a separate subsidiary. It focussed on AT&T's ability to engage in anticompetitive activities through control of "bottleneck" facilities, i.e. local exchange and toll transmission facilities, on a broad national geographic basis.[6] In addition, the Commission was concerned that AT&T's large CPE manufacturing operation combined with its market share and control over local facilities would provide the opportunity to engage in anticompetitive conduct in the equipment market.

On the other hand, the Commission found that the independent

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[3] *Second Computer Inquiry*, 77 FCC 2d 384 (1980) [Final Decision]; *reconsideration*, 84 FCC 2d 50 (1980); *further reconsideration*, 88 FCC 2d 512 (1981); *aff'd, sub. nom., Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[4] *Final Decision*, 77 FCC 2d at 386–388.

[5] *Final Decision*, 77 FCC 2d at 468.

[6] *Reconsideration Order*, 84 FCC 2d at 72.

telephone companies met none of these criteria and should not be subjected to the separate subsidiary requirements. It concluded that none of the independents had sufficient national market power to engage in anticompetitive conduct. Therefore, the argument that a separate subsidiary condition should be imposed because of these companies' "leverage to manipulate customer preferences" was rejected.[7] In particular, it found that companies such as United Telephone System, Inc. and Continental Telephone Corp. did not have the manufacturing base and toll facilities to engage in anticompetitive conduct,[8] and that GTE lacked the toll facilities and sufficiently large operating territories.[9]

As discussed in this Notice, none of the factors which caused the Commission to impose the separation requirement on AT&T is applicable to the divested BOCs. The BOCs will have neither national market power nor toll facilities. Therefore, they will not have the control of "bottleneck" facilities on the broad national basis that we found to be necessary to justify imposition of the separation requirement. Likewise, the BOCs will have no manufacturing capability and no established market with an embedded base. Since we have already rejected the notion that a separate subsidiary requirement should be imposed simply because of a local carrier's "leverage to manipulate customer preferences," there is no basis upon which to require that BOCs offer CPE or enhanced services through a separate subsidiary.[10]

To the extent that concerns exist about cross-subsidization of nonregulated CPE by regulated services, they can be taken care of without resorting to the drastic remedy of separation. In particular, we have required that the independents set up separate books of account for nonregulated CPE and are in the process of amending the Uniform System of Accounts to achieve this result.[11] This requirement would be applicable to the BOCs and there is no reason to expect that it will not be effective.

The FCC has failed the public interest once already. The Commission should have amended the *Computer II* rules to permit the BOCs to continue to provide new CPE after January 1, 1983 on a detariffed basis without the necessity of establishing a separate subsidiary.[12] As it is, under the *Computer II* rules, the BOCs are now precluded from providing new CPE. This is nonsensical given that immediately

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[7] *Reconsideration Order*, 84 FCC 2d at 73–74.

[8] *Final Decision*, 77 FCC 2d at 467, 473.

[9] *Reconsideration Order*, 84 FCC 2d at 73.

[10] I am very pleased that the Commission has already come to this conclusion in the case of Cincinnati Bell, Inc. and the Southern New England Telephone Company. *Cincinnati Bell, Inc.*, et. al., ___ FCC 2d ___ (1983).

[11] *See* Notice of Proposed Rulemaking, Amendment of Parts 34 and 35, ___ FCC 2d ___ (1982).

[12] *See* Fogarty Memorandum at 3–4.

after divestiture they will be permitted to reenter the market. Barring the BOCs from the new CPE market for this time period can only serve to discourage them from entering the market at all because of the even higher start-up costs occasioned by the one-year prohibition. At the least, unfortunately, this delay gives all competitors a one year headstart on the BOCs. Further, this restriction has the practical effect of inhibiting competition by non-Western Electric equipment suppliers contrary to the intention of the Commission. To the extent that a potential conflict existed with the MFJ, I cannot imagine that that decision intended to place the BOCs in a position in which competition with AT&T would be impossible. In any event, this question should have been confronted head on by this Commission.

Even though the matter is out of the hands of the Commission, the MFJ is not sacrosanct. While I support the decision to permit the BOCs to offer CPE and Yellow Pages, I strongly object to prohibiting the BOCs from offering information services and to the bar on AT&T's offering of electronic publishing services for seven years. These judicial restrictions are no more in the public interest than an FCC-imposed BOC separation requirement would be. Instead of taking such an inflexible approach, the wiser course for the court would have been to rely on remedies such as strict accounting and tariff regulation. At least the *Computer II* waiver standard provides more flexibility[13] than does the strict showing required under the MFJ.[14]

The restrictions imposed on the divested companies by the MFJ raise serious and fundamental questions concerning the continued adequacy of basic research and development by the BOCs. I believe that the prospect for continued progress in local exchange technology and services is dim. If the regional companies are restricted to the limited market for exchange and access facilities, new CPE and Yellow Pages, it is doubtful that they will be in a financial position to support any significant research in local loop technology. Given the increased pressures on state regulators to keep basic local exchange rates low, it seems to me all too likely that capital for such research and development will not be forthcoming. Moreover, the prohibition on operating company marketing of new services may make the local operating companies hesitant or reluctant to experiment with more advanced switching and equipment designs. This result would be in sharp conflict with the public interest.

While innovation will not cease as a consequence of the Decree's restrictions, the operating companies may no longer lead the world in telephony and allied fields. I think it is a likely result that in

[13] *Reconsideration Order*, 84 FCC 2d at 57–58.
[14] *MFJ*, ___ F. Supp. ___ at 116–117.

many instances new telecommunications technology and services will be introduced more quickly and effectively in other countries than here in the United States. The implications for the competitiveness of U. S. industry in world telecommunications markets are no less troublesome.

This concern about the MFJ's undue restrictions on telecommunications activity is not limited to the BOCs. My concern goes as well as to AT&T Long Lines and ABI. I believe that the seven year restriction on ABI's provision of electronic services is not in the public interest. Such a limitation can only serve to restrict American technological development. I note that AT&T is already one of the leading proponents of videotext. I see no First Amendment conflicts here. I believe that the public will benefit only if all telecommunications service providers are permitted to participate in the information services market from the outset.

The solution is clear to me. Upon divestiture, or even before, AT&T and the RHCs, or the RHCs alone, with full FCC support should petition the District Court to remove these onerous restrictions. For the sake of the American ratepayer and in order to maintain the supremacy of telephony in this Nation, it is essential that the BOCs remain viable. To ensure viability, it is crucial that the BOCs be unshackled. This Commission and the court hold the keys to the lock. These keys should be used to set the BOCs free.

Agreement, Formal
Common Carrier, Interconnection, Carrier to Carrier
Common Carrier, Interconnection, Specialized Carrier
Common Carrier, Specialized Services
Message Telecommunications Services
Wide Area Telephone Service (WATS)

Petitions for reconsideration on the issues of retroactive adjustment of ENFIA rates paid during period of suspension and investigation of proposed revisions to BSOC 8 and use of frozen Phase I rates during Phase II denied. Petition for reconsideration on calculation of off-peak discount to OCC minutes granted in part.
-Exchange Network Facilities
CC Docket No. 78-371

FCC 83-125

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Company and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8)	Transmittal No. 53
Exchange Network Facilities for Interstate Access (ENFIA)	CC Docket No. 78-371

ORDER ON RECONSIDERATION

(Adopted March 31, 1983; Released April 5, 1983)

BY THE COMMISSION: COMMISSIONERS QUELLO, JONES & SHARP CONCURRING IN THE RESULT; COMMISSIONER FOGARTY CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT.

1. We have before us several petitions for reconsideration of our *Memorandum Opinion and Order* FCC 82-431, 91 FCC 2d 1079, 1982, *review pending sub nom., MCI Telecommunications Corp. v. FCC*, D.C. Cir. Nos. 82-1553, *et al.* (appeals consolidated Nov. 8 and Dec. 8, 1982) (*MO&O*), in which we concluded an investigation into proposed increases to the American Telephone and Telegraph Company

(AT&T) and Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8) governing charges for exchange network facilities for interstate access (ENFIA). In the *MO&O*, we determined the proper method of calculating other common carrier (OCC) billed minutes of use and the cost per minute of OCC use of exchange facilities (SEP Amount). We ordered AT&T to file tariff revisions using a billed minutes factor no higher than 4474, a SEP Amount no higher than $.0595, and an overall rate for Elements 2 and 3 of the ENFIA charge no higher than $183.46. We also directed the OCCs to remit to AT&T the difference between this rate and the interim billing and collection rate of $178.46 that had been in effect for the five month suspension and investigation period.

2. On October 15, 1982, AT&T filed a Petition for Expedited Reconsideration of our September 29, 1982 *MO&O*, arguing that the Commission erred in its calculation of an off-peak adjustment to OCC billed minutes of use.[1] This petition has been opposed by Southern Pacific Communications Company (SPCC), United States Transmission Systems, Inc. (USTS), and MCI Telecommunications Corporation (MCI). Separate petitions for reconsideration were filed on October 29, 1982, by Satellite Business Systems (SBS), USTS and SPCC. USTS and SPCC request that the Commission rescind that portion of the *MO&O* requiring the OCCs to remit to AT&T a retroactive adjustment in the ENFIA rate.[2] SBS asks that the Commission revise the *MO&O* to preserve the ENFIA rate in effect prior to the investigation so as to avoid inimical consequences for non-signatories to the ENFIA Agreement. AT&T has opposed these petitions. For the reasons explained below, we deny the petitions by SBS, USTS and SPCC, and grant AT&T's petition to the extent that an upward adjustment is made in the SPCC and USTS billed minutes. On our own motion, we make certain other adjustments to the minutes of each of the OCCs, resulting in a net increase in the weighted average of OCC minutes of use per ENFIA per month from 4474 to 4555 and in the combined ENFIA charge for Rate Elements 2 and 3 from $183.46 to $186.72.

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[1] In a petition for review of our September 29, 1982 MO&O filed with the U.S. Court of Appeals for the District of Columbia Circuit on October 5, 1982, AT&T has maintained that the Commission erred as a matter of law both in granting an off-peak adjustment to OCC minutes and in freezing the SEP Amount at $.0595 rather than directing the use in Phase II of Bell System Interstate Jointly Used Subscriber Plant Costs for July 1980-June 1981 for Level D rates and June 1981-June 1982 for Level E rates. AT&T does not specifically raise these issues here and presents to us for reconsideration only the matter of the proper calculation of the off-peak discount.

[2] In its petition for reconsideration, SPCC also argues that the adjustments to gross OCC minutes of use approved by the Commission should be applied consistently to the minutes of all reporting carriers. This argument is repeated in SPCC's opposition to AT&T's petition and will be addressed in that context.

I. *Background*

3. The ENFIA tariff governs the charges OCCs must pay for connections to local exchange facilities in the provision of end-to-end MTS/WATS-type services.[3] The tariff, which implements an Interim Settlement Agreement signed by AT&T, GTE and several OCCs,[4] was approved by the Commission on April 16, 1979, *ENFIA*, 71 FCC 2d 440 (1979), and was extended by the Commission on April 14, 1982, for a Phase II period to last for a maximum of two years. *Extension of ENFIA Agreement*, 90 FCC 2d 6 (1982) (*Extension Order*).

4. The agreement and implementing tariff have been designed to provide an interim formula for the computation of OCC access charges pending the establishment of a more permanent, cost-based access charge system.[5] In order to accomplish this, the tariff sets forth three rate elements. Charges for Element 1, the line between an OCC switch and the local exchange or Class 5 switch, are incorporated by reference from other Bell Operating Company tariffs. Charges for Element 2, Local Switching and Trunking, and Element 3, Use of Jointly Used Subscriber Plant, are computed through reference to formulas that are designed to simulate a charge for MTS or WATS use of such facilities. The use of these formulas in the computation of Level D rates, the ENFIA rates to be in effect from May 2, 1982 through April 15, 1983,[6] required the assignment of values to two variables: (1) the weighted average monthly OCC billed minutes of use per ENFIA line, and (2) the cost of non-traffic sensitive exchange plant per minute, as identified through the

[3] The particular connections governed by BSOC 8, also known as ENFIA A, are those provided for Execunet or SPRINT-type services through line side terminations with a Class 5 switch. ENFIA does not apply to services that are connected with exchange facilities at only one end, *e.g.*, foreign exchange (FX) and common control switching arrangements (CCSA) with off-network access lines (ONALS). ENFIA, 71 FCC 2d 440, 450.

[4] The signatories to the original agreement are AT&T, MCI, SPCC, USTS, GTE, United States Independent Telephone Association (USITA), National Telephone Cooperative Association (NTCA), and Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO).

[5] On December 22, 1982, the Commission adopted an access charge plan in CC Docket No. 78-72, MTS and WATS Market Structure, FCC 82-579, released February 28, 1983, *review pending sub nom.* NARUC v. FCC, D.C. Cir. No. 83-1225 (filed March 1, 1983). Access charge tariffs implementing this plan, which by the terms of BSOC 8 will supersede the ENFIA tariff, are to be filed by October 3, 1983 so as to be effective on January 1, 1984.

[6] The ENFIA tariff provides for the periodic revision of ENFIA rates to reflect changes in certain factors in the formulas. The different rate levels are separately identified by letter. Rate levels A, B and C were effective prior to May 2, 1982. Rate levels D and E are effective for the first and second years of Phase II respectively.

jurisdictional cost separations process, for Bell System interstate MTS and WATS (SEP Amount).[7]

5. On April 16, 1982, following the release of the *Extension Order*, AT&T filed its Transmittal No. 53 proposing revisions to the ENFIA tariff. The revisions were based on an increase in OCC billed minutes from 3000 to 5823 and in the SEP Amount from $.0595 to $.0658 per minute. This would have increased Element 2 rates from $22.55 to $44.31 and Element 3 rates from $99.65 to $213.90 per month. SPCC, USTS, MCI, Western Union and SBS filed petitions to reject and U.S. Telephone Communications, Inc. (U.S. Tel.) filed a petition to reject or suspend, objecting to, *inter alia*, AT&T's calculation of OCC billed minutes and the SEP Amount. We did not agree with the OCCs that the tariff should be rejected, nor did we believe that the ENFIA agreement gave either the OCCs or AT&T the right to determine unilaterally the number of OCC billed minutes to be used in calculating the ENFIA rate.[8] Therefore, we were confronted with the necessity of determining the proper calculation of OCC billed minutes and AT&T's SEP Amount. During Phase I of the ENFIA tariff, the parties had been able to agree upon an acceptable billed minutes figure and SEP Amount. Thus, the disputes between the parties concerning the rates for the first year of Phase II raised, for the first time, substantial issues concerning the proper calculation of these factors according to the terms of the agreement. In order to resolve these issues, we suspended the effectiveness of the tariff for the full statutory period of five months and instituted an investigation into the calculation of billed minutes and the SEP Amount. We also established an interim billing and collection rate, subject to adjustment, based on 4000 billed minutes, a figure approximately halfway between the 2417 minutes reported by the OCCs and the 5823 minutes filed by AT&T, and AT&T's proposed SEP Amount of $.0658.[9] *ENFIA*, 90 FCC 2d 202 (1982) (*Designation Order*).

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[7] An additional variable affecting Element 3 rates is Factor P, or the percentage of the simulated MTS/WATS charge applicable to OCC ENFIA connections. In the Extension Order, we set Factor P at 55% for the duration of Phase II of the ENFIA tariff.

[8] In the absence of OCC December reports of 1981 billed minutes, AT&T had initially calculated the number of minutes as 6950 based on its measurements of holding time. The OCC reports were subsequently filed on March 19, 1982, at the direction of the Chief, Common Carrier Bureau, and resulted in a weighted average of 2417 OCC billed minutes. AT&T then argued that the OCC reports seriously understated the proper minutes. By making certain adjustments to the OCC reports, AT&T arrived at the 5823 figure presented in its tariff filing. *See* ENFIA, 90 FCC 2d 202, 206 (1982).

[9] This SEP Amount was chosen for the purposes of an interim billing and collection rate because it resulted in a smaller and less controversial increase over the previous rate than the proposed increase in billed minutes. Designation Order, 90 FCC 2d at 216.

6. In conducting our investigation, we maintained two major objectives. First, in resolving conflicting interpretations of terms of the ENFIA agreement, we attempted to give effect to the intent of the parties. The ENFIA agreement was entered into to provide a "rough justice" compromise between the local business rate which the OCCs had been paying and rates based upon the full separations-based cost of exchange access assigned to the interstate jurisdiction. The agreement served as a temporary means of achieving a fair balance between the divergent interests of the parties pending the development of cost based access charges. Since the institutionalization of such access charges is still in the future, the purpose of the ENFIA agreement is the same now as when it was first devised, and requires that the rate established according to the terms of the tariff reflect a reasonable middle ground between the interests of the parties. Second, in view of our public interest responsibilities, we were obliged to resolve the parties' conflicts in a way that did not "fatally curtail" competition in interstate MTS/WATS-type services [10] before the substantial changes occasioned by a shift to access charges and the divestiture of the Bell Operating Companies are put in place.[11] We found that, in order to establish a rate that satisfied these objectives, certain adjustments to the billed minutes and SEP Amount figures provided by the parties were required.

7. The OCCs had proposed numerous adjustments to their raw billed minutes of use, many of which were not contested by AT&T. We accepted these uncontested adjustments while disallowing most of the other proposed exclusions and discounts, including adjustments to the ENFIA line count.[12] One further adjustment made to the billed minute count, which is the subject of AT&T's petition, was the discount for OCC off-peak minutes. Although off-peak minutes were never explicitly addressed in the original negotiations, we found no basis in the agreement for accepting MCI's proposal to completely exclude all non-business day and non-business hour

[10] MO&O, at para. 21.

[11] *See* Modification of Final Judgment, United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 51 U.S.L.W. 3628 (U.S. March 1, 1983)

[12] The uncontested adjustments allowed were exclusions of Texas intrastate minutes, usage of ENFIA-type facilities obtained from independent telephone companies, and intracompany, administrative traffic including testing, counting of OCC WATS-type services and usage of resold MTS and WATS at one end as one minute of use per billed minute, adjustments to compensate for rounding for billing purposes, and deductions for OCC billing adjustments and collectibles. The disallowed adjustments included the single rather than double counting of each billed minute of a call that transits an ENFIA line at each end, exclusion of all SPRINT LTD. minutes (an SPCC limited hour long distance service), MCI's proposal to exclude all non-business day and non-business hour minutes, normalization of study period days per month, use of a seven day study factor, minimum billing adjustments, billing lag adjustments and reductions in ENFIA line counts to reflect intrastate usage, delayed deliveries and trouble reports.

minutes or for SPCC's proposal to exclude all minutes generated by its SPRINT LTD. service. However, we did find considerable ambiguity in the term "billed minutes" and sufficient changes in market characteristics since the agreement was first entered into to deem it necessary to examine the intent of the parties in determining the proper application of the agreement to off-peak minutes. When the parties formulated and signed the agreement the OCCs exclusively offered business services and for nearly the entire duration of Phase I the negotiated figure of 3000 minutes was used in the formula despite the continued growth of total OCC minutes and OCC expansion into residential and off-peak services. Therefore, we found that the conduct of the parties was consistent with some form of off-peak adjustment. The basic purpose of the agreement is to provide for reasonable OCC compensation to telephone companies that parallels what local carriers receive through the separations and division of revenues/settlements process. Because the size of the interstate revenue pool is affected by AT&T's MTS/WATS rate structure including off-peak discounts, we found that an OCC ENFIA off-peak discount, patterned after the one contained in AT&T's MTS/WATS rate structures, would be consonant with the original intentions of the parties. It was not possible to calculate an actual off-peak discount because the per line charges paid under the ENFIA tariff are not structured to vary by time of day. In order to reasonably reflect such a discount in the per line charges we adopted a proposal made by SPCC and USTS to apply discounts similar to those used by AT&T in its rate structure for off-peak usage of MTS and WATS (40 percent discount for evening and 60 percent for night and weekend calls) to the off-peak minutes reported by the OCCs. Therefore, each OCC's traffic during the evening period was discounted by a .40 factor and the traffic during night and weekend periods was discounted by a .60 factor. These discounts resulted in a weighted average of the billed minutes per line per month of 4474.

8. In examining AT&T's SEP Amount calculations and the OCC's objections to them, we found that AT&T had properly derived the $.0658 figure by dividing Bell System interstate jointly used subscriber plant annual costs by Bell System annual interstate MTS and WATS conversation minutes of use. We also found that none of the adjustments proposed by SPCC and USTS, many of which were related to their argument that plant investment inaccessible by the OCCs should be excluded from the calculation of representative Bell System costs for jointly used subscriber plant, were consistent with the calculation method for the SEP Amount contemplated in the agreement and tariff.[13] However, we determined that our recent

[13] The SPCC and USTS proposed adjustments to the SEP Amount included removal of costs of plant inaccessible by the OCCs, removal of the 1.01 point of measurement timing factor, reduction of annual cost factors, revisions of the conversation time factor, removal of a portion of General Services and License

action to limit the growth of interstate allocations of non-traffic sensitive (NTS) costs by freezing the subscriber plant factor (SPF) at 1981 annual average levels, *Amendment of Part 67*, 89 FCC 2d 1 (1982) *recon. denied*, FCC 82–492, released November 8, 1982, *review pending sub nom. MCI Telecommunications Corp. v. FCC*, D.C. Cir. No. 82–1237 (filed March 4, 1982), should be reflected in the payments for exchange access made by the OCCs. As we noted in our discussion of the SEP Amount in Appendix C to the *MO&O*, the possibility of a cap of the SEP Amount clearly was contemplated by the parties to the ENFIA Agreement.[14] Therefore, we found that freezing the SEP Amount through Phase II was an acceptable method of applying the SPF freeze to the OCCs. The application of the $.0595 SEP Amount and the billed minutes figure of 4474 to the formalas for Level D rates yielded an Element 2 charge of $34.85, an Element 3 charge of $148.61 and an overall ENFIA rate for the two elements of $183.46 per line per month. We directed AT&T to file a replacement transmittal in conformance with these findings and, in accordance with the provisions of the *Designation Order*, we ordered the OCCs to remit to AT&T the difference between this rate and the interim billing and collection rate for the five month investigation period.

II. *AT&T Petition*

9. In its petition, AT&T argues that the off-peak discount applied to OCC minutes is erroneously calculated. Specifically, AT&T claims that the uncontested adjustments already include peak and off-peak minutes, and that the additional discounts for off-peak minutes result in duplicate deductions. In other words, AT&T asserts that the uncontested adjustments yield a net figure for OCC minutes and that the off-peak discounts subtracted from the net figure on Table 3 of the *MO&O* are improperly calculated as a percentage of gross minutes. This leads to a double counting of off-peak minutes, such as Texas intrastate minutes, already excluded through the other allowed adjustments. AT&T proposes a correction for this "miscalculation" which requires the reduction of each OCC's deductible off-peak minutes by the aggregate percentage of all of its uncontested adjustments. For example, since the uncontested adjustments resulted in a 17 percent reduction in MCI's gross minutes, 17 percent of MCI's off-peak deduction would be considered duplicative, and would be disallowed. Similarly, 22.3 percent of SPCC's and 34.2 percent of USTS' off-peak deductions would be disallowed. As a result of this

Contract Expenses, and use of the illustrative Alabama State rate of return in lieu of AT&T's interstate rate of return. A discussion of these proposals is set forth as Appendix C to the September 29, 1982 MO&O.

[14] The agreement states that "it is anticipated that unless capped, this amount will increase each year, and that any change in this amount will be reflected in the tariff charges to be filed each year. . . ." ENFIA Agreement, para. 10, n. **.

correction, the monthly average billed minutes of use would increase to 180,036,858 for MCI, 72,005,679 for SPCC and 16,407,384 for USTS. The new weighted average of OCC minutes per ENFIA per month would be 4764, and would yield a rate of $36.88 for Element 2, $158.24 for Element 3, or $195.12 overall.

A. MCI

10. MCI argues that its off-peak adjustment is not double counted. MCI maintains that its initial report of minutes, filed on May 25, 1982, reflects sequential deductions from gross minutes. The off-peak deduction, taken after other adjustments had been made, was computed from a net figure that does not include minutes already subtracted. Neither its original reported deduction of 349,946,350 minutes for non-business and non-business day traffic nor its revised report of 74,564,131 deductible evening and 81,948,073 deductible night minutes[15] includes minutes that had already been excluded for intrastate Texas traffic, resold MTS and WATS, normalization, and billing adjustments. Therefore no adjustment need now be made.

11. Beyond its dispute of AT&T's proposed modification of MCI's off-peak adjustment, MCI advocates that, in light of the Commission's approved methodology, some of its other approved adjustments should be recalculated. These changes would decrease MCI's average minutes per ENFIA. In particular, MCI argues that our disallowance of the normalization adjustment effectively increases the net minute base upon which the off-peak adjustment should be calculated, and that the number of its deductible off-peak minutes should now be revised to 76,231,274 for evening and 83,783,040 for night. Similarly, since its original calculation of the billing adjustment was also affected by the normalization adjustment, the disallowance of normalization should result in an increase of the billing adjustment from 71,034,857 to 72,507,803 minutes. Further, MCI observes that the OCCs did not have the benefit of the Commission's decision prescribing the proper methodology for calculating billed minutes before their filings were made, and that as a result the numbers prepared by each of the OCCs on the basis of their individual theories are not necessarily consistent with each other or with the application of the theory adopted by the Commission. MCI advocates that it now be allowed to reform its calculations to include certain adjustments, specifically 33,238,742 minutes for rounding and 8,079,924 minutes for independent telephone company ENFIA, which were permitted under the approved methodology but had not previously been claimed by MCI. The inclusion of these new

[15] *See* Letter of September 16, 1982 from William J. Byrnes to Chief, Common Carrier Bureau and MO&O, Appendix B, Table 4.

adjustments, along with the revised off-peak and billing adjustments would reduce MCI's average minutes per ENFIA to 5036.

12. AT&T contests MCI's arguments regarding the computation of its off-peak exclusion but offers no persuasive evidence that MCI's minutes are not the result of sequential deductions or that they are otherwise understated. AT&T argues that MCI has never before made mention of its sequential deduction methodology, even though the *Designation Order* directed the OCCs to explain the techniques used to quantify proposed deductions. AT&T also notes that none of the OCCs challenged its restatement of the proposed adjustments in Appendix B to its June 21, 1982 comments in which each claimed OCC deduction was shown as a percentage change in gross minutes. AT&T implies that such "knowing acquiescence" to the percentage of gross minutes summary should be accorded greater weight as evidence of a methodology than any present OCC descriptions of sequential deductions. We find this unpersuasive. First, although in its initial filing on May 25, 1982 MCI did not specifically state that a sequential methodology had been used for every deduction claimed, in at least one instance, deletion of resold MTS and WATS minutes, MCI indicated that a net deduction was taken from a net figure.[16] In view of the fact that MCI's description of its methodology was generally sparse, it is not surprising that reference to sequential net deductions was not made more than once. Moreover, a sequential technique for calculating deductions is not inconsistent with AT&T's percentage summary. AT&T correctly calculated the percentage of total gross minutes for each deduction, leaving the OCCs no grounds for objection. The mere fact that these percentages are correct does not establish that the deductions were originally calculated as percentages of gross minutes, only that the numbers resulting from the methodology actually used bear the relation to gross minutes that AT&T has described. Finally, AT&T observes that the September 13, 1982 letter from the Chief of the Common Carrier Bureau directed MCI to submit figures for deductible evening and night minutes derived from percentages of total traffic and that, in its September 14, 1982 response, MCI related the reported off-peak discount to total minutes as a percentage. Again, the description of the deduction as a percentage of total minutes evidences nothing more than a mathematical identity and is not *a priori* proof of a particular methodology. In addition, it is clear from MCI's September 16, 1982 letter to the Bureau Chief that the revised off-peak deduction was derived directly from the original non-business and non-business day proposed deduction of 349,946,350 minutes, which MCI asserts was computed from a net figure.

13. In the absence of clear evidence to the contrary, we find it reasonable to conclude that MCI's off-peak minutes were properly

[16] MCI Initial Comments, May 25, 1982, p. 20.

derived from net as opposed to gross minutes and perceive no need to accept AT&T's adjustments to these minutes to correct for double counting. However, we also recognize that our disallowance of the exclusion for normalization changes the net figure upon which the billing adjustment and off-peak deduction should be based, and that, without recalculation, these adjustments are slightly understated. This results from the fact that, in the sequence used by MCI, the normalization exclusion preceded the original billing and off-peak adjustments and that, as a result of our disallowance of normalization, the number of net minutes from which these adjustments should be calculated is larger than MCI had contemplated. Since MCI could not have foreseen the Commission's ultimate decision on the permissibility of each proposed adjustment and therefore had no way of knowing the proper net figures upon which the off-peak discount must be based, we accept MCI's revisions to its billing adjustment and off-peak discount.

14. However, we agree with AT&T that MCI's proposal to revise its total minutes to reflect deductions for rounding and independent telephone company ENFIA should not be considered here. In accordance with Section 405 of the Act, 47 U.S.C. § 405 and Section 1.106(c) of our Rules, 47 U.S.C. § 1.106(c), on reconsideration we will examine only those matters raised by the parties that either involve new facts that were unknown to the parties at the time they filed their pleadings or represent compelling public interest concerns. Although MCI did not know which adjustments would be allowed or disallowed, it was fully aware that other parties had claimed exclusions that it had not, and was given ample opportunity to place into the record of this proceeding data which would permit the same exclusions to be made from its gross minutes as those allowed for SPCC and USTS.[17] MCI has not demonstrated why the public interest requires that we accept these revisions at this time when there were several other occasions when modifications to MCI's filed numbers more properly would have been made. We believe that any public interest that would be served by allowing these revisions is outweighed by the benefits of adhering to an administrative practice that encourages parties to place their best foot forward during the established pleading cycle so that other parties and the Commission can refer to a full record before a final decision is reached. In resolving the disputes over the calculation of billed minutes, we were not obligated under the ENFIA agreement to impute adjustments that had not been claimed by some of the OCCs even though we allowed such exclusions for other parties. Indeed, we could not fairly do so. If we permitted such adjustments for some parties now, on the

[17] After the initial comments of the OCCs were filed on May 25, 1982 all of the parties were given two additional opportunities, on June 21 and July 1, 1982, to comment on the other parties' pleadings and modify or reinforce their own.

basis of newly filed information, we would prejudice the interests of other parties that have not attempted such second-thought revisions to their positions. This would invite further efforts to reopen a record that, in accordance with accepted procedures, has now been closed. For these reasons, we reject MCI's proposed rounding and independent telephone company ENFIA adjustments, and recalculate MCI's average minutes as 5482 per line per month.[18]

B. SPCC

15. SPCC also challenges AT&T's contentions that the Commission erred in its calculation of the off-peak deduction. However, SPCC does not claim that it made sequential deductions similar to MCI's. Rather, SPCC argues that since it derived its billed minutes from revenue figures which include off-peak discounted revenues, its methodology "inherently" produces adjustments that reflect an off-peak discount. Thus, SPCC asserts that its various adjustments are already smaller than they would have been absent consideration of off-peak characteristics.[19] Therefore, SPCC denies that there is any double deduction for off-peak minutes. SPCC reiterates its previously expressed concerns that AT&T's conversion of SPCC's revenue factors to percentage adjustments of gross minutes is an inappropriate modification of its basic methodology and leads to a misinterpretation of the results.

16. AT&T maintains that SPCC's revenue based methodology for calculating billed minutes does not result in a reflection of the off-peak adjustment because the fact that the revenues included in the numerator of SPCC's formula are reduced through off-peak discounts is "neutralized" by a corresponding reduction in the average revenue per minute in the denominator. Thus, according to AT&T, SPCC's revenue-based methodology does not produce "inherently reduced" exclusions that are automatically adjusted for an off-peak discount and some of SPCC's off-peak minutes are therefore improperly deducted twice. AT&T recommends that, in order to correct for this defect, SPCC's allowed off-peak adjustment of 80,050,863 minutes be reduced by 22.3 percent, the aggregate percentage of the allowed adjustments other than the off-peak deduction. This would result in a corrected off-peak discount of 62,199,521 minutes and a total monthly average of 72,005,679 minutes.[20]

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[18] *See* Appendix, Table 2, *infra*.

[19] SPCC's general formula for the derivation of minutes from revenues is as follows:

$$\frac{\text{Revenue}}{\text{Average Revenues Per Minute}} = \text{Minutes}$$

[20] AT&T Petition, October 19, 1982, p. 6. Under its alternative methodology, set forth in Attachment I of its Petition, AT&T would subtract the approved off-peak deduction from gross minutes, leaving a net figure of 278,056,297 minutes from

17. We are not convinced that, in the calculation of other adjustments, SPCCs' revenue formula automatically compensates for the off-peak discount. It is difficult to trace the impact of SPCC's use of discounted revenues in both the numerator and denominator since each element of the formula, as calculated in SPCC's Initial Report, is adjusted for separate factors.[21] It is not clear that, even if all of SPCC's proposed revenue factors were allowed, either the "inherent reduction" effect claimed by SPCC or the "neutralization" effect claimed by AT&T would result from the formula. However, it is not necessary for us to analyze the inherent effect of SPCC's formula since many of the revenue factors, including adjustments of 63,659,569 off-peak and 21,067,630 SPRINT LTD. minutes have been disallowed,[22] leaving these originally claimed off-peak minutes included in the gross minute figure. Because the adjustments other than the off-peak discount are deducted first from gross minutes, these adjustments, as reflected in our September 29, 1982 *MO&O*, must include some off-peak minutes.

18. This by itself does not create a problem as long as the actual off-peak deduction is taken from a net figure (gross minutes minus other adjustments), to reflect the fact that some off-peak minutes have already been excluded. However, it is now apparent that we improperly deducted at least part of the off-peak adjustment from the gross minute figure. The off-peak deduction approved in the *MO&O* was calculated from information supplied in SPCC's May 25, 1982 Initial Report and from additional data on SPRINT LTD. minutes provided by letter dated September 14, 1982 from Mitchell F. Brecher of SPCC to the Chief of the Common Carrier Bureau.[23] The portion of the off-peak deduction relating to SPRINT LTD. minutes is correct because it was separately calculated. However, the portion of the off-peak deduction relating to non-SPRINT LTD. minutes was determined by applying the 40/60 percent discount to gross minutes minus total SPRINT LTD. minutes when it should have been applied to net minutes minus total SPRINT LTD. minutes.[24] Therefore, to the extent that the non-SPRINT LTD. part

which to subtract the originally approved percentages of other adjustments. Under this method, as percentages of net rather than gross minutes, the other adjustments rather than the off-peak deduction itself would be reduced, and would yield a total monthly average of 72,016,581 minutes.

[21] SPCC adjusted the numerator for the following factors: Texas revenue, rounding, independent telephone company ENFIA, monthly minimum revenue, normalization, official traffic and no answer supervision; and the denominator for the following factors: seven day study, normalization, division of revenues equivalency, late delivery of lines, SPRINT IV adjustment, testing and trouble. SPCC Initial Report, May 25, 1982, WP-2&3.

[22] *See* MO&O, Table 5.

[23] *Id.*, Table 4.

[24] The discount was applied to the off-peak portion of gross minutes (27.13% of gross for evening and 11.54% for night traffic) claimed in SPCC's Initial Report, May 25, 1982, WP-88.

of the off-peak deduction should have been figured against net rather than gross minutes, it is in error. Since AT&T's proposed correction is not limited to non-SPRINT LTD. off-peak minutes, we will not accept it. Instead we merely recompute the non-SPRINT LTD. portion of the off-peak deduction against SPCC's net minutes.

19. The net minutes we use here are slightly different than as calculated in our September 29, 1982 *MO&O* because we have determined that AT&T's rounding of SPCC's revenue factors created some distortions in the computation of adjustments. With one exception, we have used SPCC's reported revenue factors to refigure the adjustments.[25] As a result of these recalculations, SPCC's non-SPRINT LTD. off-peak deduction is computed against a net minute figure of 223, 137, 132.[26] The total revised off-peak deduction, including SPRINT LTD. minutes, is 65,931,711 minutes. The revised total monthly average of SPCC's minutes is 70,915,760 or an average of 3325 minutes per month per line.[27]

20. SPCC also has excepted to the exclusion adopted by the Commission for SPCC's use of ENFIA-like facilities obtained from independent telephone companies. In addressing this issue, SPCC argues, as it did in its July 1, 1982 pleadings, that AT&T's conversion of the independent telephone company revenue factor of 0.0354 to a .018 percent reduction from gross minutes is inappropriate, that AT&T offered no justification for the 50 percent reduction of the exclusion, and the Commission's adoption of AT&T's modification as a reflection of the fact that independent telephone company ENFIA are generally used on only one end of a call is incorrect in light of the revenue-based methodology SPCC has used. SPCC therefore believes that the deduction for independent telephone company ENFIA should be doubled from 6,397,537 to 12,533,751 minutes.

21. We note first that SPCC's criticisim of AT&T's conversion of revenue factors into minutes is incongruous in view of SPCC's own use of minutes in the derivation of revenue factors, particularly for independent telephone company ENFIA.[28] In any case, we find nothing in SPCC's revenue-based methodology itself to indicate that the claimed independent telephone company adjustment should not be reduced by approximately half to properly reflect the actual

[25] The exception is the factor used for independent telephone company ENFIA, which we have recalculated from data provided in SPCC's Initial Report, May 25, 1982, WP-19. *See* Table 3, *infra*. The recalculated factor is the same as the one proposed by AT&T and used in the MO&O.

[26] This number reflects SPCC's gross minutes minus allowed non-off-peak adjustments, as recalculated using SPCC's original revenue factors, minus the 55,541,860 SPRINT LTD. minutes reported in the September 14, 1982 letter for which the permissible off-peak deduction was separately calculated. *See* Appendix, Table 3, *infra*.

[27] *See* Appendix, Table 1, *infra*.

[28] SPCC Initial Report, May 25, 1982, WP-19.

technical configuration of these connections. SPCC's revenue factor was developed on the basis of minutes terminating in independent exchange areas. Assuming an in/out ratio of 50 percent, the application of the 0.0354 factor to single-counted minutes would provide the proper number of independent telephone company minutes for the non-ENFIA end of calls transiting independent exchanges. However, since we have doubled SPCC's single reported total minutes to account for the usual occurrence of ENFIA at both ends of a call, the use of the 0.0354 independent telephone company factor, as a percentage of gross minutes, yields twice as many deductible minutes as are appropriate. Thus, as explained in the *MO&O*, we believe that AT&T's 1.8 percent factor, as applied to SPCC's doubled minutes, yields the correct number of excludible independent telephone company ENFIA minutes.[29]

22. Finally, SPCC asserts that the figure of 4474 minutes approved in the *MO&O* for use in the determination of Level D ENFIA rates overstates the minutes that would be found under a correct application of the ENFIA agreement. SPCC maintains that we must apply permissible adjustments uniformly to the gross minutes of all OCCs. SPCC has prepared tables for each of the reporting OCCs demonstrating a consistent application of the approved adjustments, with modifications for SPCC and MCI in accordance with their positions on reconsideration and imputed adjustments for Teltec and Satelco, two resale carriers whose filed summary data concerning ENFIA minutes and lines were included in our calculations of weighted average OCC billed minutes.[30] According to SPCC, the use of these modified and imputed values for the approved adjustments yields a weighted average of OCC minutes of use of 4149.[31]

23. We agree that, given adequate information, the adjustments we have approved for MCI, SPCC and USTS should be applicable to the minutes of all carriers that pay for local exchange connections under the ENFIA tariff. However, many of these carriers, particularly the resale carriers, are not known to us.[32] Those resellers with very low overall volumes of traffic probably do not have the resources with which to count and report properly adjusted minutes. Therefore, enforcement of reporting requirements for all resellers paying for ENFIA would be extremely difficult. Moreover, reliance

[29] *See* MO&O, Appendix B, p. 2. *See also* note 23, *supra* and Table 3, *infra*.

[30] *See* Table 6 of Appendix B to the September 29, 1982 MO&O.

[31] SPCC Opposition, November 8, 1982, Appendix A.

[32] Identification of the resellers subject to ENFIA is made difficult by the fact that under our Competitive Carrier Rulemaking in CC Docket No. 79-252, resellers, which are those carriers that do not own any transmission facilities but obtain basic communications services from underlying carriers for resale purposes, are exempted from certification requirements under Section 214 of the Act, 47 U.S.C. § 214. Second Report and Order, 91 FCC 2d 59 (1982), *reconsideration*, FCC 83-69, released March 21, 1983.

on minutes filed voluntarily by resale carriers presents problems of self-selection since only those with relatively low averages of minutes per line per month are likely to file reports. Therefore, voluntarily filed minutes provide an unrepresentative sample of resellers' ENFIA minutes. In the case of Satelco and Teltec, resale carriers that did file minutes for 1981, no adjustments to gross minutes were claimed, and we have no data with which to verify the accuracy or applicability of the deductions SPCC has imputed on their behalf. Thus, we have no basis for accepting the adjustments to their minutes urged upon us by SPCC. However, we recognize that the inclusion of the unadjusted minutes of these carriers in the OCC total probably creates slight inconsistencies. In view of the fact that the inclusion or exclusion of the Teltec and Satelco minutes has a negligible impact on the total average OCC minutes per month per line, we will eliminate them altogether from the calculation of the OCC minutes used in Level D rates.[33]

C. USTS

24. In its opposition to AT&T's petition, USTS argues that AT&T has incorrectly assumed that USTS' deductions for Texas minutes, independent telephone company ENFIA, resold MTS and WATS, testing, rounding and billing adjustments are equally applicable to peak and off-peak minutes. USTS claims that it incurs most of these deductions during peak periods and that, as a result, an adjustment for off-peak usage against gross minutes yields a more accurate billed minute count than an adjustment against net minutes. However, admitting that at least some of its off-peak minutes have been double counted, USTS proposes that its off-peak deduction of 13,910,419 minutes remain the same but that its other adjustments be recomputed. USTS provides recalculations of each of these other deductions based on an allocation of the affected minutes between peak and off-peak periods. For instance, USTS now claims that 86.56 percent of all billing adjustments for fraudulent usage are related to peak minutes and that 10.32 percent and 3.12 percent are related to evening and night minutes, respectively. By weighting the evening billing minutes by .60 and night billing minutes by .40, USTS would recalculate its billing adjustment to be 12,701,022 minutes[34] compared to AT&T's recalculation of 11,149,168 minutes.[35] Combined, USTS' allocation based revisions would permit the deduction of

[33] The elimination of the minutes from the OCC total average used in computing the tariff rate does not alter the obligation of resellers to pay ENFIA charges for the use of local exchange interstate services. AT&T-Applicability of ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568 (1982), *review pending sub nom. U.S. Telephone Communications, Inc. v. FCC*, D.C. Cir. No. 82-2324 (and consolidated case) (filed November 3, 1982). *See* note 65, *infra*.

[34] USTS Opposition, November 8, 1982, Attachment 1.

[35] AT&T Petition, October 19, 1982, Attachment I.

5,183,429 more minutes from USTS' gross minutes than would AT&T's revisions. All of USTS' revisions are based on peak/off-peak allocation factors derived from 1982 data.[36] Records from which comparable ratios could be calculated for 1981, the test period year for the ENFIA rates at issue, were not available.

25. AT&T argues that USTS' position constitutes a concession of methodological error and that its claim that most of its deductions occur during peak periods is untimely made and unsubstantiated. We agree with AT&T that it is inappropriate in the context of this reconsideration for USTS to propose the adoption of an entirely new methodology for the calculation of these deductions. There is nothing in the record that supports a presumption that USTS followed this allocation methodology when preparing its original submissions in this proceeding. Indeed, the fact that USTS now recalculates all of these deductions based on 1982 usage data and admits the absence of similar traffic information for 1981 indicates that USTS' usage allocation theory is a recent innovation that bears no relationship to the position that USTS has previously taken. We cannot permit such a retroactive modification of a record pertaining to 1981 minutes based on 1982 data. Even if we could do so, we find that, except perhaps in the case of official usage, the proposition that the minutes pertaining to each of these adjustments occur mainly in peak periods is counterintuitive and that USTS has not provided adequate support for the usage allocation factors it proposes. Neither we nor the other parties have sufficient information with which to verify the derivation of these factors. For these reasons, we cannot accept USTS' recalculations.

26. USTS proposes other adjustments to its deductions. First, USTS maintains that the minute counts for some of its deductions, as doubled in Appendix B of AT&T's June 21, 1982 comments, are incorrect. USTS argues that, through mathematical error, AT&T understated the company usage and testing adjustment by 136,095 minutes, the rounding adjustment by 91,572 minutes and the billing adjustment by 283,476 minutes. AT&T asserts that these discrepancies between a simple doubling of USTS' minutes and the figures appearing in AT&T's June 21, 1982 Appendix B result not from mathematical error but from precise calculations necessary to reflect the fact that only USTS' MTS-like City Call minutes were

[36] USTS claims that 86.56% of its billing adjustments, 77.14% of its Texas intrastate minutes, 90.09% of its company usage and testing and 88.19% of its resold/MTS/WATS minutes are related to peak usage. USTS allocates the peak/off-peak usage for its rounding adjustment by using 1982 traffic statistics to calculate the number of messages by time period (day, evening, night) and multiplying the total for each time period by fifteen seconds. *See* USTS Opposition, November 8, 1982, Attachments 1–5.

doubled while its WATS-like SPNS Plus minutes remained single counted.[37] The application of the formula (2 MTS + WATS) to USTS' minutes yields a "doubling" factor of 1.95804 which, when applied to USTS' claimed deductions, produces the numbers used by AT&T and adopted in our September 29, 1982 *MO&O*. Because OCC calls terminating on WATS lines employ ENFIA connections at only one end, minutes generated by these calls properly are not doubled. Therefore, we affirm our acceptance of AT&T's calculations.

27. However, we do accept USTS' assertions that the adjustment for independent telephone company ENFIA is understated. In reporting its original number of 1,095,874 minutes for calls terminating over independent telephone company ENFIA-like facilities,[38] USTS halved the actual number of such minutes to reflect the fact that an ENFIA connection is used on one end of such calls.[39] USTS now argues that, as a result of doubling and the application of a peak-off-peak allocation factor, it should be permitted an exclusion of 1,848,170 for independent telephone company ENFIA.[40] Because we do not accept USTS' peak/off-peak allocation factors, we calculate the doubled independent telephone company ENFIA as 2,191,748 minutes.[41] In contrast, USTS' 1,232,678 resold MTS/WATS minutes are correctly single counted and we reject USTS' contention that its adjustments for resold MTS and WATS should be doubled.[42]

28. Because we have not been persuaded that USTS' original deductions were properly adjusted so as not to include off-peak minutes that are also contained in the off-peak discount, and since it is obvious from USTS' present position that some off-peak minutes have been double counted, it is necessary to recalculate USTS' billed minutes. However, because we do not accept USTS' peak/off-peak allocation factors and other adjustments, it is apparent that we cannot adopt USTS' revised figure of 14,684,171 average monthly minutes of use which yields a monthly average of 3618 minutes per line.[43] AT&T proposes that USTS' average minutes per month be adjusted to 16,407,384 and its average minutes per line per month to

[37] *See* AT&T Comments, June 21, 1982, Appendix A.

[38] USTS letter from Randall B. Lowe to Chief, Common Carrier Bureau, dated June 4, 1982, Response to AT&T Request B-3.

[39] *See* USTS Reply, July 1, 1982, p. 17.

[40] USTS Opposition, November 8, 1982, Attachment 6.

[41] *See* Appendix, Table 4, *infra*. The 1.95804 factor is not applicable here because the independent telephone company ENFIA connections were actually measured.

[42] USTS proposed figure for resold MTS and WATS, revised by doubling the original reported number and applying a peak/off-peak allocation factor is 2,325,127 minutes. USTS Opposition, November 8, 1982, Attachment 6.

[43] USTS Opposition, November 8, 1982, Attachment 7. This number reported by USTS, which contains a slight mathematical error, actually should be 14,684,164. The correction has no effect on the average number of minutes per line. In our September 29, 1982 MO&O, we found USTS to have 14,821,597 average minutes per month and 3652 monthly average number per line.

4042. These numbers are arrived at by reducing the off-peak adjustment by 34.2 percent, the aggregate percentage reduction from gross minutes of all of the allowed adjustments other than the off-peak adjustment.[44] However, in order to remain consistent with our original methodology and the adjustments we have applied to the minutes of MCI and SPCC, we will simply recalculate the off-peak adjustment for USTS by applying the 40/60 percent discount to the off-peak portion of 57,279,335 net rather than 88,737,050 gross minutes.[45] This results in a total off-peak discount of 8,975,672 minutes, a monthly average of 16,101,221 minutes, and an average of 3967 minutes per line per month.[46]

D. *Summary*

29. As a result of the revisions described above, MCI's monthly average is reduced to 169,509,481 minutes and SPCC's and USTS' monthly averages are increased to 70,915,760 and 16,101,221 minutes respectively. The total of the monthly averages for all three OCCs is 256,526,462 and the weighted monthly average OCC minutes per line is 4555. This increases our original calculation of Rate Element 2 from $34.85 to $35.42 and Rate Element 3 from $148.61 to $151.30, producing an increase in the overall Level D rate from $183.46 to $186.72 per line per month. Because we have determined that $186.72 is a just and reasonable rate for Level D charges under the agreement, the adjustment provision in paragraph 30 of our *Designation Order* applies to this revised rate rather than the $183.46 rate.

III. *SPCC and USTS Petitions*

30. The separate petitions for reconsideration filed on October 29, 1982 by SPCC and USTS concern that portion of our September 29, 1982 *MO&O* that requires the OCC's retroactively to adjust the ENFIA payments made during the five month suspension and investigation period for the difference between the interim billing and collection rate of $178.46 then in effect and the $183.46 rate ultimately established.[47] USTS and SPCC make several arguments in support of the conclusion that the imposition of such a retroactive adjustment is beyond the authority of the Commission under the Act. First, they argue that the Commission's reliance on Section 4(i)

[44] AT&T Petition, October 19, 1982, p. 6. Alternatively, AT&T demonstrates that the originally approved off-peak adjustment of 13,910,419 may be subtracted from gross minutes first, leaving a smaller net figure from which to subtract the approved percentages for the other adjustments, yielding a monthly average of 16,411,974 minutes. AT&T Petition, October 19, 1982, Attachment I.

[45] The percentages of off-peak traffic (28.87% evening and 6.88% night) were derived from Volume 7 of USTS' May 25, 1982 Initial Report. *See* MO&O, Table 4.

[46] *See* Appendix, Table 1, *infra*.

[47] MO&O, at para. 36. *See also* Designation Order, 90 FCC 2d at 215–216.

of the Act, 47 U.S.C. § 154(i), as authority to require this retroactive adjustment is misplaced because that section specifically prohibits the issuance of orders inconsistent with the Act,[48] They contend that, under the regulatory scheme concerning tariffs set forth in Sections 203–205 of the Act, 47 U.S.C. §§ 203–205, the Commission may only require carriers, not their customers, to pay refunds if the final rate is lower than the interim rate.[49] USTS and SPCC espouse the view that the lack of specific statutory provisions for retroactive adjustments applicable to customers must be read as evidence of Congressional intent to prohibit the imposition of such a requirement. Second, USTS and SPCC assert that *Lincoln Telephone and Telegraph Co.*, 72 FCC 2d 724 (1979), *aff'd*, 659 F.2d 1092 (D.C. Cir. 1981), provides no support for a retroactive adjustment in this case. They observe that in *Lincoln* the Commission's order directing the use of the ENFIA tariff as an interim billing and collection rate subject to adjustment was upheld because Lincoln Telephone had a duty to interconnect with MCI but did not have a lawful exchange access tariff of its own. They argue that *Lincoln* involved factual circumstances outside of the tariff process and that it is distinguishable from the present case where interconnection was not an issue and the investigation concerned an effective exchange access tariff already on file with the Commission. SPCC also argues that the requirement violates the terms of our *Designation Order*, in which a retroactive adjustment was conditioned on a finding of a just and reasonable ENFIA rate. According to SPCC, in the *MO&O* the Commission did not and could not have found the $183.46 rate to be "just and reasonable" within the cost-based standards that in the past we have found inherent in Section 201(b) of the Act, 47 U.S.C. § 201(b).[50] Moreover, SPCC contends that the Commission's establishment of a rate and required adjustment constitutes retroactive ratemaking in contravention of a central regulatory principle.

31. In an Opposition filed on November 5, 1982, AT&T contests the applicability of USTS' and SPCC's strict construction of the Act to the novel circumstances surrounding the ENFIA agreement and implementing tariff. AT&T asserts that the Commission is not engaged in a routine investigation under Section 204 of a carrier-initiated tariff but rather that the Commission is confronted with the task of evaluating data filed by competing carriers in order to

[48] Section 4(i) states:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

[49] The Commission may impose accounting orders and require carrier refunds under 47 U.S.C. § 204.

[50] In support, SPCC cites our decisions in AT&T (WATS) 59 FCC 2d 611, 678 (1976), Private Line Rate Case, 34 FCC 2d 244, 247 (1961), and Hi-Lo, 55 FCC 2d 224, 241 (1975).

interpret a rate agreement between them. Thus, AT&T maintains the Commission properly invoked its general discretionary authority under Section 4(i) here as it had in *Lincoln* to order an interim billing and collection rate subject to adjustment, either upward or downward, to protect the interests of all parties and the public.[51]

32. We believe that, under the unique circumstances surrounding this proceeding, the establishment of an interim billing and collection rate during the investigation period was desirable to protect the interests of the parties as well as the public. In order to assure consistency with the statutory scheme governing interconnection and charges for interconnection in Sections 201–205 of the Act, 47 U.S.C. § § 201–205, the two way retroactive adjustment provision as set forth in the *Designation Order* and as applied in the *MO&O* was a necessary and suitable concomitant of the interim rate and fully within our authority under Section 4(i). The appropriateness of the adjustment provision is directly related to the propriety of the interim billing and collection rate itself. Therefore, we will briefly review the reasons why the interim billing and collection rate was essential.

33. In the context of the overall intent and purpose of the ENFIA agreement and implementing tariff, this proceeding involves certain considerations of policy, the public interest and practicality that distinguish it from a conventional investigation of a carrier-initiated tariff change. The policy served by the agreement and tariff is the assurance of continued interconnection of competitively provided MTS/WATS-type services with exchange facilities for reasonable compensation to local telephone companies. As we have described in numerous previous decisions, the structure of the ENFIA tariff was forged by agreement between AT&T and the OCCs in response to the need to implement the Commission's interconnection policies[52]

[51] AT&T also asserts that because none of the OCCs petitioned for reconsideration of the Designation Order their objections to the retroactive adjustment in the instant petitions are not timely made. However, this argument fails because, as USTS and SPCC have noted, in our Designation Order we did not actually order an adjustment or make any other final adverse rulings against any of the parties that would have required petitions for reconsideration to be filed only at that time. 47 C.F.R. § 1.106(a). *See* Service Electric Cable TV, Inc., 51 FCC 2d 763, 764 (1975).

[52] *See* Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); Bell System Tariff Offerings, 46 FCC 2d 413 (1974), *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. FCC, 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); MCI Telecommunications Corp., 60 FCC 2d 25 (1976), *rev'd in part sub nom.* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (1977), *cert. denied*, 434 U.S. 1040 (1979) (Execunet I); AT&T, 67 FCC 2d 1455, *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 580 F. 2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (Execunet II).

despite substantial uncertainty as to the proper measure of the cost of interconnection for OCC MTS/WATS-type services.[53] In the absence of actual cost information and in recognition that the development and examination of such data would be a time consuming and difficult task, we adopted, as a reasonable interim solution, an agreed upon mechanism which simulates the amount paid for interconnection by AT&T as determined through the jurisdictional cost separations process, discounted by Factor P to account for both the technically inferior arrangements provided to the OCCs and the nature of the marketplace.[54] Thus, ENFIA is inherently a temporary measure, intended to provide a means of approximating costs that cannot be known with precision until a more permanent access charge system can be put in place.[55] By its very nature, ENFIA cannot be held to the same cost-based standards as conventional carrier-initiated tariffs. Yet, the lack of "mathematical nicety" does not detract from its usefulness in ensuring interconnection at reasonable rates, as required under Section 201 of the Act, 47 U.S.C. § 201. Since an access charge plan had not been finalized by the time Level D rates were to become effective, the ENFIA agreement remained our best means of fulfilling this statutory responsibility.[56]

34. Our public interest concerns also differ somewhat in this case from those arising in other tariff proceedings. Because of the peculiar circumstances that surround the ENFIA rate, we believe that our statutory responsibility to ensure its reasonableness as an interim measure includes the task of making sure that consumers of AT&T and OCC services are not indirectly disadvantaged through

[53] ENFIA, 71 FCC 2d at 541–457 (1979); Extension Order, 90 FCC 2d at 12 (1982); Designation Order, 90 FCC 2d at 203–205 (1982); ENFIA, Mimeo CC 5919, released August 23, 1982, at paras. 6–15; Memorandum Opinion and Order, FCC 82–431, released September 29, 1982, at paras. 10, 26–29, 34–35.

[54] Access arrangements provided through line side terminations with a Class 5 switch require the dialing of extra digits by OCC customers to reach the OCC switch and result in channel noise characteristics as well as lack of dial pulse access call billing and automatic number identification for OCC services. These factors have been viewed as evidence of diminished value in comparison with AT&T services that justifies a significant discount for OCC connections. *See* ENFIA, 71 FCC 2d at 455; Extension Order, 90 FCC 2d at 15.

[55] Paragraph 6 of the ENFIA agreement explicitly provides for the automatic termination of the interim charges upon the filing of cost based access charge tariffs either pursuant to an order of the Commission in the MTS and WATS Market Structure Inquiry (CC Docket No. 78–72) or legislation.

[56] Under Section 4(j), 47 U.S.C. § 154(j), we may control the disposition of our caseload, and have been well within our authority to leave the cost issues underlying access charges for resolution in our ongoing MTS and WATS Market Structure Inquiry, (CC Docket No. 78–72). *See* Nader v. FCC, 520 F. 2d 182, 195–198 (D.C. Cir. 1975). *See also*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543–544 (1978); FCC v. Schreiber, 381 U.S. 279, 289–293 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143–144 (1940).

either the demise of competitive alternatives as a result of ENFIA rates that are too high or the placement of unreasonable burdens on other services if ENFIA rates are too low.

35. The guidepost available to us in our fulfillment of our responsibilities to the carriers and to the public is the approved ENFIA agreement itself. The agreement contemplated that interconnection charges would increase under a prescribed formula as OCC minutes and separations allocations to the interstate jurisdiction grow,[57] and that the charges effective during Phase II be subject to a discount (Factor P) determined by the Commission.

36. Following the extension of the agreement into Phase II, 90 FCC 2d 6 (1982), and the filing of proposed tariff revisions on April 16, 1982 by AT&T, we were confronted with numerous practical difficulties in ensuring that our policy and public interest responsibilities under Sections 1 and 201(a) could continue to be met. First, the parties engaged, for the first time, in disputes over the proper count of billed minutes and calculation of the SEP Amount. These disputes necessitated the institution of an investigation in order to find the appropriate rate within the terms of the ENFIA agreement. Second, the relevant terms of the agreement themselves were found to be ambiguous, especially in light of changed market circumstances. Therefore, the investigation necessarily involved a more time consuming task than the mere tallying of numbers since we had to be sure that through its revisions AT&T did not "unilaterally abrogate [its] private [carrier-to-carrier] contracts by filing tariffs altering the terms of those contracts." *MCI v. FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981). Third, it was clear that we could not conclude such an investigation before May 2, 1982, the expiration date under the tariff of the Level C rates then in effect. The only tariffed ENFIA rates that could possibly be in effect after that date were the higher proposed Level D rates that were the subject of the investigation. Fourth, we were presented with the necessity of providing for the continuation of ENFIA interconnection arrangements during the pendency of the investigation.

37. The unique combination of these policy, public interest and practical factors severely constrained the actions that we could take. We could have permitted the higher rate to go into effect automatically on May 2, 1982, but this would have caused potentially grave dislocations in the marketplace despite the possibility that AT&T ultimately might have to refund to the OCCs the difference between its proposed rate and the one finally approved. In refusing to permit AT&T's proposed higher rates to go into effect on schedule, we acted to protect the interests of the OCCs and their customers. Neverthe-

[57] Paragraph 10, note ** of the ENFIA agreement provides that the SEP Amount will increase each year to reflect growth in separation allocations, unless the SEP Amount is capped. The agreement contains no explicit reference to the capping of minutes although the parties voluntarily did so during Phase I.

less, rejection of the proposed tariff was deemed unwarranted, 90 FCC 2d at 211, and would have resulted in the lack of an effective access tariff once the Level C rates expired on May 2, 1982. Suspension and investigation under Section 204, 47 U.S.C. § 204, was the only reasonable course. However, a five month suspension period with no interim rate also would have resulted in the lack of an applicable interconnection rate after May 2, 1982, creating market disturbances including possible disruption of interconnection arrangements. Therefore, contrary to the assertions of SPCC and USTS, because it had been determined that AT&T's proposed tariff revisions for Level D rates should be suspended, once the Level C rates expired on May 2, 1982, the availability of tariffed interconnection was no greater here than in *Lincoln Telephone and Telegraph Co.*, 72 FCC 2d 724, *aff'd.*, 659 F. 2d 1092, and the same need for an interim rate existed.[58]

38. Given the data that had initially been supplied by the parties indicating increases in OCC minutes of use and AT&T costs per minute, we were confident that the Level D rate ultimately determined would exceed the $122.20 Level C rate then in effect. Since we also recognized that certain adjustments to OCC minutes might reasonably be required, we believed that a rate approximating a middle ground between the divergent positions of the parties would best serve the interests of the carriers and the public during the period that an examination of the data was being conducted. We had no record upon which to base a prescription of a rate under Section 205(a) and could not allow a temporary partial authorization of AT&T's proposed tariff rate under Section 204(b) since that option had been opposed by AT&T.[59] However, having formed a "tentative opinion about the location of the line between . . . the reasonable and the unreasonable," we were not obliged "to engage in a pointless charade in which carriers . . . are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978). Thus, in this case, as in *Lincoln*, our reliance on our general discretionary authority under Section

[58] In both cases, the OCCs might have assumed that, in the absence of an effective access tariff, they could have secured interconnection merely by obtaining ordinary business lines from the local operating company. However the local tariffs offering business lines restrict their use so as to preclude resale or employment as the local distribution element for MTS/WATS-type services offered by common carriers. The very existence of the ENFIA agreement testifies to the inappropriateness of business line rates for this kind of service.

[59] Letter from AT&T to Chief, Common Carrier Bureau dated April 21, 1982. *See* Designation Order, 90 FCC 2d at 203. Temporary partial authorizations of tariff rates under Section 204(b) require a prior "written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable." 47 U.S.C. § 204(a). *See* MCI v. FCC, 627 F.2d 322, 325 (D.C. Cir. 1980).

4(i) to set an interim rate was a necessary consequence of our responsibilities under Sections 201–205 to ensure interconnection on terms and conditions that are just and reasonable for all affected parties.

39. As *Lincoln* makes clear, the very characteristic of an interim rate established by the FCC that renders it a valid exercise of discretionary power not inconsistent with the Act is that it is accompanied by a two-way adjustment. 659 F.2d at 1107. Such an adjustment ensures that the interim rate does not necessarily represent the compensation that ultimately will be received for the interconnections provided. An essential aspect of the fairness of an approximated rate, which is set without the benefit of hearings under Section 205(a) and is not a partial authorization of a carrier-initiated tariff supported by prior written showings of reasonableness under Section 204(b), is that neither party is bound to the interim arrangement. Thus, a two-way adjustment, under which either the OCCs or AT&T could be made to refund the difference between the interim and final rates to the other party, was a necessary substitute for the specific provisions for the determination of reasonableness contained elsewhere in the Act.

40. Moreover, we cannot agree with SPCC and USTS that the two-way adjustment was in direct conflict with the tariff review scheme set forth in Sections 203–205. This case is not analagous to the situation in *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973), where the court found that a plan requiring Commission approval prior to the filing of new rates would circumvent the entire scheme set forth in Sections 203–205 of carrier-initiated rate changes, limited suspension periods, rate refunds and rate prescription only after hearings and specific findings. Here we did not disturb this scheme, but found that, because of the dislocations that would occur if either the tariff were allowed to lapse or AT&T's high rate were allowed to go into effect, an interim arrangement supplementary to this scheme was necessary to protect the interests of the public and the carriers. The express provisions in Section 204 for refunds by carriers to customers were not meant to preclude the sort of adjustment at issue here. The ancillary power of a regulatory agency to impose such an adjustable interim rate is derived from the "mandate to assess the reasonableness of . . . rates and to suspend them pending investigation if there is a question as to their legality," and does not depend on an explicit statutory grant of authority. *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 654, *citing U.S. v. Chesapeake & Ohio R. Co.*, 426 U.S. 500, 514 (1976). It is well recognized that "the discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by Section 4(i) of the Communications Act," and that the lack of specific mention of certain powers does not constitute denial. *Nader v. FCC*, 520 F.2d 182, 203–204 (D.C. Cir. 1975). The Act cannot be read so

literally as to deprive the Commission of the necessary means of effectuating interconnection at reasonable rates.

41. Finally, due to the contractual basis of ENFIA rates, the adjustment provision does not run afoul of the ratemaking convention that prohibits a utility from setting rates to recoup past losses. *See generally Nader v. FCC*, 520 F.2d at 202. Here there was no attempt by AT&T to set Level D rates to recover losses incurred in a period prior to the predetermined effective date of those rates. Rather, the investigation focused on an examination of data provided by both AT&T and the OCCs for the study period relevant to Level D rates in order to achieve a reasonable rate within the terms of the agreement. The "past losses" which either party would bear as a result of having to make a refund to the other were a function of the difference between an interim rate set by the Commission and the actual rate finally determined to be due under the ENFIA agreement as interpreted and applied by the FCC.[60] As in *Lincoln*, we are here presented with the task of overseeing the terms and conditions of interconnection between "unwilling partners." In this case, the competitors have been engaged in a dispute over a rate that was to be established according to the terms of an agreed formula and effective on a predetermined date. Because our investigation was aimed at finding the proper rate under the agreement, we see little difference between this case and *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), where the enforcement of an agreed upon prior effective date for rate increases was not considered retroactive ratemaking. Furthermore, under circumstances where it is the terms of an agreement that are at issue and both sides have participated in the proceeding and have been given notice as to the actual effective date of the rate, and where any of the parties may be responsible for error, fairness dictates that a retroactive adjustment be applicable to either side. *See U.S. v. CAB*, 510 F.2d 769,775 (D.C. Cir. 1975). For these reasons, the SPCC and USTS petitions are denied.

IV. *SBS Petition*

42. In its petition for reconsideration, filed on October 29, 1982, SBS objects to the imposition of increased ENFIA rates on carriers that are non-signatories to the original agreement and proposes that

[60] SPCC is correct in asserting that we did not find the $183.46 rate to be just and reasonable in the Section 204(a) sense of that term. *See* AT&T-Applicability of ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568, 575 n.12 (1982), *review pending sub nom.* U.S. Telephone Communications, Inc. v. FCC, D.C. Cir. No. 82–2324 (filed November 3, 1982). We did, however, find the Level D rates to be "just and reasonable *under the agreement*." MO&O, at para. 35. Because of the contractual basis and temporary nature of ENFIA, *see* paras. 32–35, *supra*, we properly confined our inquiry to what was reasonable within the intentions of the parties as expressed in the ENFIA agreement.

on reconsideration we modify our decision to preserve the *status quo* that existed before the Commission issued its *Designation Order*. This *status quo* would require the calculation of Element 3 rates on the basis of 3000 minutes and a Factor P of 55%, values that were reflected in Phase I Level C rates. SBS also argues that the $0.0595 SEP Amount, effective in 1981 and adopted in our *MO&O* for use in 1982, is appropriate because it may be used without reference to the status of an OCC as a signatory or non-signatory to the ENFIA agreement. Thus, SBS proposes a return to the $99.65 Element 3 rate.[61] SBS argues that the imposition of higher ENFIA rates on all carriers penalizes nonsignatories whose MTS/WATS-type services are still in the early stages of their operations since signatory OCCs paid much lower rates during the beginning stages of their operations. SBS believes that the inequities of this situation are largely a function of the fact that, in determining ENFIA rates, the Commission was guided by the principles of contract construction rather than the conventional principles of tariff review embodied in Sections 201(b) and 202(a) of the Act. Therefore, SBS maintains that the rationale supporting an increase in ENFIA rates for signatories is not applicable to non-signatories and that the "compromise solution" that it proposes would provide a period of stability until equal access interconnection tariffs become effective.

43. In its November 5, 1982 Opposition to the OCC petitions, AT&T notes that SBS does not suggest that different rates be adopted for non-signatories, but merely reiterates a proposal to extend Phase I rates into Phase II for all OCCs, a proposal which the Commission rejected in its *Extension Order*. AT&T maintains that such arguments more properly would have been made in petitions for reconsideration of our April 14, 1982 *Extension Order* and April 30, 1982 *Designation Order*, and that the present petition constitutes an impermissible collateral attack on prior final Commission decisions.[62] Although SBS maintains that in its instant petition it does not seek reconsideration of the *Extension* and *Designation Orders*,[63] but rather proposes revisions to the September 29, 1982 *MO&O* to avoid "unjust and inimical results," we find that SBS' arguments are

[61] It is unclear whether SBS would advocate the use of 3000 minutes in the Element 2 formula used for Level C rates, which would yield a rate of $22.55 for Element 2 and $122.20 overall, or in the formula used for Level D rates, which would yield an Element 2 rate of $24.51 and $124.16 overall.

[62] Under Section 405 of the Communications Act, 47 U.S.C. § 405 and Section 1.106(f) and 1.429(d) of the Commission's Rules, 47 C.F.R. §§ 1.106(f) and 1.429(d), reconsideration petitions filed after the expiration of the 30 day filing period cannot be considered.

[63] SBS has appealed these decisions before the U.S. Court of Appeals for the District of Columbia Circuit. Satellite Business Systems v. FCC, D.C. Cir. Nos. 82-1657, 82-1659 (filed June 14, 1982).

precisely the same as those that have been adequately disposed of elsewhere and are not properly before us here.[64] Therefore, SBS' petition is denied.[65]

V. *Ordering Clauses*

44. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 5(d)(4)-(6), 201, 203–205, and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(d)(4)-(6), 201, 203–205, and 405 that the American Telephone and Telegraph Co. Petition for Expedited Reconsideration IS GRANTED to the extent indicated herein, and is otherwise DENIED.

45. IT IS FURTHER ORDERED, That the Memorandum Opinion and Order in this proceeding, FCC 82–431 released September 29, 1982 IS MODIFIED as indicated herein.

46. IT IS FURTHER ORDERED, That AT&T shall file tariff revisions consistent with this order no later than three (3) days

[64] In our Extension Order, we rejected proposals by SBS, USTS, U.S. Telephone Communications and Telesystems Management Corporation to use frozen Phase I rates during Phase II since such an action was not contemplated by the parties to the agreement and would have required the abandonment of the agreement itself, and since we found no basis for prescribing that ENFIA rate in the absence of the agreement. 90 FCC 2d at 12. *See* American Telephone & Telegraph Co. v. FCC 487 F. 2d 865. Also, in an order issued on delegated authority, the Chief, Common Carrier Bureau denied SPCC's motion to broaden the scope of the proceeding to establish an appropriate dollar level of payment for ENFIA connections in Phase II. Mimeo CC 5919, released August 23, 1982, at para. 6–15. There we also noted that, under the Sierra-Mobile Doctrine, the ENFIA agreement could not be abandoned or modified to establish a frozen rate since the ongoing investigation had to be completed before any determination could be made that the rate under the contract was unjust, unreasonable, unduly discriminatory, or preferential. United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). *See* Mimeo CC 5919, released August 23, 1982, at note 8.

[65] Although SBS has not specifically requested differential treatment for non-signatories, we note that we have also previously determined that the ENFIA tariff applies in all instances of exchange usage by interstate MTS/WATS-type switched message services, except where payments for the use of those local facilities have already been made by an underlying carrier through either ENFIA or the separations process. AT&T-Applicability of the ENFIA Tariff to Certain OCC Services, 91 FCC 2d 568. *See also* Lincoln Telephone and Telegraph Co., *supra*. (ENFIA tariff applicable to interconnection between MCI and non-signatory independent telephone company); Leased Data Services, Mimeo 32441, released June 12, 1980 (ENFIA tariff applicable to connections provided to reseller in originating cities of end-to-end MTS/WATS-type services). These decisions were reached in recognition of the fact that the ENFIA agreement was an industry-wide arrangement negotiated to resolve an industry-wide conflict, and that, by its terms, the ENFIA tariff is applicable to any carrier that requires the use of local exchange facilities in the provision of end-to-end MTS/WATS-type interstate services. We have not foreclosed non-signatories, such as SBS, from arguing in complaint procedures that the ENFIA rates as applied to them are unreasonable or otherwise unlawful. 91 FCC 2d at 571 n. 12.

following the date of release of this order, to be effective on one (1) day's notice.

47. IT IS FURTHER ORDERED, That Sections 61.38, 61.58 and 61.116 of the Commission's Rules are waived for the purpose of allowing AT&T to comply with this order.

48. IT IS FURTHER ORDERED, That this action is effective immediately.

49. IT IS FURTHER ORDERED, That, the Southern Pacific Communications Company, United States Transmission Systems and Satellite Business Systems Petitions for Reconsideration ARE DENIED.

50. This order is exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. It involves a rule applicable to particular rates and to practices relating to such rates within the meaning of the exemption contained in 5 U.S.C. § 601(2).

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendix

Table 1

Weighted Average OCC Minutes Per ENFIA Per Month

	MCI	*SPCC*	*USTS*
1. Gross Minutes	806,865,788	358,107,160	88,737,050
2. Exclusions Other Than Off-Peak	138,323,032	79,428,168	31,457,715
3. Off-Peak Deduction	160,014,314	65,931,711	8,975,672
4. Net Minutes	508,528,442	212,747,281	48,303,663
5. Average Per Month	169,509,481	70,915,760	16,101,221
6. ENFIA Lines	30,923	21,300	4,059
7. Average Minutes/Line/Month	5,482	3,325	3,967

OCC Total Average Billed Minutes Per Month	256,526,462
OCC Total ENFIA Lines	56,312
Weighted Average Billed Minutes Per Line Per Month	4,555

Level D ENFIA Charges

RE2 = 3.42 + (.00691 × 4555) × 1.015 = $ 35.42
RE3 = .0595 × .55 × 4555 × 1.015 = 151.30

Table 2

Development of MCI Minutes of Use

1. Gross Minutes[1]	806,865,788

II.	Exclusions (other than off-peak)		
	Intrastate Texas[2]	63,155,879	
	Resold MTS/WATS[2]	2,659,350	
	Billing Adjustments[3]	72,507,803	
	Sub-Total		138,323,032
III.	Off-peak Deduction[3]		160,014,314
IV.	Net Minutes		508,528,442

Sources:

[1] MO&O, September 29, 1982, Table 3. Gross minutes from MCI Initial Report, May 25, 1982, p. 19.

[2] MO&O, September 29, 1982, Table 3.

[3] MCI Opposition, Table II.

Table 3

Development of SPCC Minutes of Use

I.	Gross Minutes[1]			358,107,160
II.	Exclusions (other than off-peak)	*Factor (% Gross)*	*Minutes*	
	Intrastate Texas	.0228[2]	8,164,843	
	Ind. Telco ENFIA	.0180[3]	6,445,929	
	Intracompany use/testing	.0026[4]	931,079	
	Rounding	.0517[2]	18,514,190	
	Billing/Uncollectibles	.1267[5]	45,372,177	
	Subtotal			79,428,168
	Net Base for off-peak deduction			278,678,992
III.	Off-Peak Deduction	*Evening*	*Night*	
	SPRINT LTD.[6]	35,291,298	20,250,562	
	Other Evening (223,137,132 × .2713)[7]	60,537,103		
	Other Night (223,137,132 × .1154)[7]		25,750,023	
		95,828,401	46,000,585	
	Off-peak factor	× .4	× .6	
	Total Deduction	38,331,360 +	27,600,351 =	65,931,711
				212,747,281
IV.	Net Minutes			

Sources:

[1] MO&O, September 29, 1982, Table 3. Minutes for Sprint IV (3,635,490) and Sprint V (149,464,904) from letter from James M. Tobin to Chief, Common Carrier Bureau, June 4, 1982. Minutes for SPRINT LTD. (27,770,931) from SPCC Initial Report, May 25, 1982, Exhibit D. Gross minutes = SPRINT IV + 2 (SPRINT V + SPRINT LTD.).

[2] Letter from James M. Tobin to Chief, Common Carrier Bureau, June 4, 1982.

[3] Calculated from SPCC Initial Report, May 25, 1982, WP-19. Factor = [2 (Sample Minutes - Independent ENFIA Minutes) + Independent ENFIA Minutes] divided by Independent ENFIA Minutes. 0.0180 = 2,249,575 ÷ [2(63,600,033 - 2,249,575) + 2,249,575]. This reflects two exchange minutes for each non-independent telephone company billed minute.

[4] Factor for Intracompany Use (.0021) from SPCC Initial Report, May 25, 1982, WP-67; factor for Texting (.0005) from SPCC Initial Report WP-95.

[5] SPCC Further Reply, July 1, 1982, p. 8.

[6] Double SPRINT LTD. minutes reported in letter from Mitchell F. Brecher to Chief, Common Carrier Bureau, September 14, 1982.

[7] Percentages of evening and night minutes derived from SPCC Initial Report, May 25, 1982, WP-88. Multiplied by net minute figure (223,137,132) representing gross minutes (358,107,160) minus non-off-peak deductions (79,428,168) minus SPRINT LTD. minutes (55,541,860).

Table 4

Development of USTS Minutes of Use

I.	Gross Minutes[1]			88,737,050
II.	Exclusions (other than off-peak minutes)			
		Undoubled Minutes[2]	*Permissible Exclusion*	
	Intrastate Texas	2,090,535	4,181,070[3]	
	Ind. Telco ENFIA	1,095,844	2,191,748[4]	
	Intracompany use/Testing	3,243,446	6,350,797[5]	
	Rounding	2,182,372	4,273,172[5]	
	Billing/Uncollectibles	6,755,863	13,228,250[5]	
	Resold MTS/WATS	1,232,678	1,232,678	
	Subtotal			31,457,715
	Net base for off-peak deduction			57,279,335
III.	Off-Peak Deduction			
		Evening	*Night*	
	Evening Minutes (57,279,335 × .2887)[6]	16,536,544		
	Night Minutes (57,279,335 × .0688[6]		3,935,090	
	Off-Peak Factor	× .4	× .6	
	Total Off-Peak Reduction	6,614,618 +	2,361,054 =	8,975,672
IV.	Net Minutes			

Sources

[1] MO&O, September 29, 1982, Table 3. Minutes for City Call (43,T417,789) and SPNS Plus (1,901,472) from letter from Randall B. Lowe to Chief, Common Carrier Bureau, June 4, 1982. Gross minutes = 2 (City Call) + SPNS Plus.

[1] Letter from Randall B. Lowe to Chief, Common Carrier Bureau, June 4, 1982.

[2] Reported usage doubled.

[4] Reported usage (half of measured usage) doubled.

[5] Reported usage doubled through application of 1.95804 factor which reflects [2 (City Call) + SPNS Plus] divided by single counted City Call and SPNS Plus minutes.

[6] Percentages of evening and night minutes derived from USTS Initial Report, May 25, 1982, Volume 7.

STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY DISSENTING IN PART AND CONCURRING IN PART

In re: Exchange Network Facilities for Interstate Access (ENFIA)

The Commission's decision only underscores the validity of my previous dissents to the ENFIA approach to setting interstate access charges,[1] but, nevertheless, I will kick the dead horse again. The Commission should never have accepted the ENFIA contract, much less adopted the complicated, nonsensical, result-oriented structure with which we are now shackled. If the Commission had applied the principle which was recently accepted in the *Access Charge* order,[2] then the OCCs would pay their full share of interstate costs and there would be no need for the off-peak discounts, the 55% P factor and the other give-aways which have caused us such great difficulty in determining the proper amount that the OCCs must pay.[3] The only consolation I find is that as soon as the access charge tariffs become effective, the ENFIA tariffs and the free lunch will end.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON re: ENFIA

This decision generally affirms our order of September 29, 1982, which prescribed a rate increase for ENFIA facilities employed by

[1] *See* Dissenting Statement of Commissioner Joseph R. Fogarty, *ENFIA Memorandum Opinion and Order*, 91 FCC 2d 1079 (1982); Statement of Commissioner Joseph R. Fogarty, Concurring in part, Dissenting in part, *ENFIA Designation Order*, 90 FCC 2d 202 (1982); Dissenting Statement of Commissioner Joseph R. Fogarty, *ENFIA Extension Order*, 90 FCC 2d 6 (1982).

[2] *MTS and WATS Market Structure*, ___ FCC 2d ___ (1983).

[3] I concur in that portion of this order which affirms the Commission's decision to make retroactive adjustments in OCC ENFIA payments for the suspension and investigation period.

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the OCCs. I concur with the result of this decision because the rate we have adopted today will not be disruptive to the market. However, I find it increasingly difficult to concur once again in a result which is based on the utilization of a faulty methodology and has not shed any light on the real issue of how costs should be allocated efficiently.

As indicated in my previous statements on this subject, the ENFIA process neither allocates costs in an efficient manner nor contributes to the important task of resolving the issues of access and separations. While I will not repeat my previous statements here, suffice it to say that I continue to find objectionable the use of a methodology which applies a traffic sensitive measure to calculate the rate for use of non-traffic sensitive plant. The continued use of the ENFIA formula penalizes OCC efficiency and produces a charge unrelated to cost. Moreover, it invites additional increases in the access rate paid by the OCCs without any real record to show that the increase is either cost based or appropriate. Such rate increases so close to divestiture and the implementation of cost-based access charges only serve to weaken the OCCs before cost-based competition with AT&T begins. This result is contrary to our procompetitive philosophy and highlights the need to conclude the access charge proceeding in an equitable and expeditious manner.

Comparative Issue
Diversification of Control
Ownership and Management, Integration of

In three party comparative broadcast proceeding, applicant A with substantial preferences for both diversification and integration over applicant B, and a substantial preference for integration over applicant C, is the preferred applicant.
-Family Broadcasting Group
BC Docket No. 81–808

FCC 83R-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jose J. Ortiz, Judith Mendez de Ortiz and Bessy A. Ortiz d/b/a	
FAMILY BROADCASTING GROUP Ponce, Puerto Rico	BC Docket No. 81–808 File No. BPH-800925AA
ZABA RADIO CORPORATION Ponce, Puerto Rico	BC Docket No. 81–809 File No. BPH-800930AD
MARSONA BROADCASTING CORPORATION Ponce, Puerto Rico	BC Docket No. 81–810 File No. BPH-801003AJ
For Construction Permit for a New FM Broadcast Station	

Appearances

Joseph M. Morrissey, on behalf of Family Broadcasting Group; *William P. Bernton* and *Francis E. Fletcher, Jr.*, on behalf of Zaba Radio Corporation; *Gary S. Smithwick*, on behalf of Marsona Broadcasting Corporation; and *Charles W. Kelley* and *Allan Moskowitz*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: February 23, 1983; Released: March 4, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Family Broadcasting Group (Family), Zaba Radio Corporation (Zaba), and Marsona Broadcasting Corporation (Marsona) for authority to construct a new FM broadcast station to operate on Channel 266 at Ponce, Puerto Rico. By Hearing Designation Order, 46 FR 59631, published December 7, 1981, their applications were designated for consolidated hearing on limited financial qualifications issues against Family and Marsona, air hazard issues against each of the three applicants, and the standard comparative issue.[1] By Memorandum Opinion and Order, FCC 82M-1103, released April 7, 1982, a transmitter site availability issue was added against Family.

2. In an Initial Decision (*I.D.*), FCC 82D-62, released September 9, 1982, Administrative Law Judge (ALJ) Edward J. Kuhlmann granted the Family application. After concluding that Family had demonstrated it is financially qualified and has a transmitter site available that will not pose a hazard to air navigation, the ALJ held it was comparatively the best applicant. Specifically, under the ALJ's comparative analysis: (a) Zaba received a substantial diversification demerit because it already is the licensee of Station WZBS-AM in Ponce, Puerto Rico, which is the proposed community of license in the instant proceeding; (b) Family received a substantial preference over the other applicants for its superior quantitative and qualitative integration proposal; and (c) Marsona received very slight preferences for its proposed coverage and auxiliary power which failed to overcome Family's substantial integration preference, and Zaba received a very slight comparative coverage preference which was deemed to be decisionally insignificant.[2]

3. The proceeding is now before the Review Board on exceptions by Zaba and Marsona to the ALJ's favorable resolution of the Family financial and site availability issues as well as his choice of that applicant under the comparative issue. Replies were filed by Family and the Mass Media Bureau. The Board has reviewed the I.D. in

[1] The application of Ivanhoe Broadcasting Corporation (File No. BPH-800626AA), which was also designated for hearing, was subsequently dismissed at the applicant's request. *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

[2] The air hazard and limited financial qualifications issues against Marsona and the air navigation hazard issue against Zaba were resolved favorably to the applicants by summary decision. Memorandum Opinion and Orders, FCC 82M-1104 and FCC 82M-1610, released April 7 and May 20, 1982, respectively. No exceptions have been taken to these rulings and therefore no further discussion of them is warranted.

light of the exceptions and reply briefs and our examination of the record.[3] We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the Family application will best serve the public interest, convenience and necessity.

4. *Financial Issue.* This issue was designated to determine whether Family has available additional funds over and above its existing capital ($42,500) which it requires to meet its costs of $164,500 for construction and three months of operation. The ALJ found that Family has available $114,390 in net proceeds from a $125,000 loan from Bayamon Federal Savings plus $56,000 in cash that Family partners Jose and Judith Ortiz have on deposit with Bayamon Federal. *I.D.*, paras. 3–5, 20. Since the funds available ($170,390) exceed Family's costs ($164,500), the ALJ concluded that Family is financially qualified. *Id.*, para. 20.

5. In their exceptions, Marsona and Zaba urge that the ALJ erred in considering Mr. Ortiz's testimony that he had $81,000 on deposit with Bayamon Federal because Family's proffered post-hearing amendment of June 21, 1982, which reflects the availability of these funds, was rejected by the ALJ and therefore Mr. Ortiz's testimony varies in this regard from the Family application. We disagree because we believe the ALJ erred in not accepting Family's conforming amendment.

6. The actual existence and availability of the $81,000 deposit is undisputed. Jose Noguera, senior vice president of Bayamon Federal, who was cross-examined as to the availability of the $125,000 loan, also testified upon cross-examination that Mr. Ortiz had an $81,000 certificate of deposit with that financial institution. Tr. 64–65. Mr. Ortiz then confirmed on both direct and cross-examination that he had $81,000 on deposit, that not more than $25,000 of that amount would be needed as collateral, and that the remainder would be available to help finance the station. Tr. 102–03, 116–17, 122. One month after the hearing, Family proffered its amendment containing an updated FCC Form 301, Section III, p. 2 and a balance sheet reflecting the existence of the $81,000 cash deposit. However, the ALJ denied Family's petition for leave to amend as untimely and disruptive of the proceeding. Memorandum Opinion and Order, FCC 82M-2089, released July 6, 1982. We cannot agree with this assessment. Our review of the amendment merely indicates that it would have conformed the application to the testimonial evidence,[4]

[3] Oral argument was not requested, and the Board believes that such argument would not materially assist it in the resolution of this case.

[4] The amended FCC Form 301 page shows $56,000 available in existing capital and indicates that $117,000 was available in loans whereas the ALJ determined the correct figure to be $114,390. The slight difference in loan proceeds is not significant here because the lower figure plus the $56,000 available is more than

would not have required further cross-examination since both Mr. Noguera and Mr. Ortiz had already been fully cross-examined on this specific issue, and therefore would not have been disruptive. This case is thus clearly distinguishable from *North American Broadcasting Co., Inc.*, 21 FCC 2d 631 (Rev. Bd. 1970), relied on by Marsona, where the post-hearing amendment attempted to repair weaknesses in the applicant's financial showing revealed at the hearing and made significant changes in its financial and transmitter site plans with no opportunity for cross-examination by the other parties. Furthermore, since financial qualification is a basic qualifying issue, Commission precedent squarely holds that acceptance of the amendment would not have prejudiced the other applicants. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981). Finally, while Family could have acted with greater diligence, the Commission has made clear that this factor is not controlling where the amendment is intended to cure a disqualifying defect. *Id.* Therefore, we conclude that good cause existed for acceptance of the amendment and we reverse the ALJ's ruling rejecting it. *See Gross Broadcasting Co.*, 46 RR 2d 1091, 1097–99 (1979); *Bison City Television 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982); and *Gilbert Broadcasting Corp.*, 68 FCC 2d 186, 207–08 (Rev. Bd. 1978), *rev'd on other grounds*, 52 RR 2d 429 (1982); *Ultravision Broadcasting Co.*, 11 FCC 2d 394, 399–400 (Rev. Bd. 1968), *review denied*, FCC 68–1078, October 30, 1968, *aff'd sub nom. WEBR* v. *FCC*, 420 F.2d 158 (D.C. Cir. 1969). Accordingly, since Family was properly credited in the *I.D.* with sufficient funds to cover its costs, we affirm the ALJ's conclusion that it is financially qualified.

7. *Transmitter Site Availability Issue.* In a petition to enlarge issues, filed January 6, 1982, Marsona alleged that Family lacked permission of the land owner to use its proposed antenna site. Family responded that Marsona was referring to an incorrect location and submitted a land owner's affidavit to demonstrate the availability of its site. Marsona replied that Family was in error because it had improperly plotted its coordinates. Since the coordinates specified would place the site on land Family had not shown was available, the ALJ designated an issue to determine whether Family "has reasonable assurance of a transmitter site." Memorandum Opinion and Order, FCC 82M-1103, released April 7, 1982. Family then hired an independent engineering consultant who determined that the original coordinates were inaccurate and computed corrected coordinates for the transmitter site in late April 1982. Family Exh. 6. Family filed a petition for leave to amend on May 14, 1982 reporting the corrected coordinates and, after finding

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sufficient to meet the applicant's costs. And the $56,000 is precisely the amount that Mr. Ortiz stated would be available out of the $81,000, after subtracting the amount needed for collateral.

that no actual change in site had occurred and that no party was disadvantaged by the amendment, the ALJ granted the petition. Memorandum Opinion and Order, FCC 82M-1868, released June 15, 1982. In the *I.D.* (paras. 6–7, 21), the ALJ found that the redrawn coordinates place the transmitter at the originally designated site and that therefore Family's proposed site was available.

8. In their exceptions, Marsona and Zaba claim that the ALJ erred in permitting Family to amend its transmitter site coordinates and in resolving favorably to Family the transmitter site issue. They argue that Family was put on notice by Marsona's January 6, 1982 enlargement petition that its originally-proposed geographical coordinates were located on land that it did not have permission to use and that, consequently, Family lacked due diligence because it should have "foreseen" the need to file its amendment earlier than May 14, which was 128 days after Marsona's filing. We disagree. Family did not actually know until late April 1982 that it had made a mistake in its originally-specified coordinates. Previously, it had believed in good faith that it was Marsona who was mistaken as to the location of the site and had submitted a land owner's affidavit to demonstrate that its proposed site was indeed available. After the addition of the transmitter site availability issue against it on April 7, Family promptly commissioned an independent engineering study which resulted in its May 14 amendment reporting corrected coordinates for its originally-proposed site. We conclude that Family's actions in this regard were diligent. *See Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982).[5] And we do not believe that Family could have foreseen that its original engineering exhibit had specified erroneous geographical coordinates. Finally, since no new site was specified, there was no undue disruption to the hearing or prejudice to the other parties. In view of the circumstances, Family's proposed site has always been available to it and the ALJ correctly resolved the site availability issue in its favor.[6]

Comparative Issue

9. *Diversificatio.: of Control of the Media of Mass Communications.* Neither Family nor Marsona was found to have any attributable media ownership interests. *I.D.*, paras. 9, 22.[7] Zaba, on the other

[5] *Midwest St. Louis, Inc.*, 79 FCC 2d 519 (1980) and *WMGS, Inc.*, 14 FCC 2d 428 (Rev. Bd. 1976), relied on by Marsona, are easily distinguishable as being examples of an extreme lack of due diligence (delays of one year and two years, respectively).

[6] Although we have treated this exception as a *de minimis* engineering matter because no new engineering showing was involved—only the correction of typographical errors—the Board could easily have, perhaps should have, construed this tiff as "much ado about nothing." *Reding Broadcasting Co.*, 69 FCC 2d 2201, 2207 (Rev. Bd. 1978).

[7] Marsona principal Amaury Santiago Bonilla owns 9.5% of the stock of the licensee of AM broadcast station WBMJ, San Juan, Puerto Rico, but has promised to divest

hand, is the licensee of WZBS-AM in Ponce, Puerto Rico, and was therefore given a substantial diversification demerit. *Id.* The ALJ characterized the diversification preference awarded Family and Marsona as "clear" (*id.*, para. 22) which in this proceeding we equate with "substantial" because Zaba's Station WZBS-AM is located within the proposed community of license. *See Nuance Corp.*, 85 FCC 2d 412, 420 (Rev. Bd. 1981), *review denied*, FCC 81–473, October 1, 1981.

10. *Integration of Ownership and Management.* Family was credited for the proposed full-time integration of Jose Juan Ortiz, a 51% partner in Family, as general manager of the station, his wife Judith Mendez de Ortiz, a 40% partner, as operations/traffic director, and his daughter Bessy A. Ortiz, a 9% partner, as sales director. *I.D.*, paras. 10–11, 23, 26, 31. This integration proposal was qualitatively enhanced by the commitment of the partners to move to Ponce if the application is granted, Mr. Ortiz's broadcast experience, and by the status of Mrs. & Ms. Ortiz as female owners who will be integrated full time into management of the station. *Id.*

11. In its exceptions, Marsona claims that no integration credit should be awarded for the participation of the Ortiz women because they have no broadcast experience and only minimal knowledge of what their duties will involve, and therefore they will not be realistically integrated into station operations. We disagree. These exceptions are purely speculative and fail to address Family's uncontroverted proposal that these women serve in managerial roles. While it is clear that the women are inexperienced in broadcast matters they nevertheless testified forthrightly and specifically regarding their anticipated roles and there is no other evidence that undermines this testimony. *See* Tr. 162, 173–4. Neither lack of broadcast experience nor absence of nonbroadcast experience is relevant to proposed quantitative integration. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951–52 (Rev. Bd. 1982). Moreover, the Commission views the qualitative attribute of previous broadcast experience as of "only minor significance because it is remedial and thus only confers an initial advantage and because emphasis upon experience could discourage qualified newcomers to broadcasting." *Id.* at 952; *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). There is no reason not to apply in this case the Commission's implicit presumption that newcomers are trainable in broadcasting. And there simply is no record evidence that demonstrates that the Ortiz women cannot or will not assume their proposed managerial roles at the station.

12. Zaba was awarded no integration credit because it did not propose to integrate any of its principals into management of the

himself of that interest if Marsona's application is granted. *Id. See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 427 (1981) (divestiture accomplishes the goal of diversification which is the diffusion of ownership and control of the mass media).

station. *I.D.*, paras. 12, 23, 26, 31. In fact, Zaba stipulated on the record that it "will seek no integration credit for any of [its] principals" (Tr. 24). In its exceptions, however, Zaba seeks some credit for the local residence and civic participation of its principals. Local residence and civic participation are not separate comparative criteria but are enhancements only to an integration proposal. *Policy Statement, supra*, 1 FCC 2d at 395–96; *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, paras. 10–15, released December 8, 1982 (Rev. Bd.). Thus, having no integration proposal, Zaba cannot receive even qualitative credit and its exception is hereby denied.[8]

13. Marsona was credited for proposing to integrate 46% owner Angel I. Fonfrias, Jr., as full-time general manager and sales manager of the station and 8% owner Alejandro Luciano Lugo as part-time (twenty hours) chief engineer. *I.D.*, paras. 14, 15, 24, 26, 31. The ALJ also considered 46% owner Amaury Santiago Bonilla's proposal to work full time at the station as an advisor to the general manager/sales manager and accorded it no integration credit. *Id.*, paras. 12, 25, 26. Marsona excepts and claims that it should have been awarded full-time integration credit for Mr. Santiago Bonilla. We disagree.

14. Marsona proposed generally that "Mr. Santiago [Bonilla], Mr. Luciano, and Mr. Fonfrias, will determine the day to day programming, make decisions, and direct the operation of Marsona's station." Marsona Exh. 6, p. 1. More specifically, Marsona stated that "Mr. Santiago [Bonilla] proposes to be employed full-time at Marsona's proposed station in Ponce as president/treasurer/and adviser to the general manager/sales manager." Marsona Exh. 2, p. 3. Because Santiago Bonilla has had prior broadcast experience as "manager" of Station WRSJ, San Juan, with "responsibility for all operations in the radio station" and as "sales manager" of Station WBMJ, San Juan (*id*, p. 2), it is inferred that he understands the distinction between a managerial and an advisory role. At hearing, he testified that he would be "advisor to the general manager" (Tr. 217) and that his

> personal interpretation of advisor is if I have total knowledge of doing something and somebody is working for me or with me in a particular situation, this person will obviously need assistance from [me].
>
> So, I will devote 40 hours and more if needed to the operation of Marsona station

[8] Insofar as Zaba also argues that two of its stockholders, Huberto Zayas Chardon and Rene Bartolomei, who are local residents (Chardon is civically active), propose to spend some time on station affairs—two hours per day, six days per week each (Zaba Exhs. 1–3), we note that their functions are not described as managerial. Even if they were, such a proposal would entitle Zaba to no more than a slight residual credit, which is decisionally insignificant in this proceeding. *See Policy Statement, supra*; *Peoples Broadcasting Corp.*, FCC 83R-5, n.34, released January 25, 1983 (Rev. Bd.); *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494–95 (Rev. Bd. 1979).

> advising and assisting Mr. Fonfrias on all of these operations, the daily basis, we will be there every day.
>
> And all other major management decisions will be taken care by the boards of directors. [Tr. 236.]

15. Generally, "consultative positions will be given no weight." *Policy Statement*, *supra*, 1 FCC 2d at 395. In the case at bar, the evidence manifestly shows that Santiago Bonilla's managerial responsibilities would be primarily consultative and advisory and fails to distinguish how much time, if any, he would devote to true managerial responsibilities as opposed to merely consultative duties. Moreover, in view of the fact that Mr. Bonilla will (1) continue to reside "an hour and 20 minutes" from Ponce (Tr. 240), (2) will continue to spend substantial time (15–20 hours per week, Tr. 236) in his present advertising business, and (3) did not explain the discrepancies in his proposed time allotment, grant of full-time integration credit would be inconsistent with precedent. *See Deep South Radio, Inc.*, 46 RR 2d 1657 (1980) (slight credit awarded); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969); *cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, FCC 82R-75, released December 14, 1982 (slight credit only awarded for part-time management involvement). Thus, Santiago will be awarded slight credit only for his proposal. Overall, Marsona is credited with 46% full-time integration for Mr. Fonfrias, 8% part-time integration for Mr. Lugo, and a slight credit for Mr. Santiago Bonilla.

16. In sum, Family, which has been credited with 100% full-time integration and qualitative enhancements for its principals' proposal to move to Ponce, female ownership integration, and Mr. Ortiz's broadcast experience, is awarded a substantial integration preference over both Marsona, which has been credited with 46% full-time and 8% part-time integration plus a slight credit for Santiago Bonilla's participation as an "advisor" plus qualitative enhancements for the broadcast experience of its principals, and Zaba, which has been given no integration credit. *See generally Muncie Broadcasting Corp.*, 89 FCC 2d 123, 134 (100% full-time integrated applicant given substantial preference over applicant with 39.86% full-time integration), *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982); *cf. WHW Enterprises, Inc.*, 89 FCC 2d 799, 827 (Rev. Bd. 1982) (100% vs. 66 2;3% difference in full-time integration merits moderate preference); *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1094–95 (Rev. Bd. 1982) (55% vs. 30% difference merits moderate preference). Marsona, in turn, is given a moderate integration preference over Zaba. *See East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 173–75 (1971) (34.59% vs. 5.59% difference merits moderate preference); *Nuance Corp.*, *supra*, 85 FCC 2d at 419 (26.6% vs. 0% difference merits moderate preference).

17. *Comparative Coverage.* The ALJ found that Family would

provide primary service (1.0 mV/m contour coverage) to 411,594 persons within 1,015 square miles, Zaba would serve 592,306 persons within 1,156 square miles, and Marsona would serve 550,570 persons within 1,022 square miles. *I.D.*, paras. 16, 28. Because all of the population proposed to be served by each of the applicants already receives five or more primary aural services both day and night, the ALJ awarded Zaba a very slight comparative coverage preference over Family and Marsona and gave Marsona a very slight comparative coverage preference over Family. *Id.*, paras. 17–18, 28–29. Marsona and Zaba both except and seek larger preferences. We affirm the degree of preference awarded by the ALJ because precedent plainly establishes that comparative coverage differences are not of substantial importance in determining best practicable service to the public where primary aural services are already abundant throughout the proposed service areas. *See Simon Geller*, 90 FCC 2d 250, 276 (1982); *WVOC, Inc.*, 45 FCC 2d 420, 423–24 (Rev. Bd. 1974); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973), *review denied*, 45 FCC 2d 390 (1974); *aff'd without opinion*, 511 F.2d 448 (D.C. Cir. 1975); *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 775 (Rev. Bd. 1970), *review denied*, 27 FCC 2d 61 (1971).

18. *Auxiliary Power.* Marsona excepts to the ALJ's award to it of only some credit for proposing auxiliary power (*see I.D.*, paras. 30, 31) and claims that in Puerto Rico in particular "it is extremely important to have an emergency power generator." Marsona Br. at 18. This argument is unsubstantiated. *See The News-Sun Broadcasting Co., supra*, 24 FCC 2d at 778 (rejecting a similar argument made regarding the State of Maine). The magnitude of the preference awarded by the ALJ comports with precedent and will be affirmed. *See Addendum to Policy Statement*, 2 FCC 2d 667 (1966); *Gilbert Group, Inc.*, 88 FCC 2d 401, 406–07 (Rev. Bd. 1981) (very slight preference awarded), *review denied*, FCC 82–228, released May 18, 1982.

19. *Final Comparative Evaluation.* Family and Marsona have been awarded a substantial diversification preference over Zaba. Family also has a substantial integration preference over both Marsona and Zaba. Marsona has a moderate integration preference over Zaba and very slight preferences for comparative coverage over Family and for auxiliary power over both Family and Zaba. Zaba has a very slight preference for comparative coverage over both Family and Marsona. Because "[d]iversification is a factor of primary significance," *Policy Statement, supra*, 1 FCC 2d at 394, and integration is a "factor . . . of substantial importance" in determining best practicable service, *id.* at 395, Family, which has substantial preferences for both over Zaba and a substantial preference for integration over Marsona, is the preferred applicant. Marsona, which is preferred over Zaba on the integration factor, is in second

place. We therefore conclude that a grant of the Family application will best serve the public interest, convenience, and necessity.

20. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed on February 4, 1983 by Marsona Broadcasting Corporation IS GRANTED, and the amendment IS ACCEPTED; and

21. IT IS FURTHER ORDERED, That the application of Jose J. Ortiz, Judith Mendez de Ortiz, and Bessy A. Ortiz d/b/a Family Broadcasting Group (File No. BPH-800925AA) IS GRANTED; and that the applications of Zaba Radio Corporation (File No. BPH-800930AD) and Marsona Broadcasting Corporation (File No. BPH-801003AJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

FCC 82D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Jose J. Ortiz, Judith Mendez de Ortiz and Bessy A. Ortiz, d/b/a FAMILY BROADCASTING GROUP Ponce, Puerto Rico	BC Docket No. 81-808 File No. BPH-800925AA
ZABA RADIO CORPORATION Ponce, Puerto Rico	BC Docket No. 81-809 File No. BPH-800930AD
MARSONA BROADCASTING CORPORATION Ponce, Puerto Rico	BC Docket No. 81-810 File No. BPH-801003AJ
For Construction Permit for a New FM Station	

Appearances

Joseph M. Morrissey on behalf of Family Broadcasting Group; *Francis E. Fletcher, Jr.*, *William P. Bernton*, and *Paul Korman* on behalf of Zaba Radio Corporation; *Gary S. Smithwick* on behalf of Marsona Broadcasting Corporation and *Allan Moskowitz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: September 1, 1982; Released: September 9, 1982)

1. On November 10, 1981, in an Order of Designation[1] the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated for hearing the above listed mutually exclusive applications for FM Channel 266, Ponce, Puerto Rico. The following issues were considered at the hearing:[2]

1. To determine with respect to Family:

[1] 46 Fed. Reg. 59631, published December 7, 1981.

[2] The designation order included an issue about Marsona Broadcasting Corporation's financial qualifications but summary decision was granted on that issue on April 6, 1982. *Memorandum Opinion and Order*, FCC 82M-1104, released April 7, 1982. In addition, Ivanhoe Broadcasting Corporation's application was dismissed at its request. *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

a. The source and availability of additional funds over and above the $42,500 indicated; and

b. Whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower height(s) and location(s) proposed by Family Broadcasting Group, Zaba Radio Corporation and Marsona Broadcasting Corporation.[3]

3. To determine whether Family Broadcasting Group has reasonable assurance of a transmitter site and, in light of the evidence adduced, whether it is technically qualified to be a licensee.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. On February 1, 1982 a prehearing conference was held. Hearing sessions were held on May 25 and 26, 1982. On July 2, 1982, all parties filed proposed findings of fact and conclusions of law and, on July 21, 1982, reply findings were filed by Marsona and Family.

FINDINGS OF FACT

3. *Family Broadcasting Group's Financial Qualifications*: Family projects a need for $164,500 to meet the cost of construction and three months of operation. In part, to meet this requirement, Family intends to borrow $125,000 from Bayamon Federal Savings. The conditions of the loan from Bayamon and the ability and willingness of Family to satisfy the conditions are the subject of this issue. Jose Noguera, Senior Vice President of Bayamon Federal Savings, explained that the loan repayment would be as follows: The payments would be semi-annual, the first payment would include only interest and become due six months after disbursement of the loan, the lending rate would be the Federal Home Loan Corporation auction rate on the day of the closing (currently 16.25 to 17.25 percent) and an additional origination fee of 4 percent of the amount borrowed would be charged. Tr. 32, 33, 34, 58–60, 68–69.

4. Jose J. Ortiz, a 51 percent partner of Family, stated that Family intended to borrow $66,000, three months prior to beginning operation. Tr. 113. However, he explained that, although he intended to use his own funds initially, he might borrow the full $125,000. Tr. 117–118.

5. Mr. Noguera testified that the bank had reviewed Mr. Ortiz's proposed collateral and considered it sufficient to secure the loan. Tr.

[3] Marsona Broadcasting and Zaba Radio Corporation were granted summary decision on the hazard to air navigation issue. *Memorandum Opinion and Order*, FCC 82M-1104, released April 7, 1982; *Memorandum Opinion and Order*, FCC 82M-1610, released May 20, 1982.

49–51, 53–54, 57, 58. Mr. Ortiz has $81,000 on deposit with Bayamon Federal Savings. Mr. Noguera stated that possibly $25,000 of this amount may be needed as collateral, but most likely it would not. Tr. 73, 116, 122. Jose Ortiz and his wife, Judith Mendez de Ortiz, have agreed to provide the collateral which the bank requires. Tr. 114, 116, 122, 168.

6. *The Availability of Family's Tower Site*: This issue has now resolved into a mistake in Family's engineering coordinates. Before new coordinates were submitted by Family, its coordinates failed to locate its proposed transmitter site. Instead, the transmitter site, if plotted according to the coordinates listed in the application, was located 658 feet away, on land which Family had not demonstrated was available. See *Memorandum Opinion and Order*, FCC 82M-0832, released March 15, 1982; *Order*, FCC 82M-1103, released April 7, 1982; and *Memorandum Opinion and Order*, FCC 82M-1868, released June 15, 1982.

7. Family undertook a new engineering study which found that the original coordinates were inaccurate. Tr. 80–86. The coordinates were redrawn and submitted. Family Exhibit 6. The new coordinates place the transmitter at the originally designated, and available, site. *Id.*; Tr. 84, 86, 95, 123.

8. *Air Hazard Issue*: The Federal Aviation Administration, a party to this proceeding, determined that Family's proposed tower construction, at its corrected site location, would not be a hazard to air navigation. Family Exhibit 8.

9. *Diversification of the Media of Mass Communications*: Neither Family Broadcasting Group, nor any of its principals, have any media interests. Family Exhibit 1 at 1. Marsona Broadcasting has no media interests, but its 46 percent stockholder, Amaury Santiago Bonilla, owns 9.5 percent of the stock of Radio Rock/Mid-Ocean Broadcasting Corporation, which is the licensee of standard broadcast station WBMJ, San Juan, Puerto Rico. Marsona Exhibit 5 at 1. Mr. Santiago Bonilla stated he would divest himself of his interest if Marsona's application is granted. Marsona Exhibit 5 at 1.[4] Zaba Radio Corporation is the licensee of WZBS-AM, Ponce, Puerto Rico. Zaba and its stockholders have no other media interest. Zaba Exhibit 7.

10. *Integration of Ownership and Management*: Jose Juan Ortiz, a 51 percent partner in Family, is proposed as Family's full-time general manager. Family Exhibit 1. Judith Mendez de Ortiz, a 40 percent Family partner, is proposed as the full-time operations/traffic director of the station. *Id.* Bessy A. Ortiz, a 9 percent partner, is proposed as the full-time sales director of the station. *Id.*

[4] Mr. Santiago Bonilla testified that he was having difficulty selling his interest. Tr. 30. No findings will be made about this problem, since there is no question about his willingness to do so. If a grant is made to Marsona, it would be conditioned on Mr. Santiago Bonilla's divestiture of his stock.

None of the partners live in Ponce but they will move there if their application is granted.

11. The only Family partner that has broadcast experience is Mr. Ortiz. He worked in broadcasting from 1959–1977. Family Exhibit 2. His broadcast experience includes announcing, sales and management positions, such as the director of news, music, and programming. *Id.*

12. Zaba does not propose to integrate any of its principals. Tr. 24. Marsona proposes that Amaury Santiago Bonilla, the president, treasurer, and 46 percent owner of Marsona, would work full-time at the station as an advisor to the general manager/sales manager. Marsona Exhibit 2 at 3; Marsona Exhibit 6 at 1; Tr. 217. The position of "advisor" was made by oral understanding. Tr. 219. Mr. Santiago Bonilla would receive no salary, although Mr. Fonfrias, who is an owner and would work full-time, would receive $1,000 a month. Tr. 225–226. The position of advisor was described by Mr. Santiago Bonilla as one of advising and assisting—a sharing of knowledge. Tr. 236. Mr. Santiago Bonilla will not live in Ponce and he will continue to work at the Sales Promoters Corporation for 15 to 20 hours per week. Tr. 235, 236.

13. Mr. Santiago Bonilla worked as a manager of a standard broadcast station, WKJB, Mayaguez, Puerto Rico from 1973 to 1974; he was sales manager at WQBS, San Juan, Puerto Rico in 1974; from 1974 to 1976, he was manager of WRSJ, San Juan, Puerto Rico; and from 1976 to 1981, he was sales manager and vice president of WBMJ, San Juan. Marsona Exhibit 2 at 2–3.

14. Marsona proposes that Angel I. Fonfrias, Jr., who is vice president, secretary, and a 46 percent owner of Marsona, would be the full-time general manager and sales manager of the station. Marsona Exhibit 6 at 1. Mr. Fonfrias produced a weekly radio show on WKVM, San Juan, from 1951 to 1952, and a television show on WIPR-TV, San Juan, from 1964 to 1965. Marsona Exhibit 4 at 1.

15. Alejandro Luciano Lugo, who is vice president and an 8 percent owner of Marsona, proposes to work part-time (20 hours) at the station as the chief engineer. Marsona Exhibit 3 at 1; Marsona Exhibit 5 at 2. He has worked as a broadcast engineer at various radio and television stations since 1975. Marsona Exhibit 3. Currently, he is the chief engineer at WBMJ, San Juan. *Id.*

16. *Coverage Comparison*: Since the applicants propose different sites and HAATs, there would be differences in the location and size of their primary service (1.0 mV/m) contours. The areas and populations involved are tabulated below (Joint Exhibit 1 at 1-3):

	Primary Service	
Applicant	*Area sq. mi.*	*Population*
Family	1,015	411,594

	Primary Service	
Applicant	*Area sq. mi.*	*Population*
Zaba	1,156	592,306
Marsona	1,022	550,570
Zaba over Family	141 (13.9%)	180,712 (43.9%)
Zaba over Marsona	134 (13.1%)	41,736 (7.6%)
Marsona over Family	7 (0.7%)	138,976 (33.8%)

17. There are five or more primary aural broadcast services available to the proposed uncommon service areas both day and night. Supplement to Joint Exhibit 1 at 2.

18. In establishing the primary aural services presently available to the proposed uncommon areas, the following stations were considered (Supplement to Joint Exhibit 2 at 4–5):

Call	*Location*	*Facilities*	
WOYE-FM	Mayaguez, P.R.	Ch. 231B, 25 kW,	1960 feet
WRPC	San German, P.R.	Ch. 236B, 25 kW,	1970 feet
WAEL-FM	Maricao, P.R.	Ch. 241B, 9.9 kW,	2011 feet
WPRM-FM	San Juan, P.R.	Ch. 253B, 25 kW	1910 feet
WKJB-FM	Mayaguez, P.R.	Ch. 256B, 15 kW,	1973 feet
WZAR	Ponce, P.R.	Ch. 270B, 14 kW,	1590 feet
WERR	Utuando, P.R.	Ch. 281B, 50 kW,	710 feet
WKAQ-FM	San Juan, P.R.	Ch. 284B, 50 kW	1120 feet
WKVM-FM	San Juan, P.R.	Ch. 289B, 50 kW	1100 feet
WXRF-FM	Guayama, P.R.	Ch. 295B, 50 kW	-240 feet

19. *Auxiliary Power*: Only Marsona has proposed auxiliary power in order that it might remain on the air when its normal power supply is interrupted. Marsona Exhibit 7.

CONCLUSIONS OF LAW

20. *Family's Qualifications*: Family Broadcasting has demonstrated that it is financially and technically qualified. Family requires $164,500 to construct and operate for three months. To meet this amount, it intends to borrow $124,000 from Bayamon Federal Savings. The various letters from Bayamon promising to lend that amount were incomplete about the terms of the loan. The hearing testimony demonstrates that the bank will not require any principal payment during the construction and initial operating period but that interest of $5,610 and an initiation fee of $5,000 will have to be paid. When these payments are deducted, Family will have $114,390 of the loan left to apply to its construction and operation needs. Mr. and Mrs. Ortiz have stated that they will provide the collateral the bank requires, which will leave them with $56,000 in cash. The cash

and the loan will give Family $170,390, an amount that exceeds its needs.

21. Family's engineering application is also now correct. Family originally designated a transmitter site that did not match the site location indicated by its coordinates. Family, in checking its engineering, discovered that it had incorrectly computed its coordinates. After recomputation, the coordinates now locate the geographical site originally designated as Family's transmitter location. The FAA has reviewed the site and states that it will not be a hazard to air navigation.

22. *Diversification of the Mass Media*: With these issues resolved, all the applicants have demonstrated that they are qualified and the case becomes one of comparison. Zaba already operates an AM facility in Ponce and, therefore, it must receive a substantial demerit on diversification of the media. One of Marsona Broadcasting's principal stockholders, Amaury Santiago Bonilla, has an interest in a San Juan AM station, but he has promised to divest; thus, Marsona has no media interests. Family and its partners have no media interests. Therefore, Family and Marsona warrant a clear preference over Zaba on diversification of the media.

23. *Integration of Management and Ownership*: Zaba does not propose any integration of management and ownership. Family is a partnership made up of three family members, Jose Juan Ortiz, his wife, Judith Mendez de Ortiz and Mr. Ortiz's daughter, Bessy A. Ortiz. Mr. Ortiz, a 51 percent partner, is the proposed full-time general manager; Judith Ortiz, a 40 percent partner, is the proposed full-time operations/traffic director; and Bessy Ortiz, a 9 percent partner, is the proposed full-time sales director. Mr. Ortiz has broadcast experience and all three of the Ortizes have promised to move to Ponce if a grant is made. Family is 100 percent integrated and 49 percent of the owners are women.

24. Marsona proposes that Angel I. Fronfrias, Jr., who is an officer and 46 percent owner, would be the full-time general manager and sales manager. Mr. Fronfrias has had a little radio and television programming experience, but it was nearly twenty years ago. Alejandro Luciano Lugo, who is an officer and 8 percent owner of Marsona, is proposed as the part-time (20 hours) chief engineer. Mr. Luciano Lugo is currently a station engineer and he has worked at a number of radio stations as an engineer.

25. Amaury Santiago Bonilla is a 46 percent stockholder, president and treasurer of Marsona. He proposes to be the full-time advisor to the station manager. His duties were stated to be those of advising and assisting, which he said he would do without any salary. The Commission in assessing integration proposals looks to the positions which participating owners will occupy, "in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Policy Statement on*

Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395 (1965). Particular weight is accorded to staff positions held by owners, although positions of less responsibility are considered. *Id.* "Merely consultative positions will be given no weight." *Id.* See *Deep South Radio, Inc.*, 71 F.C.C. 2d 138, 141 (Review Bd. 1979). Mr. Santiago Bonilla was asked at the hearing to define his position but he failed to expand on his title, except to say that he would advise the station manager. His position will not be accorded any weight, therefore, because the *Policy Statement* specifically provides that no weight should be given to advisory positions.

26. Thus, on the basis of integration of management and ownership, Family, which proposes 100% integration, local residence, female ownership and an owner-manager with broadcast experience, receives a substantial preference. Zaba receives no integration credit since it does not propose any. Marsona receives credit for the 46 percent full-time integration of Mr. Fonfrias and the 8 percent part-time integration of Mr. Luciano Lugo. However, Marsona's integrated stockholders do not propose to move to Ponce like Family's do and only Mr. Luciano Lugo, who would be integrated part-time, has had broadcast experience that enhances Marsona's qualitative proposal. Since Mr. Santiago Bonilla is not going to hold a position that is managerial, his broadcast experience is of no importance.[5]

27. *Comparative Coverage*: Each applicant seeks a permit to construct an FM broadcast station on Channel 266B. Family proposes to operate with an antenna whose center of radiation would be at a height above average terrain (HAAT) of -46 feet. Zaba's HAAT would be 363 feet and Marsona's HAAT would be 203 feet. Each proposes to operate with a power of 50 kW.

28. Since the applicants propose different sites and HAATs, there would be differences in the location and size of their primary service (1.0 mV/m) contours. The areas and populations involved are tabulated below:

	Primary Service	
Applicant	*Area sq. mi.*	*Population*
Family	1,015	411,594
Zaba	1,156	592,306
Marsona	2,022	550,570

29. Zaba's proposed operation would have a 43.9 percent population advantage over Family's and a 7.6 percent population advantage

[5] Marsona and Family have sought preferences because their owners are Hispanic-Americans. On this factor they are equal, however, since 100% of both applicants are Hispanic. Only if Zaba were a serious contender, would this factor have meaning in this case.

over Marsona's. Marsona's proposed operation would have a 33.8 percent population advantage over Family's. However, all of the population involved already has five or more available primary aural services both day and night. Consequently, Zaba's and Marsona's comparative coverage advantage over Family, and Zaba's comparative coverage advantage over Marsona, merit only very slight preferences. *WVOC, Inc.*, 45 F.C.C. 2d 420, 424 (1974).

30. Marsona "is also entitled to some credit for proposing an auxiliary power source (see *Addendum to Policy Statement*, 2 F.C.C. 2d 667, 6 RR 2d 861 (1966)), but such a preference is intrinsically of less significance than other aspects of the comparative analysis." *WVOC, Inc.*, 45 F.C.C. 2d at 424.

CONCLUSION

31. Zaba proposes no integration and it already owns another radio facility in Ponce; therefore, its application is of no comparative significance despite its very slight coverage advantage. Neither Family nor Marsona have media interests. However, there are significant differences between their integration proposals. Family receives credit for its proposed full-time integration of all its partners into management. In addition, all of the Family partners will move to Ponce, one has broadcast experience, and two of the three partners, representing 49 percent of the partnership, are women. Marsona proposes less than half as much full-time integration as Family, and that person, although integrated full-time, does not intend to live in Ponce and he has no current broadcast experience. Thus, Family is entitled to a substantial preference over the other applicants for its superior quantitative and qualitative integration proposal. While Marsona is entitled to a very slight preference for its proposed coverage and a preference for its proposed auxiliary power, these preferences do not overcome Family's substantial preference on the significant criterion of integration.

ACCORDINGLY, IT IS ORDERED that the application of Family Broadcasting Group (File No. BPH-800925AA) for a construction permit for 101.1 MHz on Channel 266, Ponce, Puerto Rico IS GRANTED and the applications of Zaba Radio Corporation (File No. BPH-800930AD) and Marsona Broadcasting Corporation (File No. BPH-801003AJ) ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN *Administrative Law Judge*

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Reconsideration, Petition for, Denial of

Petition for reconsideration of *George E. Cameron Jr. Communications* (KROQ), FCC 82R-58, 91 FCC 2d 870, denied.
–George E. Cameron Jr. Communications
Docket No. 20629

FCC 83R-20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GEORGE E. CAMERON JR. COMMUNICATIONS (KROQ) Burbank, California	Docket No. 20629 File No. BR-2724
For Renewal of License	
ROYCE INTERNATIONAL BROADCASTING COMPANY Burbank, California	BC Docket No. 79–65 File No. BP-20,111
BAKER-SMITH COMMUNICATIONS, INC. Burbank, California	BC Docket No. 79–66 File No. BP-20,191
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: March 14, 1983; Released: March 23, 1983)

BY THE REVIEW BOARD:

1. In a Decision released on September 24, 1982 (FCC 82R-58, 91 FCC 2d 870) (hereinafter "*Decision*, at para. ___ "), this Board affirmed the ALJ (Initial Decision, FCC 82D-6, 89 FCC 2d 1279, (hereinafter "*I.D.*") and found that the incumbent licensee, George E. Cameron Jr. Communications ("GECC"), was not qualified for renewal of the license of standard broadcast station KROQ and granted the license instead to the competing applicant, Royce International Broadcasting Co. ("Royce").[1] Since the issuance of its

[1] Baker-Smith Communications, Inc. has been eliminated from the proceeding. *Decision*, at para. 2.

Decision, the Board has been cascaded with new pleadings, which we reckon as follows in footnote[2], below.

PETITIONS FOR RECONSIDERATION

GECC

2. It has been long held that reconsideration will not be granted "merely for the purpose of again debating matters on which the [deciding body] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, *aff'd sub nom. Loraine Journal Cov. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). And, Royce is correct that the standard for reconsideration is:

> . . . manifest error or omissions so material that their corrections will result in substantial alterations of the original decision.

Royce Opposition to Supplement to Petition for Reconsideration, at p. 2 (citing *WWIZ, supra*, 37 FCC at 686). It is also true that many of the theories and arguments here urged by petitioners for reconsideration are merely a battology of plaints already rehearsed before the ALJ and once again in the Board's prior review. Nonetheless, because petitioners here assert factual errors in the Initial Decision and in the Board's *Decision*, challenge the *Decision's* legal premises, and particularly because the consequence of nonrenewal has such a profound impact on the licensee, we shall hereinbelow address the relevant arguments raised by the petitioners. As the ALJ and the

[2] (a) Petition for reconsideration, filed October 25, 1982, by Kenneth J. Roberts; (b) opposition to (a) and (h), filed October 29, 1982, by San Marco; (c) opposition to (a) and (h), filed November 4, 1982, by A.W.A.R.E.; (d) opposition to (a) and (h), filed November 9, 1982, by the Mass Media Bureau; (e) motion to accept late-filed opposition to (a) and (h), filed November 9, 1982, by Royce; (f) opposition to (a) and (h), filed November 9, 1982, by Royce; (f) opposition to (a) and (h), filed November 9, 1982, by Royce; (g) reply to (b), (c), (d) and (f), filed November 19, 1982, by Roberts; (h) petition for reconsideration, filed October 25, 1982, by GECC; (i) motion for leave to file a supplement to (h), filed November 10, 1982, by GECC; (j) supplement to (h), filed November 10, 1982, by GECC; (k) request for oral argument filed November 10, 1982, by GECC; (l) opposition to (i), filed November 17, 1982, by the Mass Media Bureau; (m) opposition to (i), filed November 16, 1982, by Royce; (n) reply to (b), (c), (d) and (f), filed November 19, 1982, by GECC; (o) opposition to (i) and (k), filed November 22, 1982, by San Marco; (p) rely to (l), (m) and (o), filed November 29, 1982, by GECC; (q) reply to (o), filed November 29, 1982, by GECC; (r) opposition to (j), filed December 27, 1982, by Royce; (s) opposition to (j), filed December 27, 1982, by San Marco; (t) opposition to (j), filed December 28, 1982, by Royce; (u) opposition to (j), filed December 27, 1982, by the Mass Media Burea; and (v) reply to (r), (s), (t) and (u), filed January 4, 1983, by GECC; (x) petition to reopen record and to enlarge issues, filed November 5, 1982, by GECC; (y) opposition to (x), filed December 1, 1982, by Royce; (z) opposition to (x), filed December 2, 1982, by the Mass Media Bureau; (aa) reply to (y) and (z), filed December 10, 1982, by GECC; (bb) further petition to reopen record and to enlarge issues, filed December 17, 1982, by GECC; (cc) opposition to (bb), filed January 20, 1983, by Royce; and (dd) reply to (cc), filed January 28, by GECC.

Board did previously, we will examine GECC's conduct on an issue-by-issue basis as those issues were designated by the Commission.

3. *Ineptness.* GECC does not generally deny that a multitude of violations of the Commission's rules took place under its stewardship of KROQ.[3] And, in seeking to identify the reasons for the serious problems at the station, the Commission designated a specific issue:

> To determine whether carelessness, ineptness or disputes among the principals evidence an inability on the part of George E. Cameron Jr. Communications and Burbank Broadcasting Company to effectively exercise the responsibilities of a licensee of Station KROQ and KROQ(FM), respectively, affecting their basic and/or comparative qualifications. [*Designation Order*, 67 FCC 2d 143, at 147–148 (1977).]

In assessing the evidence under that issue, we noted that the analytical standard thereunder was whether the applicant's conduct was marked by a "pattern of carelessness and inadvertence" on relevant matters of major significance, *citing Edward G. Atsinger, III*, 29 FCC 2d 443, 447 (Rev. Bd. 1971); *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 75 (1970). *Decision*, at para. 18. After reviewing at length the chronology of events at KROQ, the estrangement of the licensee principals from their licensed duties and the myriad violations that ensued, *id.*, at paras. 5–39, we were compelled to affirm the ALJ's conclusion that GECC was inept and almost literally "careless" in complying with its licensed responsibilities.[4]

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[3] "No one denies that there were difficulties encountered and mistakes made in the early years of KROQ. . . ." GECC Petition for Reconsideration (hereinafter "GECC Petition"), at p. 1. Kenneth J. Roberts, currently a 49% owner of the licensee (*Decision*, at para. 32), has separately petitioned for reconsideration but does not "address here the multi-pronged basis for disqualification of the renewal applicant found by the Board with respect to the so-called ineptness, technical, reporting, and misrepresentation issues," leaving the other GECC principals to fend for themselves on the deficiencies. Roberts Petition for Reconsideration (hereinafter "Roberts Petition"), at p. 2. Rather, it is Roberts' purpose not to argue that the derelictions never occurred but to distance himself from the other principals of GECC. Hence, Roberts summarizes his grievance thusly (*id.*, at p. 3):

> One of the distinguishing and disturbing features of the Board's *Decision* is its failure to adequately set in time the various acts of omission and commission attributed to GECC and to relate those acts to the position of Roberts *vis-a-vis* GECC over the course of time that he was involved with the corporation. The impression is projected, therefore, that Roberts shares all of the pre-1976 derelictions of GECC set out in the *Decision* as if he were an original stockholder of the corporation.

[4] In iterating the atmosphere in which KROQ was run, we examined the testimony of numerous GECC principals. *Decision*, at paras. 6–12. GECC urges, correctly, that a transcript miscitation attributes certain testimony of one GECC principal, Neil Visser, to another, Dr. Manuel de J. Castillo. GECC Supplement to Petition for Reconsideration (hereinafter "GECC Supplement"), at pp. 3–4. While the Board regrets the misattribution, it is certainly non-decisional since the balance of the record overwhelmingly affirms that the GECC principals showed insufficient awareness of, and care for, their public interest responsibilities (*i.e.*, their responsibility to keep the station on the air, to file required reports, to maintain

4. GECC's defenses to the adverse finding under the ineptitude issue, like common law defenses of yore, are somewhat inconsistent and a bit scrambled. As best we discern them, they are: (1) that the principals were not inept; (2) that even if they were inept before 1977, the ineptitude inquiry is wrongly focused on the pre-designation period rather than the post-designation conduct of the licensee; (3) that GECC did not show carelessness in delegating its public interest responsibilities to the hired staff since Commission policy permits such delegation; (4) that the causal ineptitude leading to KROQ's downfall was not the ineptitude of GECC but the ineptitude of counsel in organizing GECC as a partnership rather than a corporation; and, (5) that ineptitude is not a disqualifying offense.

5. As noted, GECC does not contest strenuously on reconsideration that many rule violations marked KROQ's record. Rather, with respect to its numerous reporting violations, for example, GECC states that these were "not characterized by an intentional concealment or misrepresentation."[5] As another illustration, and with respect to its technical violations, it claims that "[t]here was no degree of willfulness in any of the alleged deficiencies nor was any effort made to conceal the violations."[6] Hence, on the one hand, GECC argues that its violations were not willful.[7] And yet, under the ineptitude issue, it apparently argues that its violations were not caused by carelessness or disputes among the partners. One thing is certain: KROQ's record is riddled with violations, many of a very

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technical standards, to be fully forthcoming as to their financial position with respect to the FM application, to maintain *de facto* control over the station) and that they subordinated these public duties to concern for their individual financial jeopardy.

[5] GECC Petition, at p. 8.

[6] *Id.*, at p. 11. This tergiversation is characteristic of GECC's entire approach to its record. Thus, while GECC will go only so far as to depict its technical violations, for example, as "alleged," it seeks credit in the same sentence for not concealing them.

[7] While not important to the outcome of this case, we believe that GECC's definition of "willful" may be at odds with the definition used by the Commission. Indeed, to clarify, Congress recently amended Section 312 of the Communications Act of 1934 (47 U.S.C. § 312) as follows:

* * *

(f) For purposes of this section:

(1) The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

See Public Law 97-259. In the Conference Report [caccompanying H.R. 3239], Congress explained that it was merely conforming the statute to the Commission's consistent definition, *citing Midwest Radio Television, Inc.*, 45 FCC 1137 (1963). *See* Rep. No. 97-765, 97th Cong., 2d Sess. 51 (1982).

serious nature, and we reiterate our prior view that in affirming the ALJ's holding that GECC was merely inept at complying with FCC standards we might have used "genteel understatement." *Decision*, at para. 18. Not satisfied, and presumably arguing that its multiple violations were neither willful *nor* careless (it does not apparently contest "repeated"), GECC claims throughout that its violations were simply the result of an unarticulated "financial situation."[8] But, with respect to that vague "financial situation," GECC is all over the lot. To wit, in contesting the Board's holding that GECC lacked candor by overstating its financial abilities in 1973 when applying for an additional station (*see Decision*, at paras. 40–45), it quibbles that the Board erred in finding that KROQ was then in the midst of a "deep financial decline" and it disputes the Board view that GECC was advised by its general manager that its financial situation was "perilous."[9] In that connection, GECC intimates that it was not terribly concerned about its faltering finances when applying for a second station because, no matter what, it could always rely upon the bottomless pockets of "Kenneth Roberts who both the ALJ and the Board found sufficient by himself to render GECC and BBC financially qualified in this proceeding."[10] Similarly, GECC takes issue with the findings of the ALJ and the Board that after October 1973, the GECC principals were either unwilling or unable to financially support the station. It declaims: "many of the principals contributed vast amounts of . . . money to assist the station"[11]; "[a]nd, contrary to the Board's belief, principals did continue to contribute . . . money to the station following the October 11, 1973 meeting."[12]

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[8] *See, e.g., GECC Petition*, at p. 9, where it goes so far as to claim that even its failure to file Annual Financial Reports (Forms 324) from 1974–1978 until 1980 was a result of its "unfortunate financial situation." We are puzzled because, unless GECC had already done many of the calculations necessary to complete Form 324, it could scarcely know with certainty how "unfortunate" its situation was.

[9] *See* GECC Supplement, at pp. 9–10. Actually the term used by the general manager was "somewhat bleak." *Id.* For the objective financial situation, *see Decision*, at para. 40; *see also* paras. 17–19, *infra*. Likewise, GECC chides the Board for attributing KROQ's perceived financial crises in any part to a "commercial failure" of a 1972 rock concert because "the station was not anticipating a short-run 'commercial' success but was using the concert as a promotional device." GECC Supplement, at n. 2 (Tr. citation omitted). Yet, last time around, GECC claimed that "[s]everal major factors contributed to the problems which confronted the licensees" and that "[o]ne such factor was the financial loss incurred by the station in sponsoring and promoting a rock concert. . . ." GECC Joint Exceptions and Appeal, at p. 29.

[10] GECC Supplement, at p. 9. Furthermore, in arguing its financial strength in connection with its FM application, it contends that it submitted and relied upon the balance sheet of Roberts, GECC Petition, at p. 14, and that it "*was* (and is) financially qualified due to Kenneth Roberts' unquestioned ability to fulfill commitments." *Id.*, at p. 15 (emphasis in original.).

[11] GECC Supplement, at p. 3.

[12] *Id.*, at 4. *But see I.D.*, paras. 21–22 (and transcript citations therein). We do

6. Given the fact that GECC submits that its original principals were indeed willing and able to support the station and, in any contingency, cushioned by the ample reserves of its latter principal, Roberts, it is not precisely clear just what "financial situation" GECC blames for its myriad violations.[13] Nonetheless, even if GECC's ambiguously referenced "financial situation"[14] was partly responsible for its derelictions, GECC would not necessarily be excused from complying with Commission rules without a timely showing that the difficulties arose from circumstances "beyond its control" or "not attributable to a disproportionate allocation of resources to [KROQ-FM] rather than a lack of resources to satisfy [KROQ-AM's] commitment." *West Coast Media, Inc.*, 79 FCC 2d 610, 621 (1980), *aff'd West Coast Media, Inc.* v. *FCC*, No. 81–1548, released December 7, 1982 (D.C. Cir.)[15]

7. GECC next argues that the ALJ and the Board misperceived

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acknowledge that some contributions were made by principals other than Roberts after October 11, 1973. *See, e.g.*, Tr. 1562–63; 1646–47 However, it is not clear here whether GECC is arguing that it had sufficient financial resources or that it hadn't. Some of the circumstances of these later contributions are discussed *infra*, para. 24, in connection with GECC's lack of candor in applying for an FM station in 1973.

[13] In addition to laying the blame for its violations to its never-described "financial situation," it also blames several sets of counsel (see, *e.g.*, GECC Petition, at p. 16; GECC Supplement, at p. 7) and even, *mirabile dictu*, the Commission itself (*see, e.g.*, GECC Supplement, at p. 7, where it is contended: "Because GECC's main objective, at the insistence of the Commission, was to resume broadcasting, the stations went back on the air without being as technically prepared as they would have preferred"; *see also* GECC Petition, at p. 7).

[14] Despite GECC's equivocating adversions to a "financial situation" and its current implication that its principals were willing to fund the station at a level where it would comply with FCC rules, we adhere to our conclusion that many of the licensee's "financial problems" were self-imposed in that—in the main—the principals simply refused to fund the station at compliant operating levels, or, for a time, at any operating level at all. That much is admitted in the Roberts Petition where it is ceded:

> The [other GECC] stockholders were apparently not prepared or unable to cooperate with one another to run the station harmoniously, keep it on the air, and deal with the Commission as a unit. [*Id.*, at p. 15.]
>
> * * *
>
> The stockholders refusal to expose each of themselves to personal bankruptcy and full liability for all of the debts of the corporation resulted in the dissipation of virtually all of the assets of the station so that broadcast service was rendered difficult, if not impossible, to resume. [*Id.*, at pp. 15–16.]

See also I.D., paras. 21–27 (and transcript citations therein); paras. 18–24, *infra*.

[15] It will be recalled that notwithstanding KROQ-AM's "somewhat bleak" financial picture and its organizational contretemps in 1973 (*see Decision*, at paras. 9–13, 40), the principals of GECC nonetheless prosecuted contemporaneously an application for an FM station which also collapsed for lack of licensee support in the summer of 1974. Just how much additional financial burden the FM acquisition put on the GECC principals is not reflected in the record.

the purpose of the Commission's 1977 designation of an ineptness issue and erred when they considered pre-1977 conduct.[16] In suggesting that the Commission intended to virtually ignore GECC's past conduct and to focus entirely on conduct *after* the license had been set (for the second time) for a renewal hearing, GECC would turn upside-down the well-established principle that conduct *post litem motam* is not the best index of future reliability. Reflecting the instruction of the court in *Office of Communications of the United Church of Christ* v. *FCC*,[17] the Commission has refused to give much weight to post-designation improvements, explaining its policy as follows:

> This policy is rooted in the common sense proposition that enforcement of the public interest obligation of broadcasters cannot be meaningful if licensees are free to perform inadequately during their franchise period, secure in the knowledge that post-term efforts would guarantee renewal if a challenge should ever be mounted. Indeed, if we routinely allowed evidence of 'upgrading' to save broadcast licenses that would otherwise not be renewed, we would expect to find potential competitors for the frequency hesitant to file a competing application because all would recognize that protracted litigation will give the licensee ample time to improve his performance.

Alabama Educational Television Commission, et al., 50 FCC 2d 461, 477 (1975); *see also Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1421–26 (1978), *recon. denied*, 71 FCC 2d 416 (1979).[18] Moreover, our prior decision in this case *did not* necessarily focus on the pre-1977 period in coming to an overall conclusion that GECC

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[16] GECC Supplement, at p. 7, where it is postulated:

> The Commission was acutely aware of the pre-1977 conduct which now forms the basis for the ALJ's conclusion that GECC should be disqualified on 'ineptness' grounds. While not condoning that conduct, the Commission clearly was focusing on GECC's *future* reliability—a matter virtually ignored by the ALJ. [Emphasis in original.]

[17] 359 F.2d 994, 1007 (D.C. Cir. 1966). The court there stated:

> . . . although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant . . . must literally 'run on his record.'

[18] Therein, the Commission repeated its policy:

> To permit belated improvements in a licensee's performance as a general matter would also undermine the basis of the Commission's enforcement system. As a practical matter the FCC cannot rely on enforcement actions to make certain that our licensees operate in accordance with our rules. Our system is based to a great extent on voluntary compliance. If we were to permit all licensees to receive credit for 'corrective' actions taken after the Commission has investigated them, our system would break down. Even if we permitted only 'one free bite of the apple,' with over 9,000 licensees such a policy would make a mockery of broadcast regulation. [69 FCC 2d at 1424.]

was, at the very least, inept, careless, or impaired by disputes among its principals insofar as assuring compliance with Commission rules and standards. Indeed, many of GECC's rule violations occurred after, and continued into, the post-designation period. *See, e.g., Decision*, at paras. 19–20 (reporting violations) and para. 22 ("ten Official Notices of Violations [of technical rules] between August 1976 and April 1979"). Although it is correct that a renewal hearing is not punitive but predictive, it is the licensee's past record upon which those predictions are based. *Office of Communications of the United Church of Christ, supra*. We may not disregard that record.

8. Relying on *Alabama Educational Television Commission* and *University of Pennsylvania, supra*, GECC next insists that it was not inept or careless in delegating its responsibilities to its hired staff and that, even in the cited cases where an absence of requisite licensee control was found, "those licensees were not—as the licensee is here—disqualified from being licensees."[19] GECC's reliance on those two cases is incredibly misplaced. First, the Commission in those cases (where both licensees were—in fact—denied renewal of their licenses) did not condone the delegation of basic licensee responsibility to staff agents. To the contrary, in *University of Pennsylvania* the Commission repeated the doctrine of *Continental Broadcasting Company*[20] and rejected the view:

> . . . that a licensee who delegates to persons it deems responsible, authority to operate and manage a station cannot be held responsible for their activities if it is unaware of them. This is, of course, a completely untenable view. *Retention of effective control by a licensee of the station's management and operation is a fundamental obligation of the licensee, and a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control.*

69 FCC 2d at 1397 (footnote deleted; emphasis in original). As reflected in our *Decision* (at paras. 7–8), not one of the GECC

[19] GECC Petition, at p. 6. GECC's reading of *Alabama Educational Television Commission* and *University of Pennsylvania* is bizzare. In both cases, the licenses at issue were *not* renewed because the Commission could not find that a renewal would serve the public interest. *See*, respectively, 50 FCC 2d at 477, 478; 69 FCC 2d at 1430. Nor were the licensees given short-term renewals. In the extraordinary situation in the *Alabama* case involving the state educational authority, the Commission waived 47 CFR § 1.519 (denied license applicant may not refile for 1 year) and permitted the state authority to file new applications *along with the other competing applicants*. 50 FCC 2d at 478. In the *Pennsylvania* case, the Commission merely allowed the university to seek waiver of § 1.519 and specifically invited competing applicants. 69 FCC 2d at 1430 n. 79. In neither of the above cases was there a competing applicant. Because there is a qualified applicant in this case, we need not speculate as to whether the Commission would grant a waiver of § 1.519 to GECC and allow it to refile its application in less than one year.

[20] 15 FCC 2d 120, 126 (1968), *recon. denied*, 17 FCC 2d 485 (1969), *aff'd sub nom. Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971).

principals even alleged much familiarity with the FCC's rules, regulations, or policies, nor did they assume responsibility for complying with the Commission's standards.[21] *See also, I.D.*, paras. 9–13, Conclusions, paras. 3–6. This is not merely delegation, but a lack of care and ineptitude in meeting licensee responsibilities. More germane, however, to GECC's inexplicable reliance on *Alabama Educational Television Commission* and *University of Pennsylvania*,

[21] Typifying this abyss was the testimony of GECC's (BBC's) original president, Jack Gonsalves:

Q. Did you have any responsibility for programming of the station?

A. No, sir.

Q. Did you have any responsibility for engineering at the station?

A. No.

Q. Did you have any responsibility for setting operating policy for the station?

A. No, sir.

Q. Did you have any responsibility for determining whether the public file was up to date?

A. No, sir.

Q. Did you have any responsibility for insuring that the Federal Communications Commission's rules and regulations were followed?

A. No, sir.

Q. Were you aware of what the Federal Communications Commission's rules required of a radio station?

A. Well, the only thing that I know that they required was that, when—before we got the station, we made a survey, and I went around making part of the survey. That was one thing I knew they needed. [Tr. 2333.]

* * *

Q. As President of BBC, did you ask to see the books and records of the Company.

A. No.

Q. Were they made available to you?

A. Well, I never did ask to see them. They were never brought and say, here, do you want to look at them.

Q. Did you receive regular reports as to the financial condition of the Company?

A. No.

Q. Did you receive any kind of reports as to the condition of the Company, either its technical operations or its programming?

A. No. [Tr. 2335.]

To the identical effect is the testimony of Neil Visser who took over as president in 1973. *See* Tr. 1768–69, 1779, 1781–85. Likewise is the testimony of Dr. Castillo who was president and managing partner from 1975 to 1979. *See, e.g.*, Tr. 1664–65.

is that whereas those cases turned on the designated issue of "Abdication of Control," we specifically stated in our *Decision* that the ineptitude issue designated by the Commission in 1977 was somewhat different.[22] As we explained, our reference to the above-cited cases was merely to state the standard of ultimate licensee responsibility and then to examine the licensee's conduct to determine whether (in the words of the *Designation Order*) "carelessness, ineptnes or disputes among the principals" inhibited GECC's ability to meet its licensee responsibilities. *Decision*, at para. 18. We found therein that the ALJ was manifestly correct in his conclusion under the ineptitude issue. Even *after* 1977, GECC could not comply with rudimentary rules.

9. On reconsideration, GECC once again advances its chief defense that the operative ineptitude at the core of its non-compliance is not its own but that of its organizing counsel which constituted GECC as a partnership rather than a corporation. It argues, in essence, that its principals would have stayed the course, not battled and sued each other into paralysis, and would have adequately supported the station had they but the personal shield of corporate immunity.[23] Nonetheless, and while counsel's failure to incorporate GECC no doubt created deep financial anxiety for its individual principals, a licensee's organization structure is irrele-

[22] *See Decision*, at n.5 ("no 'Abdication of Control' issue . . . [and] we do not intend to add to, or change, the designated issues.")

[23] *See, e.g.*, GECC Petition, at pp. 3–4; GECC Supplement, at pp. 2, 4. However, it is not clear that the GECC principals were completely unaware of potential personal liability for at least some debts. For example, Gary Bookasta testified that GECC's original (1972) purchase of the station was conditioned "on the basis that each and everyone of the stockholders personally guarantee that $1,700,000 note [to the estate of the late George E. Cameron]." Tr. 1132. Several of the principals also "individually guaranteed" a later note (or notes) to Valley National Bank (*see* note 47, *infra*) to help offset losses from the 1972 rock concert. Tr. 1155–56; Bur. Exh. 10. Additionally, GECC's (BBC's) original 1972 application (FCC Form 315) for the acquisition of the station indicated that BCC was a partnership. FCC Form 315 (Bur. Exh. 1), Section I, p. 5. The application was signed by E.H. Bookasta as "General Partner," *id.*, at p. 6; specified again that it was a "general partnership," *id.*, at Section II, p. 1; listed all the principals as "general partners," *id.*, at Section II, p. 3; and contained signed certifications from each principal that they attested to the application, *id.*, Section I, p. 5. We recognize that BBC, the partnership, later in 1972, transferred its equipment to a wholly-owned subsidiary, GECC (Bur. Exh. 3), and that GECC became the actual licensee of KROQ (FCC Form 323 filed August 2, 1972) (Bur. Exh. 6). And, we further recognize that in spite of being advised by counsel in 1972 that BBC was a "general partnership" (Bur. Exh. 7), many GECC principals believed that they had "corporate immunity" or that their lawyers would change their status to a corporation. The essence of GECC's "failure of incorporation" defense is that the principals did not fully know what they were getting into. We agree. *See Decision*, at paras. 5–18, 53; *I.D.*, paras. 9–39, Conclusions, paras. 3–25. However, *somebody* was required to take responsibility for the operations of a powerful broadcast station in the Los Angeles market: that "somebody" was the licensee.

vant to its duty to comply with Commission standards. As we observed previously (*Decision* at para. 53), the Commission does not have differential standards of licensee conduct depending on organizational form; nor is it pertinent here that the basis for GECC's collective disintegration is that its liabilities began to exceed the amounts the principals had originally agreed to venture in the KROQ enterprise[24] or that the principals were unanimously advised by their individual lawyers that the best way to protect themselves from further loss "was to put no more funds into the stations until such time as a practical solution of increasing revenues and cutting expenses, as well as paying off existing obligations could be found."[25] It is obvious of course, that the Commission cannot compel licensee principals to invest more than they wish (or can afford); it is just as obvious that a licensee cannot neglect its basic public interest responsibilities, violate rules *ad infinitum*, and sit on a license for several years merely because it is not a corporation or because its principals—fearful of personal liability—cannot agree on whether and how to support the collapsing station. GECC's failure to become incorporated, through act of counsel or otherwise, is not a pertinent public interest concern. Once the partnership ruptured and the principals decided in 1973 that they wanted no further liability for the station nor would they invest the necessary capital in the station, one proper course would have been to have sold the station forthwith (even if at a loss) or turned the license back to the FCC.[26]

10. Finally, GECC urges that the ineptitude issue has never been found to be an independent ground for disqualification for renewal,

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[24] Thus, GECC has framed its claim (that "the most significant factor" contributing to its debacle was the failure of its counsel to incorporate) in these terms:

> The failure is particularly significant because the members were all under the impression that they were buying stock in a corporation, and that accordingly their liability would be limited to their initial investments, and that responsibility for operating losses would be that of the corporation. [GECC Joint Exceptions and Appeal, at p. 30.]

[25] *Id.*, at p. 31.

[26] We note, in passing, that competing applications for the GECC (BBC) licenses were not filed until, at least, November 20, 1974. *See Designation Order*, 56 FCC 2d 752 (1975). Further, although unpalatable, federal bankruptcy laws provide for limited relief from creditors where liabilities threaten to consume a debtor. Until the filing of competing applications in November 1974, there was no legal barrier to the sale of KROQ. *See* discussion of *Second Thursday Corp.*, *infra*, para. 54. Thus, it is not our position that principals must "commit financial suicide to pay homage to some ideal notion that, when one becomes a FCC licensee, one has abandoned all of one's civil rights and may never exit the broadcast business." Roberts Petition, at p. 17. We simply note that many other businesses and individuals, every year, face the tragic personal consequences of a failed enterprise and have no FCC to invoke.

although it does concede that new applicants have been disqualified, at least in part, under the issue.[27] It contends, therefore, that its disqualification under this issue is contrary to precedent. We must disagree for several reasons. First and foremost, the Commission designated the ineptitude issue as a "basic and/or comparative issue" (67 FCC 2d at 148), not simply as a comparative issue. Hence, the Commission must have assumed that GECC might be found basically unqualified under the issue.[28] Second, merely because the Commission has not previously failed to renew a license based on a particular issue does not mean that it is estopped from so doing in the future. Indeed, in a recent case involving a "promise v. performance" issue, a licensee denied a renewal unavailingly made the same argument; but, the court affirmed the Commission. *West Coast Media, Inc.* v. *FCC*, No. 81-1548 (D.C. Cir. 1982), Slip Op. at 10.[29] This same "first time" argument was also made—with similar lack of success—in *Greater Boston Television Corp.* v. *FCC*, 444 F.2nd 841, 859 (D.C. Cir. 1970). There, the late Judge Leventhal speaking for the court (and *citing International Bhd. of Operative Potters* v. *NLRB*, 320 F.2d 757, 761 (D.C. Cir. 1963) opined: "in the evolution of the law of remedies some things are bound to happen for the 'first time'." Even so, GECC points to no case designated on an ineptitude

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[27] *See* GECC Petition, at p. 7 & n.5.

[28] GECC even goes so far as to intimate that the principal purpose of the Commission's designation of the license for renewal hearing was as a spur and that, in so doing, it did not intend to make much of its concerns about the licensee's ineptitude GECC states:

> Even though the Commission had full knowledge of GECC's problems, it made no effort to take away GECC's license, and instead urged KROQ to recommence broadcasting. The Commission even set a hearing for renewal of KROQ's license to put time pressure on the licensee to go back on the air. It is patently unfair for the Commission thus to have prompted GECC to put KROQ back on the air (at no small expense to GECC), with full knowledge of the station's problems, and to now say that these same problems now disqualify GECC from being a broadcasting licensee.

GECC Petition, at p. 7. Given the procedural requirements of the Communications Act (*see, e.g.*, 47 U.S.C. §§ 309, 312) and the A.P.A. (*see, e.g.*, 5 U.S.C. § 554–558), it is not clear how the Commission could "take away GECC's license" without setting it for hearing. Furthermore, while the Commission did note that its 1975 designation was intented to have a "cathartic effect" (58 FCC 2d at 624), we must assume that when the Commission redesignated the license for hearing in 1977 to determine whether GECC was qualified to remain a licensee (67 FCC 2d 143 (1977)), it meant business.

[29] There the court stated:

> This case is apparently the first time a license renewal has been denied solely because of a promise-versus-performance failure. Such derelictions in the past have been remedied through fines or short-term renewals. West Coast argues that the Commission did not convincingly explain its decision to impose such a severe sanction.

issue where the facts remotely resemble the record here and where the license was nonetheless issued.[30] We reaffirm the ALJ's conclusion under this issue.

11. *Reporting.* In the Initial Decision, the ALJ (*citing to Designation Order*, 56 FCC 2d at 754–55) laid out the numerous alleged reporting failures of GECC in violation of 47 CFR §§ 1.65, 1.613, 1.615 (*see I.D.*, at paras. 54–60) and found that these were more than mere "technical violations" (*id.*, at Conclusions, para. 14).[31] GECC's defense here is that the reporting violations "do not merit disqualification because they are not characterized by an intentional concealment or misrepresentation."[32] While it is true that an isolated failure to report or even more occasional lapses of reporting requirements are not ordinarily disqualifying unless accompanied by an intent to conceal, *see, e.g.*, *WADECO* v. *FCC*, 628 F.2d 129 (D.C. Cir. 1980); *cf. Fox River Broadcasting, Inc.*, 88 FCC 2d 1133, 1137 (Rev. Bd. 1982), no Commission case holds that a licensee can consistently ignore fundamental reporting requirements with impunity unless a sinister motive is proven. To construct such a categorical rule would be tantamount to authorizing licensees *never* to file a required report so long as, in so doing, they were not prompted by deceit. We believe that GECC paints with too broad a brush and perceive that the facts in this case are clearly more akin to *John C. Roach*, 20 FCC 2d 255 (1969), *aff'g* 20 FCC 2d 260, 273 (ALJ 1968), where continued reporting failures occurred even after the licensee was on notice to comply. Here, even after the licensee was on notice in 1975 as to the significance of its reporting derelictions, GECC Petition, at p. 9, *citing to Designation Order*, 56 FCC 2d at 756, serious failures continued long after that. *See, e.g.*,

[30] For much the same reason, we find GECC's reliance on *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) to be off-key. *See, e.g.*, *White Mountain Broadcasting Co., Inc.* v. *FCC*, 598 F.2d 274 (D.C. Cir. 1979) (*Melody Music* patently distinguishable); *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1982) (*Melody Music* inapposite). Not one case cited by GECC (or to our independent knowledge) is attended by a record *quite* like that in evidence here.

[31] As the ALJ observed, the Commission found that GECC's failures in this regard were so pronounced that, during critical periods when KROQ was off the air, the agency simply did not know who the licensee was or how to communicate with it. *I.D.*, Conclusions, para. 14, *citing to* 56 FCC 2d at 755 where the Commission stated:

> As noted, these reporting failures are indicative of a result of the various disagreements among the partners of BBC. As a result, the Commission's staff has been unable to deal with either BBC or GECC as entities for the past fourteen months. The Commission's files indicate that the telephones at the licensee headquarters have been disconnected and that the mailing address of those headquarters is no longer valid. Staff dealings with the licensee have therefore taken place with individual partners, who at times contradicted each other.

[32] GECC Petition, at p. 8.

I.D., paras. 58–60. Further, as with the ineptitude issue, *supra*, GECC argues that inasmuch as the Commission was aware of the licensee's reporting failures at the time of designation and urged that required report filings be made, this "hardly implies" that the Commission was prepared to disqualify GECC when it designated the reporting issues.[33] This reasoning is circular and frivolous. We believe that GECC's violations, both before and after designation, clearly "establish a pattern of flagrant disregard for our reporting requirements." *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827 (1982).

12. *Technical.* In our *Decision* (at paras. 22–27) and in the *I.D.* (at paras. 69–77), the number and the seriousness of GECC's technical violations were recounted. Here again, GECC insists that we and the ALJ should have ignored its violative record and "focused primarily on the current state" of KROQ.[34] It states that a current assessment "would demonstrate that GECC is now at least minimally technically qualified and is eager to meet its licensee responsibilities in this regard."[35] It further contends that the ALJ and the Board have "ignored the significant progress" that has been made;[36] that "one of the Commission's own engineers remarked . . . that the transmitter situation was 'vastly improved'" by 1980;[37] and that it "has been working diligently to solve any remaining technical problems."[38]

13. Let us put it this way: GECC has been the licensee of KROQ since 1972. *I.D.*, para. 7. If, in 1982, the most that can be said for GECC's technical compliance is the aforestated, it is conclusively not

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[33] *See* Petition, at 9. Indeed, "disqualify" is hardly the right word. Upon reconsideration of its *Designation Order* in 1976, the Commission noted that GECC's reporting failures were so egregious as to warrant summary dismissal of its application. *See* 58 FCC 2d at 623 where the Commission stated:

> For fourteen months prior to designation of this proceeding for hearing the Commission's staff had been unable to communicate with the KROQ and KROQ(FM) licensees by mail or by telephone, although there were communications with individual principals. According to one of the principals, those individuals who signed the renewal applications were no longer principals, and the renewal applications which had been prepared for submission to the Commission had been intercepted and altered. The applications were subject to dismissal under Rule 1.513 if proper signatures were not affixed. It further appeared that the licensees had not reported to the Commission contracts affecting ownership and control of the facilities, and had not filed timely and accurate financial and ownership reports, as Rule 1.611–1.615 require. Under Rule 1.539, the renewal applications were subject to dismissal for failure to comply with these reporting requirements.

[34] GECC Petition, at p. 9.

[35] *Id.*, at pp. 9–10.

[36] GECC Supplement, at p. 8.

[37] *Id.* In fact, however, after noting that the licensee failed to respond substantively to the January 1980 Notice of Violation within the required 10 days (Tr. 3718), the FCC engineer to whom GECC adverts (D.V. Bosque) testified that the technical operation of KROQ was "very poor" (Tr. 3721) compared to "most other stations" inspected by him (Tr. 3722).

[38] GECC Supplement, at p. 8.

qualified to be a licensee. We will not ignore its atrocious record; even if we consider its "upgraded" record (*i.e.*, from the designation for hearing onward), its technical disqualification is patent. And, having acceded to GECC's urgings that it "was and is" financially qualified (*see* GECC Petition, at p. 15), it cannot blame its violations entirely on that condition: it cannot have it both ways.[39] Finally, we reaffirm that GECC's cumulative technical violations are independently sufficient to warrant disqualification. *See United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1978). GECC contends that although the *United Broadcasting* court stated that it was relying solely on technical grounds, the court was disingenuous in that case.[40] We cannot be so presumptuous.

14. *False or Misleading Statements re: Application for KROQ-FM.* In designating GECC for a renewal hearing in 1975, the Commission considered the licensee's April 1973 application for a second station, an FM facility, and stated:

> That application contained BBC's 'Statement of Financial Condition' as of April 2, 1973, reflecting total assets in excess of total liabilities by $2 million, and a projected balance sheet for the partnership reflecting assets in excess of liabilities by approximately $3.3 million. Moreover, a revised projected balance sheet filed July 5, 1973 showed BBC's assets in excess of liabilities of approximately $3.7 million. [56 FCC 2d at 756.]

It further stated:

> It therefore appears that in and around the time BBC was representing to the Commission that its financial condition was properly reflected on balance sheets

[39] GECC argues that the Board was in error in assuming that the licensee spent money on the station in 1977, but neglected expenses for technical equipment. It states:

> That is wrong. Not a dime was expended on the carpeting which came to the station in a trade-out arrangement with and advertiser (Tr. 3235). If technical equipment could have been purchased via the same method, presumably it would have been.

GECC Petition, at p. 11 n.8. Apart from the fact that we were merely repeating the lament of GECC's own engineer (*See Decision*, at para. 27), no case holds that technical compliance is contingent on a licensee's ability to "trade-out" for equipment. As admitted by Dr. Castillo (president of GECC from 1975–1979), and despite Roberts' financial support, "many technical violations" continued at KROQ (Tr. 1710) and continue to the present, *see* note 37, *supra*.

[40] *See* GECC Petition, at p. 10, where it speculates:

> While the Court of Appeals did rely on the 'long history of persistent violations of [FCC] rules' as sufficient grounds for disqualification, the facts which gave rise to that case plainly illustrate its inapplicability to the GECC situation. First, at the Commission level, the licensee's abominable record was found to include the illegal broadcast of lottery information and false and misleading advertisements as well as numerous technical violations. *United Television Co.*, 55 FCC 2d 416, 417 (1975). Although the appellate court did not reach the former grounds, it hardly could have ignored such conduct in its evaluation of the licensee's overall reliability. [Footnote omitted.]

showing an excess of assets over liabilities of $2 million, other events indicated that the partnership was in financial trouble. [*Id.*, at 757.]

Accordingly, it specified an issue:

(f) To determine whether (i) Burbank Broadcasting Company made false or misleading statements regarding its financial condition in its application for assignment of license of KROQ(FM), or (ii) failed to maintain that information in an up-to-date fashion pursuant to Section 1.65 of the rules. [*Id.*, at 762.]

15. The ALJ considered the evidence and concluded that GECC's financial showing[41] to the Commission "was essentially a sham";[42] that during the relevant period "BBC and its subsidiary GECC were on the verge of financial collapse";[43] and, that it violated 47 CFR § 1.65 for failure to advise before the grant of the FM application that its financial picture had changed in a decisionally significant manner.[44] The Board considered GECC's exceptions and found that even if the original balance sheet submitted by BBC was "technically accurate,"[45] GECC misled the Commission by failing to notify it of a sharply declining economic position and of a deep financial rupture in the GECC organization.

16. GECC argues here, again, that there was no reliance on its balance sheet and that the balance sheet was submitted only because the Commission required it with the application.[46] It also argues that the Board's characterizations of GECC's financial situation during the summer and fall of 1973 (*see Decision*, at para. 40) are not supported by the record and that the GECC principals were not advised by the general manager that KROQ's financial situation was "perilous."

17. In support of its cause, GECC contends that—contrary to the Board's view—the picture available to the GECC principals in June 1973 was "upbeat, mixed at worst."[47] Without colloquy, we will let

[41] Actually, the financial showing was that of Burbank Broadcasting Co. ("BBC"), whose principals were identical to that of its subsidiary, GECC.

[42] *I.D.*, Conclusions, para. 19.

[43] *Id.*

[44] *Id.*, para. 20.

[45] The BBC balance sheet showed approximately $5 million in assets and $3 million in liabilities. However, $3.2 million of the purported assets consisted of a $2.6 million demand note from GECC and $600,000 in advances made to GECC. Bur. Exh. 15. These "GECC" asserts were vaporous.

[46] GECC Petition, at p. 14. It is difficult to imagine that the Commission, at that time, would have required an applicant's balance sheet and not relied upon it, even in part. Apparently, however, the Commission believes that it relied upon it. *See* text, *supra*, para. 14 *reprinting Designation Order* text (56 FCC 2d at 756, 757).

[47] GECC Supplement, at pp. 9–10. However, on June 6, 1973, a missive was sent to the GECC principals which read in part:

BURBANK BROADCASTING COMPANY
PERSONAL AND CONFIDENTIAL

June 6, 1973

To The Partners of Burbank Broadcasting Company:

the minutes of the June 16, 1973 meeting of GECC principals speak for themselves. The principals were told:

Gary Bookasta passed out to members of the board of directors a list of current debts of the station and/or 'company.' We have a note outstanding at Valley National Bank, and they have sued the partners for this obligation. The United Medical $300,000 loan commitment was discussed. Because of the money owned the Bank, etc., we sought a loan from United Medical. However, as we got closer to funding, problems developed that we were not aware of. We are in receipt of a letter from United Medical that they will fund the loan; however, it was never funded as we were led to believe. Because of this suit with Valley, it was suspected that it will be more difficult to get a loan from a lending institution. We need a long term consolidation loan to pay off existing loans, etc.

• • •

[BBC Attorney] *Harvey Fierstein told the group that the status with BBC was critical and foreclosure imminent, for we owed the Government back taxes to the tune of $180,000 and that Valley National Bank had filed suit for the note due*

I am respectfully taking this means of advising you with respect to the present financial posture of Burbank Broadcasting Company and its wholly owned subsidiaries. Our condition at this time is as follows:

A. Outstanding current liabilities, all of which are due or past due.

1. Valley Bank	$180,000.00 (plus interest)
2. Security Bank	$ 24,000.00 (plus interest)
3. Accounts payable	$200,000.00 (approx.)
4. State and Federal Withholding Taxes	$186,000.00

B. Fixed monthly expenses

1. Payroll	$ 60,000.00 (approx.)
2. Pepsico Lease	$ 16,100.00
3. Other expenses (fixed)	$ 20,000.00 (approx.)
4. Estate of George Cameron (beginning July, 1973)	$ 17,000.00

C. Present Income

At the present time, though we are writing orders at a considerably greater rate and amount, our cash billings have just reached $40,000 per month, and we have been averaging 'trade' billings in excess of $20,000 per month. Though this represents a tremendous increase it still (on a cash basis) is short of covering our on-going obligation.

D. Outstanding Obligations

At the present time our outstanding unsecured loans total approximately $1,000,000.00, including, but not limited to, a loan of $500,000 from Ken Roberts and approximately $400,000 from the Visser Brothers. [Bur. Exh. 18.]

> *them*. It was imperative that we get funds to clean up these and other important obligations.
>
> The problem is that we are in an *emergency financial condition* and we need a quick solution if we are to resolve our financial problems.

Partnership Minutes of Meeting of BBC, June 16, 1973. (Bur. Exh. 20, at p. 3; emphasis added.) Although the partnership minutes go on to note that alternative loan sources would be explored, these generally fell through except for a $500,000 loan from Roberts.[48] Considering KROQ's cash flow at that time (*see Decision* at para. 40, *citing I.D.*, para. 67), GECC's failure to entice many institutional lenders to supply the large amounts needed by GECC is hardly surprising.

18. More important, the GECC principals themselves certainly did not view the 1973 financial picture as "upbeat" or "mixed." For example, Jack Gonsalves, the president of GECC until the June 16, 1973 meeting, testified that he was unaware of the heavy debts of GECC and that when he was advised thereof, he and his brother Joe (20% combined owners) immediately resigned. Tr. 2337–2339. Jack Gonsalves, who thought KROQ might be worth more than GECC paid for it, evinced his surprise at being told by KROQ's lawyer in June, 1973 that "we have an obligation of some 3.4 million [dollars] and that the present package is unrealistic against the potential." Tr. 2339–40.[49] Joe A. Gonsalves recalls that after being apprised of the financial picture in June 1973 and advising the other principals that he could not pay in his share of his indebtedness to BBC, he indicated that he was trying to sell his shares through a broadcasting lobbyist in Sacramento. Tr. 2297–99. Thus, the 1973 outlook of the Gonsalves brothers, who owned one-fifth of GECC, was far from optimistic.[50]

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[48] GECC Supplement, at pp. 10–11. For example: "Dr. Castillo spurred an effort to get a $6 million loan from the Commonwealth Bank in the Bahamas and had arranged the transaction only to see it evaporate when the dissident partners contacted the bank. A similer arrangement was discussed with the Lowry Investment Company but was killed following the intervention of the dissidents." *Id.*, at p. 11 (Tr. citations omitted).

[49] KROQ was purchased by GECC for $500,000 down, and $1.7 million over 5 years. *I.D.*, para. 9; Tr. 1430.

[50] Joe Gonsalves' apprehension was reflected in his testimony:

> Q. Can you tell us what took place at that [June 16, 1973] meeting, from your point of view?
>
> A. Well, from my point of view, when they were talking about the amounts of money needed, I first said that I thought I had someone who would buy my interest in the station, and I was told at that meeting that we couldn't sell our interest in the station; that, if we couldn't come up with our share of the money, that we would have to give up our share of our holdings in the station. And I was very willing to do that. And it was at that point, the fact is, I wanted to get out of the station because, when I went into it, it was my understanding from some of the documents that were drafted and what was said to me that at any time that money was needed, that if you couldn't put up your share of the

19. Other GECC principals shared the pessimism of the Gonsalves brothers. For example, Michael Colicigno described his perception of GECC's situation at the pertinent time as follows:

Q. You said before I believe that there were other matters that arose during 1973 which caused some concern to you besides the tax assessment that you just testified to.

A. Yes.

Q. What were the other matters?

A. The other matter was that we had a very high priced operation with a very low income yield. We were, it was costing us $100,000 a month or thereabouts in salaries and services needed by the members of the staff or the radio station, be it electricity, telephones, car rentals, credit cards, rent on the building, the salaries and the like. The income derived which was $20,000, $25,000 a month most of the time it was trade outs and I could see that we had to somehow change the operation somewhere along the line. We were not generating the dollars to take care of the financial responsibility. So, I indicated to Gary that maybe we were just operating at a too high a level. Maybe we should cut down.

Q. This is Gary Bookasta?

A. Yes.

Q. When did you say this to him?

A. Probably in August of 1973.

* * *

Q. From the beginning of the operation of KROQ by Burbank Broadcasting Company, George E. Cameron Communications which was I believe in the middle of 1972.

A. July 22nd, 1972.

Q. Okay. From that time, from the time you began operating the station to the time you first became concerned in August of 1973, was there ever a month where the station operated at a profit?

A. We lost every day, every month from 1972 until the time I became concerned. [Tr. 1435–37.]

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money, you could turn your stock over to the person—to the people who would put up your share of the money and leave. And that's what I wanted to do at that June meeting.

Q. How much money were you asked to put up?

A. I don't recall what it was. But it was more money than I could afford to put up.

Q. It was a substantial amount of money?

A. It was. And I always made it clear when I went in it, I just didn't have the money. I didn't have the income and didn't have the resources to be able to do that. [Tr. 2297–2298]

Joe Gonsalves had previously indicated that the "first real alert [he] had to the financial problems" came when he received the June 6, 1973 missive (*see* note 47, *supra*) to the principals (Tr. 2322); and that it was also probably his first notice that GECC was even acquiring an FM station. Tr. 2323.

20. By November of 1973, the IRS had levied a lien against Colicigno for the still-unpaid FICA withholding taxes in the amount of $177,000 adverted to in the June 6, 1973 letter to GECC principals. *See* note 47 *supra*. Colicigno explained:

> Q. Were you aware in 1973 of whether the station, KROQ-AM, was paying the proper withholding for its employees?
>
> A. I thought we were, yes.
>
> Q. Did there come a time when, did there come a time when you were informed to the contrary?
>
> A. Yes, I did. I was told by Pete Prestininzi that the checks were signed but they were not sent, were not mailed to the government. In other words, everything was done, the bookkeeping was done but the checks were signed but they were held in abeyance because we didn't have the money in the bank to pay them.
>
> Q. When did he tell you this?
>
> A. Right near the time when we began to make some waves about breaking away from the partnership because that was my greatest concern. This is one of the reasons and for no other reason did I try to buy out in 1973. [Tr. 1432–33]

21. Two other GECC principals, Robert L. Goe (5%) and Peter Prestininzi (10%), alleged in December, 1973, that the very purchase of the FM was unauthorized[51] and further complained:

> That prior to the filing of this complaint numerous lawsuits have been filed against the partnership by BARBARA KING (as assignee for Ball, Hunt, Hart & Baerwitz, in the sum of $14,731.00, plus interest; CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA, a corporation, for damages in the sum of $1,541.00; CHANDLER LEASING DIVISION, PEPSICO LEASING CORPORATION, a corporation, for damages in the sum of $767,011.00; VALLEY NATIONAL BANK, Glendale, California, for damages in the sum of $180,000.00, plus interest in the amount of $75,000.00, plus an additional note in the amount of $125,000.00, plus accrued interest and attorneys' fees. There are numerous other threats of litigation. These complaints are not being answered. Plaintiffs are informed that

[51] *See Complaint of Goe and Prestininzi* (filed against the other GECC principals on Dec. 20, 1973 in the Superior Court of California, L.A. County) (Bur. Exh. 36), at p. 5, where it is asserted:

> The plaintiffs are informed and believe and therefore allege, that some of the defendant partners, but less than a majority of all of the partners, negotiated and entered into an acquisition program for Radio Station KPPC-FM from the NATIONAL SCIENCE NETWORK, INC. Said partners signed and authorized a lease back contract with TOOL RESEARCH ENGINEERING CO. for the sum of $220,000.00 utilizing some corporation assets as security and upon receipt of the funds into the partnership have caused these funds to be disbursed through the partnership to favored creditors and/or designates of some of the defendant partners instead of paid to GEORGE E. CAMERON, JR. COMMUNICATIONS, INC., to liquidate withholding obligations of the corporation to the Internal Revenue Service of the United States.

This question over formal GECC authorization for the FM application was echoed by Joe Gonsalves who testified that he had never approved it. Tr. 2303. His brother, Jack (the president of BBC at the time), knew very little about the FM application himself. Tr. 2345–46.

the attorney for the partnership has not been paid, up to this time, fees in the amount of $5,000.00 and an additional sum of $5,000.00 to his firm and has notified the partnership that he is preparing an application to be relieved as counsel of record in the VALLEY BANK case. [*Complaint of Goe and Prestininzi:fo, supra* note 51, at pp. 5–6]

Prestininzi, who until October 1973 was the treasurer of GECC (Tr. 2393), testified at hearing as follows:

Q. And when did you first become aware of the large number of debts or creditors' claims against Burbank Broadcasting Company and George E. Cameron Communications?

A. Summer of '73.

Q. And what caused you to become aware of those debts and obligations?

A. By reviewing reports.

Q. What reports?

A. Well there were P&L's that were reported to that time. [Tr. 2397]

Prestininzi indicated that although the KROQ general manager held some promise out in June 1973, he didn't believe him (Tr. 2421) and his testimony explains why:

Q. Well, in comparing income to expenses, how—what was the relationship?

A. Our expenses were probably one and half to two times what the income was.

Q. And this is in '72 and '73, on a monthly basis?

A. Yes. [Tr. 2410]

* * *

Q. In '73 isn't it true that George E. Cameron was behind in its payments on its obligations?

A. Yes. [Tr. 2415–16]

22. The ALJ found that by August, 1973, GECC's real assets "were under 1 million while its total liabilities exceeded $3.4" (*I.D.*, para. 67); that, in general, its principals were refusing to come up with the badly needed cash (*id.*, Conclusions, para. 19); and that although GECC made its first monthly payment (of a $1.7 million total it owed) to Bank of America in August, 1973, it thereafter defaulted (*I.D.*, para. 19).[12] On August 31, 1973, GECC agreed to sell

[12] GECC appears to challenge this latter finding, contending:

> Actually the principals did not default on a loan from the Bank of America because there was no such loan. In October, 1973 BBC missed its monthly payment to the Bank *as executor* for the estate of George Cameron to whom the money was owed.

GECC Supplement, at n. 13 (emphasis added; transcript citations omitted). If this datum is material, its significance eludes us. However, we correct our observation in the *Decision*, n. 12, that the amount to be remitted was $2.2 million: the amount was $1.7 million. Bur Exh. 15.

Roberts an option to acquire a 25% interest in BBC (which wholly owned GECC) in exchange for the $600,000 he had already lent BBC (*see Agreement*, Bur. Exh. 29); and Roberts further agreed to lend an additional $100,000, in part, to pay the $51,000 owed to Pepsico and $34,000 in back payments on the $1.7 million Cameron Note (*id.*). However, these loans from Roberts were not enough to stanch the tide of red ink engulfing GECC.

23. By October 11, 1973, the financial situation reached disintegration. Dr. Manuel de J. Castillo, currently the vice president of the company, describes that when the principals found out that they were each personally liable on the massive debts of GECC, and on advice of counsel, they refused to put more money in the station. He testified:

> No, listen to me very carefully. October 11th, 1973, there was a fight in which each member got an attorney. And at that time the attorneys told the members don't put a dime. Remember, I was Secretary and Treasurer. [Tr. 1647]
>
> * * *
>
> The radio station was abandoned by all the attorneys that made their clients completely unable to put any money, even if they wanted to. I went to the Vissers' house, and they wanted to put money. But [attorneys] Degracio and Demetio refused them to put in the money. [Tr. 1652]

Dr. Castillo further recounted:

> I was at the meeting, October 11, 1973, and you saw maybe 80–$800,000 of bills not paid. And the Pepsi Cola bill two months behind, Bank of America bill, three months behind. Therefore, you have to know just a little bit to know how bad you are doing. [Tr. 1656]

While he personally put $235,000 more in the station after October, 1973 (Tr. 1648), even Dr. Castillo stopped in 1976 (Tr. 1649).

24. Neil Visser, a GECC principal, who did contribute $20,000 at the October 11, 1973 meeting (and another $5,000 later), was there elected President of BBC (Tr. 1965); but upon advice of counsel, he resigned almost immediately (id).

Visser stated:

> Q. Your lawyer advised you not to have anything to do with those stations?
>
> A. That is correct.
>
> Q. Did you make any phone calls to people at the station after that or to other partners?
>
> A. No, sir.
>
> Q. Did you write any letters to them about the business?
>
> A. No, sir.
>
> Q. Did you participate in the business in any way?
>
> A. No, sir.
>
> Q. Did you respond to them in these areas?

A. Only when our lawyer would ask us to.

Q. In other words, you did only what your lawyer told you to do?

A. That is correct. [Tr. 1957]

Edith Mitchell, another GECC principal, also contributed some money after the October 11, 1973 confrontation. She explained why:

Q. And my question is when you gave money to Bookasta in '73 you say to meet payroll among other things?

A. Utilities, the telephones were going to be cut off. The utilities were going to be cut off.

Q. Did Gary Bookasta ask you for that money specifically?

A. That is right.

Q. And what did he tell you?

A. Just what I said. It is for payroll, utilities, telephone bills. I stood in line with him at the Pacific Telephone Company one night until 7:00 o'clock to keep the phones from going off. [Tr. 1563]

25. We need not belabor the record any further to confirm the ALJ's perception of GECC's financial plight up to mid-October, 1973. Unaware of any of the foregoing circumstances, the Commission granted the FM license on October 30, 1973. GECC suggests: "The attempts to solve the station's financial problems were dealt a harsh blow when AFTRA called a strike and shut the station down in July, 1974."[53] However, AFTRA's 1974 action was scarcely a *vis proxima* or a bolt from the blue. In fact, no sooner had the Commission granted the FM license in 1973 than AFTRA sent the following telegram to the agency:

TWX PD HOLLYWOOD 12/13/73

FEDERAL COMMUNICATIONS COMMISSION
919 M Street NW (sic)
Washington, DC

Gentlemen

We understand that Burbank Broadcasting Co. owners of Radio Station KROQ in Burbank, Calif., have applications pending for licenses for radio stations KPPC in Pasadena, Calif., KMPX in San Francisco, California.

This is to inform you that payroll checks issued to employees of station KROQ have been returned by the station's bank for insufficient funds. Also the station is in default of its contractual obligation to make payments to the AFTRA pension and welfare funds on behalf of the announcers and the newsmen employed there.

We therefore file a protest to the granting of any further FCC licenses or renewals of licenses to this company and respectfully request an opportunity to be heard on this matter.

Allan H. Davis

[53] GECC Supplement, at p. 4.

Assistant Executive Secretary
American Federation of Television and Radio Artists
(AFTRA) [Bur. Exh. 35]

In light of all of the foregoing, we reaffirm the ALJ's finding that, throughout most of 1973, GECC/BBC maintained a drastically inflated financial picture before the Commission and we find that the licensee is culpable for a misleading lack of candor. We find that there was acute awareness on the part of the GECC principals of the gravity of the financial situation and that its breach of its duty to so inform the Commission during the pendency of the FM application was egregious. GECC's last-ditch defense is that it was not advised by counsel to report its predicament to the Commission, even after the fractious meeting on October 11, 1973.[54] However, *citing Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969), the court recently reminded that the serious failure to report a decisional matter cannot be excused. It stated:

> But 'advice of counsel cannot excuse a clear breach of duty by a licensee.' *Asheboro*, 20 F.C.C. 2d at 3. The client becomes fully responsible at some point, and that point is reached more quickly in practice before the FCC than in courts of law. *E.g.*, *WADECO, Inc.* v. *FCC*, 628 F. 2d at 128; *Lorain Community Broadcasting Co.*, 18 F.C.C. 2d 686, 688 (1969), *aff'd sub nom. Allied Broadcasting, Inc.* v. *FCC*, 435 F. 2d 68 (D.C. Cir. 1970).

RKO General, Inc. v. *FCC*, 670 F. 2d 215, 231 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982). GECC's lack of candor here is independently sufficient for disqualification.

26. *Transfer of Control.* It is undisputed—in any significant sense—that since 1974, and assuredly since 1976, Kenneth Roberts has been the mainstay of KROQ and not the majority principals of GECC. The operative question is whether Roberts, in contravention of a stern admonition from the Commission in 1975,[55] assumed *de factor* control of KROQ in violation of 47 U.S.C. § 310. After examining the Initial Decision, the record, and the exceptions, we affirmed the ALJ's adverse findings. *Decision*, paras. 29–39. GECC challenges the previous finding "with a fusillade of easily parried"[56] emissions to the effect that, although Roberts had virtually absolute financial control over the station and virtually all financial responsibility and liability from 1976 on, Roberts never used his financial position to control the station. Thus, for example, GECC asserts:

> Here again, the clear preponderance of the evidence indicates that at *no* time has Roberts taken, or attempted to take, advantage of his financial 'leverage' over the BBC partners. [GECC Petition, at p. 19 (emphasis in original)]

[54] GECC Supplement, at p. 12.

[55] *See Letter of Chief of Broadcast Bureau*, June 26, 1975, *reprinted* in pertinent part at *I.D.*, para. 41.

[56] *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1091 (1982) (Rev. Bd.).

. . .

There is no evidence that the arms-length nature of Roberts' financial supervision over the stations has changed at all since he became managing partner of BBC and President of GECC in 1979. [*Id.*]

It also claims:

It is equally clear that the financial arrangements entered into between Roberts and the various GECC principals by which he became 49% owner with options to increase his ownership interest to nearly 100%, have not resulted in any exercise of control over the station by Roberts. Roberts never intended to exercise his financial 'leverage' over any of the GECC principals and, in fact, he has not done so. Even since 1979, when Roberts was elected president of GECC and managing partner of BBC as a result of the GECC principals' wish to demonstrate some progress to the station's outside creditors in terms of financial stability, his role has been basically limited to that of a financial adviser. [GECC Supplement, at p. 13 (Tr. citations and footnote omitted).]

27. The record, however, puts the lie to these claims. A good—but far from the singular—illustration of the control arrangement at KROQ is portrayed in the testimony of Dr. Manuel de J. Castillo who was the president of GECC from 1975 (Tr. 1644) until Roberts personally took over as president and managing partner in 1979 (Tr. 1670). Dr. Castillo explained:

Q. After the stations resumed broadcasting 1976 did Ken Roberts give you money to keep the stations operating?

A. The answer is yes, after.

Q. And up until today has he done that?

A. Yes.

Q. And in 1976, in 1977, in 1978, and 1979, when Mr. Roberts would give money to you to keep the stations operating how would he do it? Would he give you one lump sum a month, or would he give you money each week? How did it operate?

A. *That depended how he need it.* [Tr. 1662 (emphasis added).]

He went on:

A. We opened the radio station. and we have some money that we didn't have—you know, we had a special—the people to help us to open the radio station in '76. Now the people get us started, the radio station, and Gary Bookasta started the radio station in '76. I was there, and the other people. He hired the people to open first the AM, after it then the FM. Now Ken when we didn't have enough money to make the payroll at the end of two weeks, then we said, 'Ken, we need about $12,000 or $15,000.' The station makes some money, not enough. Then Ken he said, I want to give you a loan to the radio station through you. Give the loan to me. A city Bank in Beverly Hills in a special account I have for the radio station. I am the financial. Therefore, I make the payroll checks, paid the rent, telephone, and utilities. And that payroll, you know, completely pay off. Sometimes you have to pay more, sometimes less. He put up, in this part, about it would be $60,000, $75,000 in the three years.

Q. So would it be correct to say that you would get money from Ken Roberts from time to time in 1976, '77, '78, '79, and take that money and put it to a station account and pay bills for operating expenses?

A. That would be correct. [1663–64] *See also* Tr. 1650, 1659–61. Moreover, Dr. Castillo did not know exactly how much Roberts had spent on the station (Tr. 1661) and, more particularly, after Dr. Castillo relinquished the presidency to Roberts in 1979. Dr. Castillo responded:

Q. How recently to your knowledge has Mr. Roberts advanced sums to Cameron-Burbank?

A. At the present time I don't know since November 6, 1979, Mr. Roberts is the—the man that is the President of the corporation. I am the Vice President. He signs checks now.

Q. My question is to your knowledge.

A. I say I don't know right now.

Q. You don't know?

A. No, I don't know. The answer is I don't know. [Tr. 1725]

Moreover, Roberts is the first secured creditor of all of the other GECC principals (Tr. 1095), holding liens against the non-broadcast property of some principals (*see, e.g.*, Tr. 1661), and he owns, *inter alia*, the tower and transmitter site (*I.D.*, para 47). Finally, Jose Molina, who has been the station manager since 1978 (Tr. 1828), testified that he has reported to Roberts ever since Roberts took over the presidency from Dr. Castillo in 1979 (Tr. 1835). He had previously reported to Dr. Castillo and (KROQ general manager) Patrick Welch (*id*.).

28. It is evident from the record that, at least since 1976, Roberts' *de facto* control over KROQ has been essentially absolute. This plain fact is tacitly acknowledged by Roberts who desires primarily that a clear dichotomy be drawn on the performance of KROQ from 1976 onward. Roberts Petition at pp. 3–5, 15–16. We recognize the practical predicament Roberts found himself in in 1976. Having invested many millions of dollars in KROQ and being confronted with principals who wanted, at that point, nothing much beyond indemnification, Roberts' reluctance to entrust his fate and the fortune lodged in KROQ to hands of the majority principals after he compensated KROQ creditors and recommenced operations in 1976 evinces obvious, if belated, fiscal prudence on his part.[57] Nonetheless, the law forbids unauthorized assumption of *de facto* control. *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*,

[57] GECC takes issue with the Board's general observation that—in view of Roberts' satisfaction of KROQ's multifarious creditors, his investment of approximately $6 million in the operation, his indemnification of the original principals, and his current options to acquire virtually 100% of the licensee (he now owns a *de jure* 49% interest)—Roberts is the primary individual with any meaningful interest in the fate of KROQ. GECC Supplement, at p. 14. A much more candid depiction, however, was offered by counsel for Roberts who forthrightly stated: "I represent a real party in interest in this proceeding, Mr. Ken Roberts, *who is the real party in interest*, and I coin a phrase." Tr. of Oral Argument, July 9, 1983 (emphasis added). That "coin" is good tender.

50 RR 2d 1346 (1982). And, the Commission has recently indicated that financial dominance remains a valid indicator of *de facto* control. *Cf. Radio WAVS, Inc.*, FCC 82–537, released December 10, 1982, at para. 17. GECC argues that inasmuch as it notified the Commission of the increase of Roberts' *de jure* interest to 49%, "[t]hese actions were hardly those of a licensee transferring control '*sub silentio*'."[58] It further submits: "Here, although an unauthorized *de facto* transfer of control may have occurred, no actual 'control' has ever been exercised by the transferee, who has scrupulously avoided violation of the letter of the Commission's warnings."[59] We know not what to make of the latter claim, which is periphrastic at best; however, it is germane to recall that the issue here was solely whether GECC had transferred unauthorized *de facto* control. The evidence that it did—despite a 1975 Commission warning—is irrefutable. Finally, as to GECC's "fall-back" position that even if there was an unauthorized transfer of *de facto* control, it was not marked by any concealment or misrepresentation,[60] we note that although GECC continues to deny that Roberts, since 1976, has controlled KROQ, such *de facto* control clearly continues to this day.[61] At no point has GECC candidly notified the Commission that the only way KROQ could continue to operate after 1976 was to yield the reins over to Roberts and to allow him to attempt to "save the bacon" by removing the *de jure* majority principals from the "frying pan." We reaffirm the ALJ on this issue.

29. *Comparative.* GECC, yet again, urges that the Board take into consideration its "comparative showing." Indeed, in its pleadings, it attempts upon a requested reconsideration of the Board's

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[58] GECC Petition, at n. 19 (citation omitted).

[59] *Id.*, at n. 25.

[60] *Id.*, at pp. 22–23.

[61] Kenneth Roberts is less emphatic in his denial that a *de facto* transfer of control has occurred. While maintaining his legal defense, "Roberts does not request the Board to engage in a full-scale reconsideration of the factual record with respect to this [transfer of control] matter. There is not any factual dispute as to what occurred." Roberts Petition, at p. 14. Rather, Roberts:

> . . . does request, however, that the Board reconsider whether a valid distinction may be drawn between what Roberts did and what the stockholders did, assuming that an illegal transfer of control occurred. While we do not believe that the record evidence necessarily compels the conclusion that an illegal transfer took place, it is only fair to request the Board to recognize the different position of Roberts and the stockholders, assuming that they were engaged in a series of transactions that required prior Commission approval.

Id., at p. 15. The larger question of whether the conduct of Roberts, who converted his option into a 25% ownership interest in GECC in 1976 and who now owns 49%, is to be considered discretely from that of the licensee (GECC) is discussed more fully at paras. 33–36, *infra*.

Decision affirming the Initial Decision to submit a quasi-proffer of its alleged comparative assets.[62] However, the Commission itself has thoroughly considered the circumstances concerning GECC's failure to submit a comparative case and, after considering the ALJ's tolerance and solicitude, refused to grant GECC the very relief it here seeks. *George E. Cameron, Jr. Communications*, 84 FCC 2d 345 (1981). Where the Commission has considered and spoken on an issue, its subordinates may not alter its decision. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720 (1966). Indeed, the Commission's extraordinary patience with GECC's erratic prosecution of its application was demonstrated long before GECC's recurring inability to timely proffer its "comparative case." Thus, as far back as 1976, the Commission expressed regret at having even gone so far as to designate a hearing in 1975 rather than cancelling outright the KROQ license. It stated:

> We believe [in 1975] that the cathartic effect of placing the renewal applications in hearing would spur the renewal applicants to resolve their problems and to undertake steps to resume service.
>
> 7. The record of succeeding events, as set forth below, has convinced us that we require more convincing evidence at this time that these licensees can and will prosecute the renewal applications and undertake realistic measures to resume broadcast service to the public at an early date. The record shows that the licensees did not file a timely appearance in the proceeding; that the presiding officer directed them to show cause why the applications should not be dismissed for failure to prosecute them; and that, when an appearance was filed (and accepted by the presiding officer), it was on behalf of fewer than half the principals, and did not include the persons who signed the renewal applications. The record also indicates that even now no affidavit has been filed which would evidence compliance with publication requirements. See paragraph 5, *supra*. Derelictions giving cause for dismissal of the applications cannot continually be excused, especially where, in the first instance, the failure to give notice had a direct bearing on the ability of competing applicants to file in timely fashion. The instant circumstances convince us that the underlying basis for designating a hearing in lieu of dismissing the applications as defective, was misplaced, and that the hearing, rather than expediting the reinstitution of service would only delay it further. *George E. Cameron Jr. Communications*, 58 FCC 2d 622, 624 (1976). It therein vacated its original designation order (see 56 FCC 2d 752 (1975)) and dismissed the GECC application, subject to one last 30-day grace period. 58 FCC 2d at 625. The matter of GECC's failure to submit an appropriate comparative case is, of course, part of a much larger panorama. Viewed in context, its inability below to submit a proper comparative case is consistent with its inability from the outset to conform with the rules governing ordinary licensees and applicants. It has been no better at prosecuting its application than at operating KROQ. Its arguments relating to its "comparative case" are firmly rejected.

30. *Miscellaneous.* GECC contends that the Board also erred in affirming the ALJ's refusal to add the transmitter site availability, reporting, misrepresentation, and ineptness issues against Royce that were previously requested by Baker-Smith and GECC. GECC's

[62] *See* GECC Supplement at pp. 14–20.

arguments with the ALJ's rulings, in the main, may be rejected without further consideration because they are doubly repetitive of arguments made at hearing and considered and fully addressed in our *Decision*, at paras. 48, 49, and 52. Reconsideration is, therefore, inappropriate. *See WWIZ, Inc., supra.*

31. We shall, nonetheless, address one contention raised by GECC in this regard. GECC faults the Board for failing to address cited precedent in denying Sections 1.65 and 73.3514 issues concerning Royce's failure to report an unsatisfied $5,465.13 judgment in its Burbank or Palm Springs applications.[63] *See Decision*, at para. 48. GECC had previously argued in its exceptions to the Initial Decision that the facts of this case closely paralleled those of *Cosmopolitan Enterprises, Inc.*, 49 FCC 2d 934 (Rev. Bd. 1974), where an existing Section 1.65 issues was expanded to consider the effect of an unreported outstanding judgment; it also cited, without discussion, a number of other cases.

32. *Cosmopolitan* and the other cases cited by GECC are inapposite. In *Cosmopolitan*, the applicant was remiss in not reporting information which, in light of an existing issue, raised the question of a pattern of conduct Conversely, Royce's omission of the $5,465.13 judgment was adequately explained, shown to have no decisionally significant impact upon its financial qualifications, and was not part of a pattern of nondisclosure. *See Decision* at para. 48. With respect to the other cases cited, these are also distinguishable because they involved matters of potential decisional impact. Thus, *Belo Broadcasting Corp.*, 49 FCC 2d 464 (Rev. Bd. 1974), dealt with a financial omission where the applicant's basic financial showing was deficient; *Martin Lake Broadcasting Co.*, 34 FCC 2d 956 (Rev. Bd. 1972), involved an applicant's failure to report major changes in its stock ownership; *Berwick Broadcasting Corp.*, 12 FCC 2d 175 (Rev. Bd. 1968), concerned much larger unreported outstanding judgments totalling $471,833.13; *Fidelity Radio, Inc.*, 1 FCC 2d 1145 (Rev. Bd. 1965) involved an unreported judgment resulting from misappropriation of corporate funds; and, in *Henderson Radio, Inc.*, 46 RR 2d 771 (ALJ 1979), a Section 1.65 issue was added because of unreported tax liens resulting from the applicant's failure to pay withholding taxes to the government. Having reviewed each of these cases, we reaffirm that the ALJ was correct in refusing to add the requested issues.

[63] As indicated in para. 14, *supra*, Section 1.65 of the Commission's Rules (47 CFR § 1.65) requires applicants to inform the Commission within thirty days wherever the information furnished within its application is no longer substantially accurate in all significant respects or whenever there has been a substantial change as to any other matter which may be of decisional significance. Section 73.3514 (formerly Section 1.514), 47 CFR § 73.3514, requires applicants to provide all of the information called for in the application form.

33. As noted earlier (*see, e.g.*, note 3, *supra*), Roberts does not generally appeal on the issues underlying the disqualification of GECC. Rather, Roberts requests the Board to reconsider its prior view that he is to be considered herein as a GECC principal. Roberts contends that because he did not become a GECC principal until 1976 when he exercised the option granted to him in 1973 to acquire 25% of GECC, the Board ought to permit GECC, *qua* GECC, to sell KROQ to Roberts (who now owns 49% of GECC with options to acquire nearly 100%) under the doctrine of *Second Thursday Corp.*, 25 FCC 2d 112 (1970) and progeny cases. Roberts further suggests that, inasmuch as many of the derelictions charged against KROQ occurred prior to 1976, the Board ought to specially find Roberts, *qua* Roberts, qualified to be a licensee. Roberts states:

> First, the [Board's] *Decision* may be read to represent an unwarranted and unintended finding that Kenneth J. Roberts, as an individual, is not qualified to be a licensee of the Commission in this proceeding or any other proceeding and that no distinction can be drawn between his qualifications and those of the GECC stockholders, whose involvement, as distinguished from Roberts, has been characterized by the Board as a 'lamentable chronicle of management ineptitude and of an all but wanton abandonment of the public trust'. *Decision*, paragraph 5.

Roberts Petition, at pp. 5–6 (footnote omitted). Roberts then postulates that, if *he* is found to be personally qualified, he should be given, at a minimum, the right to be individually compared with the competing applicant, Royce. *Id.*, at p. 11. We address these theories below.

34. First, and as explained in our prior examination, Roberts is not an "innocent creditor" of GECC within the purview of *Second Thursday, supra*. *Decision*, at para. 54. Although Roberts' relationship with KROQ commenced as that of a creditor in 1973, *I.D.*, paras. 15, 41, that relationship progressively began to change. By 1976, Roberts had purchased the outstanding debts of GECC (some at a discount) (*id.*, para. 33); he then sued the GECC principals on those debts as assignee (*id*); he settled the claims with the GECC principals in exchange for cash and, in some cases, the principals' interests in GECC (*id.*, at paras. 42–49); he exercised his option to acquire a 25% interest in GECC and has since acquired 24% additional *de jure* interest as well as further options to purchase almost 100% of GECC (*id.*, at Conclusions, para. 9); and, in 1979, Roberts formally took over as president and managing partner of GECC (*id.*, paras. 51–52, Conclusions, para. 9). Hence, the record reflects that Roberts, long ago, elected to become more than a "mere creditor" of GECC.[64] At

[64] GECC contests the Board's observation that Roberts desired, early on, to become the owner of KROQ; it urges that Roberts wished only to become a partial owner. GECC supplement, at n. 14; *see also* Roberts' testimony reproduced at *Decision*, n. 24; Tr. 1002.

any of a number of points along the temporal spectrum, Roberts could have elected to cease his operational involvement with GECC and to remain simply a creditor. It might have as early as 1973 when his investment was only $600,000 (*I.D.*, para. 41). However, in 1976, Roberts elected to legally convert his status from that of creditor to that of principal. *See generally*, *I.D.*, paras. 42–49. And, there is no dispute that since 1976—and *prior to* the Commission's 1977 redesignation of this hearing—Roberts has been the largest single principal of GECC.[65]

35. It is not stipulated as to why Roberts affirmatively elected to convert his legal status from one of creditor to that of principal. Although the other principals were apparently personally liable to Roberts on the loans from him, Roberts presumably preferred the security of an equity interest in the station. Or, perhaps, in acquiring other creditors' interests at a discount, Roberts believed he was effecting a reduced price acquisition of KROQ AM/FM. Whatever his reasons, Roberts voluntarily chose to convert the debt owed to him into equity (*see I.D.*, paras. 42–49) and he may not at this late date claim to be an "innocent creditor." Indeed, even if we had not affirmed the ALJ's finding that Roberts has been in *de facto* control of the station since 1976, Roberts' voluntary decision to convert to an equity owner prior even to the instant designation for hearing in 1977 would deprive him of the right to now claim "innocent creditor" status under *Second Thursday*.[66]

36. Second, we cannot accord with Roberts' request to single him out from the other GECC principals and to specially find that Roberts, individually, is qualified to be a licensee and to permit "GECC" to assign the station to Roberts. The most elementary reason why a discrete finding as to Roberts' personal qualifications

[65] Roberts' Petition (at p.4) notes that the Board was incorrect in holding that Roberts "has since 1973 been by far, the largest individual equity partner in the licensee." We will acknowledge that more precision was warranted. *Compare Decision*, at n. 15. However, in using our terminology, we meant to connote that even before his exercise of the initial option to acquire a 25% interest in GECC, Roberts was more than an ordinary debt holder with respect to the other principals. Thus, Roberts attended a partnership meeting as early as 1973 (*I.D.*, para. 19); he was elected and served briefly as president in 1974 (*id.*, para. 22); he has attended board of directors' meetings regularly since 1973 (Tr. 1070); and, in 1975, he entered into an agreement to purchase all of GECC, to indemnify all others, to furnish all funds for broadcast operations, and to manage the station pending FCC approval of an assignment of license to him (*id.*, para. 29). Moreover, in explaining why Roberts was galvanized into action after 1975, it is submitted: ". . . the [other GECC] stockholders wished to limit their financial exposure further from operation of the station. Roberts took on the risk of full exposure for the operation of the station." Roberts Petition, at p. 15. It is that "risk of full exposure" that Roberts now eschews.

[66] Moreover, neither *Second Thursday* nor its progeny involved situations where there was a competing applicant. From that standpoint alone, *Second Thursday* is inapposite.

to succeed to the license of KROQ would be inappropriate is that the Commission has designated no issue with respect thereto. As we have noted in a recent case which involved a curiously similar request for relief, *West Jersey Broadcasting Co.*, 90 FCC 2d 363, 371 (Rev. Bd. 1982), the issue before the Board is the qualification of the licensee, not the purported credentials of an individual principal thereof. Although Roberts, by his own choice, has appeared in this proceeding as a party-intervenor, he is decidedly not a separate party-applicant. Not only is Roberts an inseparable component of GECC at this point, he has no individual application before the Commission, having withdrawn his own mutually-exclusive application (d/b/a KRE Broadcasting, Inc.) in 1976. *See I.D.*, paras 31–32. Nonetheless, Roberts requests that he, individually, be given comparative consideration *vis-a-vis* GECC's competing applicant, Royce.[67] We have held earlier that, by virtue of the Commission's decision in *George E. Cameron Jr. Communications*, 84 FCC 2d 345 (1981), GECC itself had limited its opportunity for the conventional comparative analyses. *See* para. 29, *supra*. *A fortiori*, Kenneth Roberts—who formally withdrew a competing application in 1976 and who has proffered no individual comparative showing (and is not now permitted to do so)—is not entitled to discrete comparative consideration.

37. Third, GECC having been found unqualified to remain a licensee, the law does not permit a post-hearing alienation of the license. *Stereo Broadcasters, Inc.*, 74 FCC 2d 543 (1979), *aff'd Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981); *West Jersey Broadcasting Co.*, 90 FCC 2d 363 (Rev. Bd. 1982). In *Stereo*, the Commission solidified its "minority distress sale" policy[68] and held squarely that it would not permit a post-hearing assignment of a defunct license, even to a minority group. Here, Roberts seeks the Board's allowance of a post-hearing sale not to a minority group, but to him.[69] As we indicated in *West Jersey* v. *Broadcasting, supra*:

> West Jersey admits, as it must, that it meets none of the foregoing criteria for an exception as set forth in the *Minority Ownership* policy statement. What it does not say, of course, is that the precedent set by a grant of the relief requested here by West Jersey would wholly eviscerate the carefully balanced incentives embodied in the minority ownership policy statement and undercut fatally the disincentives inherent in the Commission's general policy of refusing to permit disqualified licensees to avert the consequent processes of law. Were a disqualified licensee permitted to avoid the serious ramifications of non-renewal or revocation by simply passing the sullied license, hand-over-hand, throughout its organizational

[67] *See* Roberts Petition, at p. 11, where it is asserted: "At a minimum, Roberts should be given the opportunity to be heard and to compete for the license in a comparative hearing. . . . At a minimum, Roberts should be granted an opportunity to compete with Royce for the license."

[68] *See generally Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), *clarified*, 44 RR 2d 479 (1979).

[69] Roberts Petition, at p. 11.

structure until it reposed in the grasp of a putative 'Mr. Clean,' it is doubtful that the *Minority Ownership* 'distress sale' policy would retain much vitality.

90 FCC 2d at 372. Moreover, Roberts asks to correct any misimpression that he requests a ruling allowing an assignment to him in order that Roberts may, in turn, sell the station to another party, Jose Molina. Roberts asserts[70]:

> With respect to the Board's finding that Roberts requested the renewal of GECC's license for KROQ merely to sell it to Mr. Jose Molina, that finding does not fairly represent the evidence in the record, is contrary to Roberts' actual intent, and should not have been relied upon as a basis for the dismissal of Roberts' request that his creditor position be given consideration in this proceeding.

38. It will be recalled from the Initial Decision (at paras. 37–39) that Jose Molina was given an (unauthorized) option to purchase KROQ for $2 million; Molina is currently the station manager, having paid what he thought was $12,000 down, converted the station to a Spanish language format, and taken over sales for the station on behalf of United Latins, Inc. *I.D.*, paras. 37–38. Molina claims to have invested about $200,000 in cash and equipment in the station (Tr. 1829) and he considers that stipend in the following manner:

> Q. Do you consider the money that you have put into the station a loan?
>
> A. I consider it an advance for future negotiations.
>
> Q. Do you consider it a payment towards purchase of the station?
>
> A. In a way I do. If it can not be purchased, then I am out of luck.
>
> Q. Have you maintained records of your investments in the station?
>
> A. Yes.
>
> Q. Has Mr. Roberts or Mr. Castillo been kept informed of your investments in the station?
>
> A. Every day, sir. I cry every day. Every day.
>
> Q. Are these advances that you are making toward the ultimate purchase price of the $2 million, in your mind?
>
> A. It is my understanding of previous discussions, and we are now currently working on that particular – if, I don't know, if it can be done or not—working very diligently right now, at this very moment.
>
> Q. You are working diligently now at formalizing an agreement? Is that why you are saying?
>
> A. Or trying to legally, with lawful money, buy the radio station.
>
> Q. Have you been negotiating with Dr. Castillo about this?
>
> A. Yes, sir.
>
> Q. And Mr. Ken Roberts?

[70] Roberts Petition, at p. 12.

A. Yes, sir . . . .[Tr. 1830–31.]

See also Testimony of Dr. Manuel de J. Castillo:

Q. And isn't it true that Mr. Molina, since August of '78, has put in over $200,000?

A. The answer is correct.

Q. Is there any commitment by George E. Cameron Communications to pay Mr. Molina back the money that Mr. Molina has put in?

A. The answer is no.

Q. Isn't it true that you told Jose Molina that if George E. Cameron Communications is successful in obtaining its license renewal that Mr. Molina will have an opportunity to buy the AM station?

A. That is true. [Tr. 1686-87]

See also Testimony of Kenneth J. Roberts, Tr. 1034–35. Notwithstanding, Roberts now asserts: "Whatever Molina's expectations, they do not square with the current intent of Roberts."[71]

39. Even if we accept Roberts' claim that he has no present intention to sell KROQ, we do not believe that Commission policy permits a post-hearing sale to him. Thus, even if, *arguendo*, we consider Roberts to be separate and distinct from GECC and, again *arguendo*, even if we were to ignore the fact that Roberts has assumed an unauthorized *de facto* control of KROQ or the fact that many of the station's other violations occurred *after* Roberts converted to an equity partner in 1976, a post-hearing sale to Roberts by "the licensee" would still be impermissible. GECC has been found unqualified for renewal and, as a matter of law, has nothing to sell. *Stereo Broadcasters, supra*; *West Jersey Broadcasting, supra*. And, perforce, no Commission case of which we are aware permits a post-hearing assignment in the face of a qualified competing application, even those cases involving genuinely "innocent creditors." For these reasons, Roberts' extraordinary request must be denied.

PETITIONS TO REOPEN RECORD

40. On November 5, 1982, GECC filed a petition seeking to reopen the record and enlarge the issues against Royce to include issues relating to Section 1.65, financial qualifications, and effectuation of integration proposals based upon Royce's alleged failure to report its filing of two applications for new television broadcast stations at Caldwell, Idaho, and Citrus Heights, California. GECC asserts that these are the third and fourth instances where Royce has failed to amend its Burbank application to report subsequently filed applications (two prior instances were considered in our *Decision*, at paras. 48–49) and argues that a Section 1.65 issue is warranted against Royce. GECC also argues that the filing of the

[71] Roberts Petition, at p. 13.

Caldwell application casts serious doubts on Royce's financial qualifications and justifies the addition of a financial issue. Specifically, GECC claims that Royce proposes to finance the Burbank station through a $500,000 loan from the Bank of America to be secured in like amount by the parents of Royce's sole stockholder, Edward R. Stolz, II. Analyzing the parents' balance sheet, and noting that two of Royce's other applications (Desert Hot Springs and Caldwell) are also relying upon bank funds secured in full by Stolz's parents, GECC contends that, at most, only $269,718 is available to Stolz's parents to secure the $500,000 Burbank loan. In addition, GECC contends that an issue is warranted as to Stolz's ability to effectuate his full-time integration proposal at the Burbank station since the Caldwell television application also contains a pledge by Stolz that he will be integrated part-time at the Caldwell station.

41. GECC further contends that since the proceeding must be remanded to explore the issues it raises above, the Board should also add a technical violations issue against Royce based on the issuance of four Official Notices of Violations against Station KWOD(FM), Sacramento, California, between February 1977 and April 1982. GECC notes that Stolz is the general manager and chief engineer of Station KWOD(FM). Even though it concedes that the test for reopening the record may not have been met in this regard because three of the Notices predate the closing of the record herein, GECC argues that since a technical violations issue was added against it based on Notices of Violations, a similar issue must be added against Royce. Finally, GECC requests an "ineptness" issue against Royce premised on the technical violations and reporting omissions alleged above, and other shortcomings previously alleged (and considered in our *Decision*, paras. 48–52).

42. The Board will not reopen the record and add the requested issues. It is well established that a petition to reopen the record must be supported by newly discovered evidence, that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts at the time of hearing, and that the new evidence, if true, would affect the decision. *See The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 62 (1971); *Julie P. Miner*, FCC 76R-47, 36 RR 2d 313 (Rev. Bd. 1976). Here, GECC's petition fails to meet the above test. Its allegations regarding the technical violations are, by its own acknowledgement, not newly discovered or diligently raised; and, while the filing of the television applications occurred post-hearing (respectively, February 16 and August 8, 1982), GECC's contentions based on those filings are insufficient to affect our ultimate disposition in this proceeding. We shall turn first to the requested issues concerning Section 1.65, financial qualifications, and effectuation of Royce's integration proposal—all based on Royce's alleged failure to report the two television applications.

43. Initially, with respect to the requested Section 1.65 issue, we

perceive no intent on the part of Royce to deceive the Commission or to conceal information relating to its television applications nor do we find "a pattern of flagrant disregard for our reporting requirements" of the type found with respect, for example, to GECC. *See pcra.* 11, *supra.* Nor has GECC demonstrated that the unreported information could be of decisional significance. *See Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210, 1220 (Rev. Bd. 1982). Royce submitted the affidavit of Stolz in its opposition to the petition to reopen wherein he averred that he was unaware that the Burbank application had to be amended after it had been granted by the ALJ's Initial Decision (Royce Opposition, Exh. D). The unlikelihood of any intent to conceal on his part is demonstrated by the fact that the instant Burbank application was specifically referenced in both of the television applications. *See David Jordan*, 51 FCC 2d 940 (Rev. Bd. 1975). And, although GECC argues that Royce should have been on notice because of its previous reporting problems (*see Decision*, at paras. 48–49, where Royce's failure to report two other pending applications was considered) that subsequently filed applications had to be reported, there is nothing before us to contradict Stolz's attestation that he misunderstood his reporting obligation to end upon grant of Royce's application by the *I.D.* We do not here condone Royce's reporting failures; however, we find no evidence of deliberate concealment or of an aggravated pattern of nondisclosure such as would warrant further action. *See Washington Association for Television and Children (WATCH)* v. *FCC*, 665 F.2d 1264, 1970 (D.C. Cir. 1981); *Radio Station WABZ, Inc., supra.* Royce's failures are to be contrasted with the situation at KROQ where the reporting failures were critical and recurring, even after the Commission's express warning. *See* para. 11, *supra.* And, for the reasons stated below, we find no decisional impact on Royce's financial qualification or integration plans resulting from the omissions in question.[72]

44. With regard to GECC's request to explore Royce's finances, we agree with the Mass Media Bureau that Royce's television application filings have no decisional impact on Royce's financial qualifications. In opposing reopening, Royce explained that although its original financial plan was based upon a showing of construction costs and anticipated *first year* operating expenses, subsequent Commission standards require an applicant merely to show that it could meet *three month* operating expenses and construction costs. As calculated by Royce, those latter costs come to $165,095.10. Thus, even assuming, as GECC calculates, that the collateral available to Stolz's parents to secure the Burbank loan would be reduced by their

[72] In addition to the reasons stated below, we point out that filing of the television applications would have no impact on the diversification criterion of the standard comparative issue. It is Commission policy not to take account of applicants' other pending applications. *See Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (Rev. Bd. 1968).

other collateral commitments to $269,718, this figure would appear to be more than sufficient to secure the considerably lesser amount needed to finance the subject station. In any case, however, and in order to provide further assurance of its financial qualifications, Royce has submitted an amended loan commitment letter from the Bank of America, Sacramento, California, which reduces the amount of the loan and matching collateral obligation of Stolz's parents to $250,000. Since this figure is more than sufficient to meet Royce's costs and there is no question that Stolz's parents can provide at least that much collateral, we are satisfied that no financial issue is required.[73]

45. With respect to GECC's challenge to Royce's integration proposal (*i.e.*, Stolz's promise to devote full time to the Burbank facility as general manager and chief engineer—*see Decision*, at para. 44—and his proposal to work part-time at the Caldwell station), Royce points out that the Caldwell television application identifies a Mr. Stelljes as the full-time, on-site general manager and specifies that Stolz will be "on-site only on weekends, holidays and on an as-required basis." Royce Opposition, pp. 21–22 (*citing* Caldwell application). Thus, Stolz's commitment to Caldwell is minimal on its face and does not negate his full-time proposal at the Burbank station. While GECC also refers to Royce's managerial role at his Desert Hot Springs proposal, this obligation was fully considered in our *Decision* (at para. 49) and not found to impact on the Burbank proposal. The Caldwell proposal does not appear by its terms to contradict the Burbank proposal. In addition, Royce submits an affidavit from Stolz affirming his proposal to serve as the full-time general manager of the Burbank station and pledging again to subordinate his other commitments to his Burbank proposal (Royce Opposition, Exh. L). Based on this representation, there is no record basis for discrediting Stolz's proposal to accommodate his lesser obligations to the other stations applied for as well. *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), relied on by GECC, is inapposite. In *Berryville*, the Board found no reasonable likelihood

[73] The new financial commitment was provided in a petition for leave to amend, filed by Royce on December 2, 1982. GECC opposes the financial portion of the amendment on the ground that the amendment was necessitated by a voluntary act on the part of Royce. We will grant the petition for leave to amend and accept Royce's amendment. Good cause exists for acceptance of the amendment. A showing of involuntariness is not required where, as here, the amendment tends to remove a disqualifying defect and confers no comparative advantage. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488–89 (1981). Royce acted diligently in obtaining the new commitment once potential disqualifying questions had been raised, the proposed amendment would not cause undue disruption of the Commission's processes, and no party would be unfairly prejudiced by the amendment. *See Gross Broadcasting Co.*, 46 RR 2d 1091, 1097–98 (1979), *Azalea Corp.*, 31 FCC 2d 561, 563, 22 RR 2d 909, 911–12 (1971). The other information contained in the amendment will be accepted for the limited purpose of keeping Royce's application up to date.

that the principal involved would effectuate his integration proposal because of the unusually high number of hours in the proposed work week, the division of responsibility among several stations in different communities, heavy drive time, and improbable relocation plans. Here, by contrast, Stolz has consistently represented that his primary commitment is to the Burbank facility and that his other obligations will be handled by telephone or periodic visit when needed. *See Decision*, at para. 49. Therefore, Royce's failure to report the filing of the television applications provides no basis for enlargement of issues relating to reporting (§ 1.65), financial qualifications, or effectuation of Royce's integration proposal.

46. Nor do we find any grounds for the addition of a technical violations issue based on infractions at KWOD(FM). As noted previously (*see* para. 42, *supra*), GECC does not allege that the technical violations, by themselves, justify reopening the record (GECC Petition to Reopen at n. 4) and we agree with this assessment. The KWOD violations, in most part, occurred more than a year before the record was closed. Additionally, on their face, the Notices do not appear to reflect any repeated violations. Royce asserts that the infractions were not, in fact, repeated, and further states that the licensee quickly corrected the violations after they were brought to its attention. See Royce Opposition, at p. 19. GECC's argument that a technical violations issue must be specified against Royce because a similar issue had been added against it is without merit. By comparison, the infractions alleged and subsequently proved against GECC involved a great number of serious and continuing technical violations occurring over a period of several years. *See Decision* at paras. 22–27. GECC's technical shortcomings stand in sharp contrast to the infractions involving KWOD(FM). *Compare Memorandum Opinion and Order*, FCC 79M-1303, released November 5, 1979 (adding technical violations issues against GECC). Finally, GECC's allegations do not warrant an ineptness issue. An ineptness issue will be added only where an applicant's conduct has concerned relevant matters of major significance and where the conduct has disclosed a pattern of carelessness and inadvertence. *Edward G. Atsinger, III, supra*. We agree with the Bureau that the alleged shortcomings considered here (and previously in our *Decision*) do not disclose a serious pattern and have not been shown to be of major significance. In our view, it would be inappropriate to specify an ineptness issue based merely on an accumulation of allegations where no single allegation or combination of allegations is sufficient to support addition of an issue. Again, a comparison with the matters which led the Commission to designate an ineptitude issue against GECC is instructive. *See Decision*, at paras. 5–18. p1 47. On December 17, 1982, GECC filed a further petition to reopen record and to enlarge issues to include financial, Section 1.65, and misrepresentation issues against Royce based on material contained

in an application amendment filed by Royce on December 2, 1982. (*See* note 73, *supra*.) That material was also attached to Royce's opposition to the November 1982 petition to reopen and to enlarge issues and includes the new commitment letter from the Bank of America, the letter from Stolz's parents agreeing to provide collateral for the loan, the balance sheet of Stolz's parents, revised cost estimates using the three month standard, and a list of other broadcast applications filed by Royce. *See* para. 44, *supra*. With respect to its request for a financial qualifications issue, GECC renews its claim that Royce is financially unqualified because Stolz's parents have insufficient collateral to support the loan guarantees they have pledged for three of Royce's proposed stations. We disagree. The Bank of America loan commitments are for $250,000 and $200,000 for the Burbank and Caldwell applications, respectively, and the Desert Hot Springs application is to be financed by a loan of $100,000 from the Crocker National Bank, Sacramento, California, secured by a Certificate of Deposit in like amount to be provided by Stolz's parents. Thus, the total collateral requirements for the three stations is $550,000. The Bank of America requires security for its loans to be in the form of stock certificates valued at 75% of present market value and savings accounts. Stolz's parents' balance sheet of November 22, 1982, shows $380,000 available in stocks and bonds, $204,000 in cash deposits in the Bank of America, and $116,000 in cash deposits in other banks. Thus, counting only 75% of the value of the stocks and bonds ($285,000), the $204,000 cash on deposit with the Bank of America, and the $116,000 on deposit elsewhere, Stolz's parents still have sufficient funds ($605,000) to provide collateral to support the loan guarantees for all three stations. The fact that they have agreed to provide collateral of up to $500,000 for the Burbank loan from the Bank of America is not significant since the bank is now requiring only $250,000.[74] GECC's unsupported contention that it is unrealistic to believe that Stolz's parents will tie up most of their liquid assets for their son's stations provides no basis for a financial issue; it is based on sheer conjecture. *See* Section 1.229(d) of the Commission's Rules. Finally, a financial qualifications issue will not be specified on the grounds that Royce's costs estimates are outdated, as argued by GECC. GECC's contention is largely speculative because it has not supplied an affidavit of a person with personal knowledge of to what extent the costs may have increased and as to how much the costs should be at present

[74] GECC also suggests that Royce's Citrus Heights proposal is likely to be financed in the same manner as its other applications and thus adds support to its argument for an issue. We disagree. Royce has certified its financial qualifications for Citrus Heights pursuant to current Commission practice and that is all it is required to do. GECC's speculative contentions on how Royce will finance this proposal do not meet the requirements of Section 1.229(d) for enlargement of the issues.

(*see* Section 1.229(d)). Nor do Royce's cost estimates appear to be unreasonable on their face. *See Electrocum, Inc.*, 53 FCC 2d 201, 204–05 (Rev. Bd. 1975). In any event, Royce's estimate of construction and operating expenses is $165,095.10, and since it has a $250,000 loan available to meet its costs, this leaves a financial cushion of almost $85,000 to cover any increased expenses.

48. GECC again contends that a Section 1.65 issue is warranted because Royce has admitted, by implication in filing its amendment, that the filing of the other broadcast applications was required to be reported under Section 1.65. It further contends that the reduction in the bank commitment from $500,000 to $250,000 for the Burbank application may show a deterioration in Stolz's financial situation that should have been reported under Section 1.65. Finally, GECC contends that a misrepresentation issue is warranted against Royce because Royce had a motive to conceal the information in the amendment and only filed it after being compelled to do so by GECC's petition to enlarge issues. GECC's allegations do not warrant addition of either issue. Royce has never contended that it made no error in failing to report the filing of its other broadcast applications. However, it explained to our satisfaction why the omissions occurred. (*see* para. 43, *supra*.) Moreover, we agree with Royce that the fact that it has now amended its Burbank application shows merely that is attempting to correct its earlier oversights once those oversights were brought to its attention. Moreover, no issue will be specified merely on GECC's speculative contention that Royce's financial situation may have deteriorated which Royce should have reported; in fact, Royce demonstrated the availability of more than enough funds to meet its costs. And, finally, GECC offered no articulated rationale why a misrepresentation issue should be added. Contrary to its allegations, Royce's amendment contained no information adverse to its qualifications and thus no motive to conceal is apparent. GECC has utterly failed to meet the test necessary for the addition of a misrepresentation issue. *See, e.g., Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

CONCLUSIONS

49. In its prefatory arguments, GECC invites the Board to contemplate the larger policy implications of its *Decision* and states[75]:

> The decision in this case, if permitted to stand, sends the wrong signal to the broadcasting industry and those who are considering risking capital to enter it at a time when the Commission is actively seeking to disentangle itself from the excesses of regulation and to rely more on marketplace forces. This decision says, in effect, that if you risk your capital to enter the broadcast business and you run

[75] GECC Petition, at p. 2.

into financial difficulties that in turn create temporary problems of compliance with FCC rules and policies, you stand to lose everything.

The contrapositive: were we to grant GECC's ultimate prayer, it would "signal" that a licensee could (1) accept a Commission license without troubling to become cursorily acquainted with fundamental FCC rules; (2) delegate its bedrock responsibilities to an inexpert promoter; (3) apply for an additional station at a time when it is incapable of supporting its initial station; (4) violate all manner of important FCC rules; (5) transfer control of its stations despite a pointed Commission admonition; and (6) fail to file a timely "comparative case" in the face of competing applications—and nonetheless be renewed over the opposition of a qualified competing applicant. Signals aside, that is not the law. *See generally Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (1982); *Simon Geller*, 90 FCC 2d 250 (1982), *appeals docketed sub nom. Committee for Community Access, et al.*, Nos. 82-2314, 2373, 2400 (D.C. Cir.).

50. It is true that the GECC principals have been thoroughly open and candid in this proceeding; indeed, they have been startlingly candid with respect to their shortcomings as a collective licensee. As the torturous record here attests, the KROQ experience has been a nightmare—for regulatee and regulator alike. The licensee principals were not maleficent, merely hapless; it is unarguable that they were "in over their heads," financially and organizationally. In a not-too-distant renewal case, *West Coast Media, Inc.* v. *FCC*, *supra*, the Commission observed that the ALJ—who had granted a 1-year renewal—had found:

> '. . . that the West Coast principals are honorable men who have erred because of ignorance and misjudgments. Experience has dispelled their ignorance, and misjudgments are less likely to occur.' 79 FCC 2d at 622. The Commission nonetheless reversed the ALJ, denied the renewal, and held:
>
> In our view, there is simply no justification to give inexperienced broadcasters the advantage of performing below minimal renewal standards for a license term without suffering the same consequences which experienced broadcasters would incur. . . . '[i]nsubstantial past performance should preclude renewal of a license. The licensee, having been given a chance and having failed, should be through.'

Id. (footnote and citation omitted).[76] We recognize that non-renewal will have serious ramifications for the original principals of GECC even though they appear to have been largely indemnified by Kenneth Roberts with respect to their earlier liabilities. Still, we must apply the law dispassionately and, in that connection, find as

[76] In *West Coast Media*, the Commission stated that "[i]t is expected that principals entering the broadcast field for the first time will hire experienced managers until they have gained experience" (*see id.*). Even here, however, GECC failed in that it reposed its public interest responsibilities entirely in Gary Bookasta (*see I.D.*, paras. 9-20, Conclusion, para. 3), a non-principal who had no prior experience in managing broadcast stations. Tr. 2956-58.

well that KROQ's specialized format (Spanish language) is not a fulcrum for renewal.[77] *See, e.g., Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423 (1980), *aff'd per curiam sub nom. Cosmopolitan Broadcasting Corp.* v. *FCC*, No. 80–1902 (D.C. Cir., filed June 29, 1981), *cert. denied*, 454 U.S. 1143; *Simon Geller, supra.*

51. Communications law apart, it is not easy to be censorious of the conduct of Kenneth Roberts. Finding himself deeply invested in GECC at a time when the original principals were unwilling or unable to support KROQ, Roberts stepped in with enough financial support, at least, to permit the station to recommence operations in 1976 after a 2-year lacuna. Thereafter, and unable to rely on the controlling principals to maintain operations or to protect his multi-million dollar investment, Roberts converted loans and options into GECC equity and supplied sufficient funds after 1976 to permit the restoration of broadcasting operations. Nevertheless, even after Roberts took the lead in 1976, many violations of FCC rules continued. Thus, for example, while Roberts did expend funds after 1976, KROQ's engineer Darryl Wampler complained in December 1977, that KROQ's technical operation was still far below legal specifications. *See Decision*, at para. 27 (*reprinting* Bur. Exh. 238). No doubt, GECC was disinclined to commit more generously after 1977 in view of the fact that KROQ's license appeared in serious jeopardy by virtue of the Commission's designation of the license for hearing on many disqualifying issues. This hazard was accompanied by the presence of competing applications. A licensee's disincentive to invest in such circumstances is clearly a negative by-product of the comparative renewal process, especially since "upgraded" performance receives little, if any, weight. *See* para. 7 *supra*. On the other hand, Roberts was aware of his risk when he converted to an equity owner of GECC and he also must stand or fall on KROQ's record. We cannot accede to Roberts' requests to change his present legal status (1) from *de jure* GECC principal back to "innocent creditor"; or (2) from a party who withdrew his individual competing application in 1976 (*I.D.*, para. 32) to a separate applicant now entitled to "personal" comparative consideration *vis-a-vis* Royce (and/or GECC). Finally, there is no precedent which would permit the post-hearing sale of KROQ's license to Roberts in the wake of the disqualification. *See* paras. 33–39, *supra*.

52. As to Royce, we have recognized both in our *Decision* and hereinabove that its application is not perfect and that several rule violations have attended its record. However, in light of the fact that Royce's application has been on file since 1975 (*see* 56 FCC 2d 752), occasional ministerial reporting lapses—while not condoned—are

[77] GECC urges renewal, in part, on the basis of its Spanish language format. *See, e.g.*, GECC Petition, at pp. 1–2; GECC Supplement, at pp. 19–20. However, GECC does not allege, nor could it (*see Broadcasting Yearbook 1982*, at p.C-25), that KROQ is the sole Spanish language station in its service area.

not entirely unexpected. Nor are changes in financial plans. But, Royce's limited derelictions would warrant, at most, a comparative demerit of non-decisional magnitude. *Cf. WADECO* v. *FCC, supra.* More troubling are Stolz's ambitious personal integration plans with respect to newly-applied-for television stations. Although none of Stolz's later integration pledges is so strong as to contradict his full-time (40 hour per week) proposal for the instant AM station, Stolz has maneuvered as close to the perimeter as should be permitted without further testing his *bona fides* on this matter. However, to date, Royce has demonstrated no conduct or condition warranting absolute disqualification or remand.

53. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Royce International Broadcasting Company on December 2, 1982, and by George E. Cameron, Jr. Communications, Inc. on September 30, 1982, ARE GRANTED, and the amendments ARE ACCEPTED; and

54. IT IS FURTHER ORDERED, That the petition and further petition to reopen the record and to enlarge issues filed November 5 and December 17, 1982 by George E. Cameron, Jr. Communications, Inc. ARE DENIED; and

55. IT IS FURTHER ORDERED, That the motion for leave to file a supplement to petition for reconsideration filed November 10, 1982, by George E. Cameron, Jr. Communications, Inc. IS GRANTED, and the supplement IS ACCEPTED: that the motion to accept late-filed opposition filed November 9, 1982, by Royce International Broadcasting Company IS GRANTED; and that the petition for reconsideration filed October 25, 1982, as supplemented November 10, 1982, and the request for oral argument filed November 10, 1982 by George E. Cameron, Jr. Communications, Inc. ARE DENIED; and the petition for reconsideration filed October 25, 1982, by Kenneth J. Roberts IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

Application, Processing of
Domestic Fixed Satellite
Reconsideration, Petition for, Denial of
Satellite Domestic Communications

Petition for Reconsideration of Commission's 1982 Order establishing processing group for domestic fixed satellite applications denied. Petitioner failed to substantiate claim of mutual exclusivity, and Commission procedure determined to be more effective and efficient than alternative advanced by petitioner. *–GTE Satellite Corp.*

FCC 83-183

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Processing of pending space station applications in the domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: June 20, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. Before the Commission is GTE Satellite Corporation's (GSAT's) petition for partial reconsideration of *Domestic Fixed Satellite Service*, 90 FCC 2d 1 (1982) (hereinafter *Order*). In its petition, GSAT argues that our *Order* is unlawful insofar as it bars domestic satellite applications filed after May 18, 1982 from consideration with earlier filed applications with which they may be mutually exclusive. Advanced Business Communications, Inc. (ABCI), American Satellite Company (ASC), Rainbow Satellite, Inc. (RSI), RCA American Communications, Inc. (RCA Americom), Satellite Business Systems (SBS) and United States Satellite Systems, Inc. (USSSI) filed oppositions to GSAT's petition. Because the alleged condition of mutual exclusivity does not exist, and because our processing procedure is preferable to that proposed by GSAT, we deny reconsideration.

I. *BACKGROUND*

2. In the *Order* we adopted a procedure to process as a group the then-pending domestic satellite space station applications. Applications filed subsequent to the adoption of the *Order* are to be

processed after those then on file. The applications were "frozen" in order to define the group for processing purposes. This procedure allows us to act upon the applications in a timely manner and to assign orbital locations efficiently. We noted that in assigning orbital locations, we must consider the specific proposals of the applicants to minimize potential interference and to maximize the number of satellites to be accommodated. Thus, the *Order* was made effective immediately upon adoption because we feared that speculative filings otherwise would be encouraged, thus delaying action on any of the then pending applications. However, in defining this group we did not preclude favorable action on subsequently filed applications. Thus, we emphasized that our group approach did not prevent the subsequent filing, or granting, of new applications for the 4/6 GHz bands, the 12/14 GHz bands or the 18/30 GHz bands.

II. *PLEADINGS*

3. GSAT asserts that the usable portions of the orbital arc in the 4/6 and 12/14 GHz bands are fast reaching the saturation point. Thus, according to GSAT, the grant of one application may preclude the grant of another and there exists a very real possibility of mutual exclusivity in applications for orbital assignments. Therefore, the Commission's processing *Order* is an unlawful cut-off and must be modified. GSAT asserts that the *Order* is unlawful because we did not give advance notice to potential applicants prior to its adoption. Additionally, GSAT claims that the *Order* "sub silentio" repealed the Commission's general procedural rule—Section 1.227(b)—which assures comparative consideration to prospective domestic satellite applicants in mutually exclusive situations. According to GSAT, insofar as the Commission's *Order* bars domestic satellite applications filed after May 18, 1982 from comparative consideration with earlier-filed applications with which they might be mutually exclusive, the *Order* is in conflict with the court's ruling in *Kessler*[1] in that it denies applicants their substantive rights that flow from *Ashbacker*.[2] GSAT also believes that the Commission's

[1] Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). In *Kessler* the Commission imposed a "freeze" on the acceptance of applications for most standard radio broadcast stations without providing advance notice. The action was taken so the Commission could reexamine the standards used in assigning new or changed standard broadcasting facilities. In affirming the Commission's decision, the *Kessler* court stated, *inter alia*, that pre-freeze applications may not be processed and granted without also considering timely-filed post-freeze applications with which they are mutually exclusive.

[2] Ashbacker v. FCC, 326 U.S. 327 (1945). In *Ashbacker* two applications had been filed, one for a new broadcast station and one for a change in frequency. For reasons of electrical interference both could not be granted. The Commission granted one application and set the other for hearing. The court reversed, finding "if the grant of one application effectively precludes the other, the statutory [47 U.S.C. § 309] right to a hearing which Congress has accorded before denial of their applications becomes an empty thing." 326 U.S. at 330.

1980 Processing Order, 77 FCC 2d 946 (1980), which similarly identified a group of applications for simultaneous processing, is distinguishable. In that case there was no possibility of mutual exclusivity between applications. Today, GSAT argues, this is no longer true.

4. In particular, GSAT claims that the usable orbital arc at 12/14 GHz for its dual-polarized satellite system and 50-state coverage is effectively limited to the arc from 98° to 106° West Longitude. According to GSAT, orbital locations outside of this limited arc are inadequate for its purposes. In light of current authorizations and pending applications, GSAT continues, the assumptions of 1980 as they relate to mutual exclusivity are no longer valid. Therefore, GSAT argues, the Commission must modify its procedures in order not to preclude comparative consideration of later-filed applications that may be mutually exclusive with the applications that have been grouped for processing.

5. GSAT contends that the Commission may legally accomplish its fundamental objectives of allocating the usable orbital arc in the most efficient manner possible only through a modification of the processing procedure contained in our *Order*. Specifically, it suggests that the Commission defer action on all pending applications until the orbital spacing policies are resolved in CC Docket No. 81-704.[3] The Commission should then allow a discrete period in which existing applicants may amend their applications and new applicants may file applications in light of new rules and policies adopted in CC Docket No. 81-704. Only then, GSAT states, should the Commission process and grant the pending applications.

6. Six parties filed oppositions to GSAT's proposal. Although all opponents address the merits of GSAT's arguments, USSSI and RSI also assert that GSAT lacks standing to petition for reconsideration. The opponents all agree that there is, at present, no potential mutual exclusivity among the 12/14 GHz satellite applicants.[4] They identify the major problem with GSAT's petition as its failure to demonstrate that GSAT is in a mutually exclusive posture vis-a-vis those who had applications on file prior to the adoption of our *Order*.

7. Specifically, ASC observes that to create a mutually exclusive

[3] Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981). This proceeding is resolved in a companion order adopted today.

[4] USSSI, while it rejects GSAT's claim to mutual exclusivity on the grounds that GSAT's applications were untimely filed, does believe that mutual exclusivity can arise between applications on file before the processing *Order* was adopted. USSSI believes that "Ashbacker rights arise when a timely filed and fully qualified domsat applicant is granted facilities substantially different from or inferior to those requested, and another applicant is given the authorization sought by the first or one which is mutually exclusive with it." USSSI's Opposition, fn. 1. Because it is unnecessary to the resolution of GSAT's petition, we need not and do not address USSSI's argument.

situation GSAT relies on the assertion that its GSTAR satellites must be located within a small 8° segment of the orbital arc. Based upon its own self-defined concept of mutual exclusivity, GSAT alleges its application must be considered with the group selected by our *Order* for processing. ASC believes that GSAT should not be allowed to capitalize on the technological limitations of satellites it designed to the detriment of other satellite applicants. ABCI agrees that 50-state coverage and dual polarized satellites are factors that make 98° to 106° West Longitude the most desirable portion of the orbital arc. However, ABCI points out that, even taking into account these factors, an extended arc is in fact usable.[5]

8. ABCI also observes that nothing prevents the subsequent filing of an application that may seek one or more orbital positions previously assigned to another entity. Nor, ABCI believes, does anything prevent the Commission from later adjusting assignments so as to achieve a more efficient and equitable scheme.[6] The Commission could, ABCI believes, assign positions to the current group and still retain flexibility to make subsequent assignments. For example, it could reserve certain locations based on consideration of various criteria such as 50-state coverage.

9. ABCI, ASC, RCA Americom, RSI and SBS all state that the Commission's reserved right to assign orbital positions at variance with what an applicant requests, and to require operators to move their satellites after they are in orbit, prevents mutual exclusivity so long as new applicants can be accommodated in the orbital arc. Both RSI and RCA Americom state their belief that there still will be locations available, even if all pending applications in the current processing group are granted. Thus, according to RSI and RCA Americom, GSAT's application is not mutually exclusive with any other.

10. All opponents believe that the Commission's decision is sound. Because each satellite application may impact the entire satellite service, they argue, a group processing approach is the most expedient method of assigning orbital locations. Several also agree that discouraging speculative filings is a legitimate reason for not giving notice of the procedure before its adoption.

11. All of GSAT's opponents object to any modification of the processing order. They claim it would only result in additional delays and invite speculative filings. These delays, RCA Americom asserts, would culminate in the inefficiencies of comparative hearings. Such

[5] ABCI notes that it too proposes a satellite system with 50-state coverage and dual polarized satellites. However, it acknowledges that the orbital locations it requests between 85° and 125° West Longitude will provide acceptable service at 12/14 GHz.

[6] This, ABCI remarks, is especially true since the launch of many of the satellites authorized in this present group will not take place for three or four years.

delays, SBS comments, would injure both the pending applicants and the public interest in the timely implementation of facilities and service by qualified carriers. ABCI concludes that the result of GSAT's proposal would be a nightmarish situation where the Commission's processes would be overwhelmed and the public denied additional service for a considerable period of time.

III. *DISCUSSION*

12. We are not persuaded to grant GSAT's petition for reconsideration.[7] First, GSAT has not established that the *Order* impermissibly compromises any of its legal rights. In particular, GSAT has failed to demonstrate mutual exclusivity between its applications and those in our current processing group. Accordingly, because such mutual exclusivity does not exist, GSAT's arguments that our *Order* violates the principles of *Ashbacker* and *Kessler* are without merit. Second, we believe that the issuance of our *Order* without notice was reasonable and required by valid Commission objectives. Finally, in balancing the interests of the various parties, as well as the right of the public to receive prompt and efficient service, we believe the processing approach defined by the *Order* is superior to that proposed by GSAT.

13. GSAT claims that our *Order* is unlawful in that it denies mutually exclusive applicants substantive rights that flow from *Ashbacker*. In *Ashbacker*, the court held that when two bona fide applications are mutually exclusive the Commission shall not grant one without affording a hearing to both. To do otherwise deprives the loser of the opportunity for a hearing provided by Section 309 of the Communications Act. A mutually exclusive situation arises when the grant of one application for all practical purposes precludes the grant of another. Thus, to invoke *Ashbacker* or *Kessler* GSAT would have to demonstrate that its applications are mutually exclusive with those we have granted today. It has failed to do so. None of the applications granted today precludes favorable action on GSAT's applications.

14. Contrary to GSAT's speculative claims, all usable orbital locations have not been assigned by today's *Orbit Assignment Order*.[8] GSAT asserts that even with a 2° orbital spacing standard, the entire usable arc—from 70° to 135° West Longitude—would be consumed if all pending and possible applications are granted. Notwithstanding GSAT's assertions, we consider the usable orbital arc in the 12/14 GHz band to be between about 60° and 132° West Longitude and thus larger than that assumed by GSAT. Moreover,

[7] Two opponents argue that GSAT lacks standing to petition for reconsideration. However, we believe it has demonstrated sufficient interest to address the merits of its argument.

[8] Memorandum Opinion and Order, FCC 83-186, adopted today.

on-ground spares are not, as GSAT believes, an express exception to our processing *Order*.[9] Hence, after today's assignments, and with the adoption of reduced spacing criteria in CC Docket No. 81–704[10], there are still orbital locations available in the usable portion of the geostationary satellite arc. Several of the additional locations available both for new entrants and for the expansion of existing systems, such as GSAT's, are specifically identified in today's *Orbit Assignment Order, supra*.

15. GSAT also argues that, because it seeks orbital assignments between 98° and 106° West Longitude, the grant of any application within that orbital arc would render its application mutually exclusive by definition. According to GSAT, its satellite system is effectively limited to this portion of the orbital arc. However, GSAT's claim is based on broad generalizations rather than on concrete engineering analyses. No affidavits were submitted by GSAT to provide specific facts in support of its claims.

16. Consequently, GSAT had not established its claim of mutual exclusivity. In the first place, we note that at least one orbital location is available for assignment in the portion of the orbital arc within which GSAT claims it must be located. But more importantly, in making such a claim, GSAT ignores our satellite processing procedures. These policies have successfully expedited the development of this dynamic industry, and continue to accomodate an increasing number of satellites in orbit.

17. The Commission has allocated spectrum differently in different services given the particular aspects of the services. For example, in many terrestrial services it is common for only specific channels to be available for assignment to licensees in specific areas of the country. In such instances two or more applicants requesting the same frequency allotment cannot be accommodated. In contrast, use of the radio spectrum in the domestic fixed satellite industry is assigned in a different and more flexible manner than in many terrestrial services. From the beginning of the service, the Commission has recognized the high risk, large capital investment requirements and long lead times characteristic of the domestic satellite industry. We believe that the technology must be developed by those who take the risks, of both success and failure, in the marketplace. Thus, rather than inflexibly prescribing the technical parameters of

[9] GSAT claims that its third application, requesting authority to launch its on-ground spare, falls within the paragraph 9 exception of our *Order* and should thus be processed along with the applications on file prior to its adoption. We disagree. The exception articulated in Paragraph 9 was intended to allow for the filing of launch applications for satellites whose construction was previously authorized for in-orbit use or as emergency replacements of failed satellites. *See* Domestic Fixed Satellite Service, 77 FCC 2d 956 (1980), for an elaboration of the conditions under which this exception could be claimed.

[10] Report and Order, FCC 83–184, adopted today.

orbital and frequency assignments, the Commission relies initially on applicants to design their own proposals for the Commission's consideration.[11] The Commission has also recognized the inherent flexibility of this technology to respond to changing circumstances and growing user needs. This includes the capability of satellites to provide adequate service over a significant range of orbital locations. For such fixed satellites, the entire allocated frequency band is assigned at the outset to insure sufficient capacity to make it economically viable over its lifetime.[12] However, orbital locations, which consider the applicant's needs along with those of other operators, are assigned to individual domestic satellites by Commission order. These assignments are temporary in nature, in that we have reserved the right to change them or adjust spacings between satellites if changing conditions so require.[13]

18. The Commission's flexible licensing policies and procedures have avoided institutional restraints and inhibitions to the development of the technology. Thus, the acquisition of experience with the technology has not been delayed. Additionally, this flexibility has allowed us to adjust our policies as experience dictates. The public benefits which have flowed from this rapidly growing industry have resulted from our ability to accommodate all of the previously filed applications with a minimum of regulatory interference, delay, or uncertainty. This flexibility is important to accommodate new entrants, the changing requirements of existing carriers and satellites proposed by other countries. Thus, an applicant's request for a particular orbital location can not be dispositive of the location actually assigned by the Commission.

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[11] Domestic Communications Satellite Facilities, 22 FCC 2d 86, 93 (1970).

[12] This is not necessarily the case for other satellite services, such as Direct Broadcast Satellites, where different technologies, international regulations and economic considerations may make it necessary or feasible to assign only a portion of the allocated spectrum, or specific channels, to an individual licensee.

[13] All satellite launch authorizations make the orbital assignment subject to change on 30 days notice. *See, e.g.*, Orbit Deployment Plan, 84 FCC 2d 584 (1981). There have been a number of satellite relocations after initial positioning in orbit. These relocations were performed for a variety of reasons. For example, Westar II was relocated from its initial 90° West Longitude location to 123.5° West Longitude to provide service to Alaska. *See* Western Union Telegraph Company, 54 FCC 2d 976 (1975). Later, the RCA Satcom I satellite was moved from its initial location when Satcom II was launched to provide improved service to Alaska. *See* RCA Global Communications, 58 FCC 2d 656, 659 (1976). Both Westar I and Westar II were relocated at 79° West Longitude after their replacement by Westar IV and V at 99° and 123° West Longitude, respectively. *See* Western Union Telegraph Company, FCC 83–196, adopted today. *See also* COMSAT General Corporation, 84 FCC 2d 547, 558 (1981) (relocation of COMSTAR D-1). Finally, domestic satellites have been relocated to accommodate new systems, Satellite Business Systems, 86 FCC 2d 180 (1981) (to accommodate GSAT's initial satellite), and to adjust orbital spacings, Orbit Deployment Plan, *supra* at 614–615 (relocation of COMSTAR D-4).

19. We have also concluded that conflicting requests by different applicants do not give rise to comparative hearing rights.[14] The desire of an individual applicant for a particular location is, and must be, balanced against the requirements of other users (domestic and foreign) if the most efficient and practical use is to be made of the spectrum and the amount of service maximized. Assigning orbital locations is a complex process involving many factors, parties and even, at times, foreign countries. Although private interests may be considered, when they are balanced against strong public considerations, the latter must prevail. In addition, there are no significant differences between nearby locations in the same portion of the geostationary arc.[15] Thus, the objective of our policies and procedures has been to accommodate as many applicants as is efficiently possible with a minimum of administrative costs or delays. In particular, artificial or inflexible definitions of mutual exclusivity have been avoided and an increasing number of satellites have been authorized to satisfy growing demand. We have thus avoided traditional administrative procedures, such as comparative hearings, that have been used in other services that we regulate. The

[14] Western Union Telegraph Company, 46 FCC 2d 162, 165 (1974). Although a hearing cannot be invoked with respect to the actual orbital location assigned to any particular satellite, such hearing rights might be invoked in the event all applications of fully qualified applicants within a processing group cannot be granted. However, even in such a situation, the Commission has wide discretion to fashion procedures to insure that administrative proceedings do not delay service to the public. *See e.g.*, Domestic Fixed Satellite Earth Stations - Alaska Bush, 81 FCC 2d 304 (1980), concerning our rulemaking powers under such circumstances.

[15] Orbit Deployment Plan, *supra* note 13 at 598. In the past, applicants have requested identical locations in the orbital arc. We have, however, resolved these conflicts through our processing procedures and orbital assignment orders. For example, in a previous conflict over orbital locations, the Commission has found in GSAT's favor with respect to the particular locations at issue. *See* GTE Satellite Corporations, 84 FCC 2d 562 (1981) and Satellite Business Systems, 86 FCC 2d 180 (1981). GSAT is now using these decisions to support its claim of mutual exclusivity. However, those decisions simply resolved a controversy between the two parties. Although we indicated the desirability of GSAT's satellites being located within a specific portion of the orbital arc, we were focusing only on the accommodation of GSAT's initial in-orbit satellites. Engineering analyses were submitted in those proceedings that demonstrated that operations outside of the desired portion of the orbital arc were feasible, and we made no finding that service would be inadequate if GSAT's satellites were located outside of this portion of the orbital arc. Thus, GSAT cannot use the rationale of those decisions as support to limit its additional GSTAR satellites, which are to be used to satisfy growth requirements, to a particular portion of the orbital arc. Growth satellites carry only a portion of the total system traffic, and services can be routed over any of the multiple satellites within the system which provides an adequate signal quality. Thus, growth satellites can not have the same constraints as the initially authorized satellites over which all traffic must be routed during the start-up of the system. Rather, these additional system expansion satellites often must be located in adequate, though less than optimum, orbital positions, if they are to be accommodated at all.

result has been an industry that has served the public interest through the timely implementation of facilities and services.

20. Similarly, just as *Ashbacker* is inapplicable in this instance because no mutual exclusivity exists, the holding of *Kessler* is not inconsistent with our *Order*. In *Kessler*, the court affirmed the Commission's imposition of a "freeze" on acceptance of applications, but created a limited exception for mutually exclusive applications timely filed, pursuant to our rules, after the freeze. The Court concluded that:

> [I]f a grant of a pending application is to be considered under existing standards, the public interest would demand that mutually exclusive applications timely tendered be also considered in a comparative hearing designed to ascertain the applicant best qualified to provide the broadcasting service involved. *The Commission will of course exercise its judgement as to whether mutual exclusivity does in fact exist in the case of any applicant claiming it. . ..*

326 F.2d at 688 (emphasis added). The court was concerned that "the substantial effect of a contrary view would be . . . to freeze new applicants out of a right of substance—the comparative hearing . . .." *Id.* However, we have already established that GSAT's requests are not mutually exclusive with the applications filed before May 18, 1982. Thus, the limited exception created in *Kessler* is not available to GSAT[16]

21. In addition to not infringing upon the rights of later applicants, our decision to "freeze" the inclusion of additional applications into the current processing group was reasonable and consistent with the public interest. Such a group of applications was required at that time for a number of reasons. For example, the *Order* was necessary to make the complex procedure of processing satellite applications a more manageable task. Processing such applications in groups lends more certainty and administrative efficiency to the pleading cycles because issues raised in the pleadings are often interrelated. Group processing avoids the problems caused by applications being filed over a period of several months, as had occurred prior to the adoption of our processing *Order*, which result in overlapping pleading cycles with numerous

[16] We disagree with GSAT's assertion that our *Order* was an unlawful cut-off procedure. Cut-off procedures, such as Section 1.227(b) of our rules, are intended to deny *Ashbacker* hearing rights to untimely filed applications so that the licensing process will function smoothly. These procedures are adopted by the Commission to insure an orderly discharge of the Commission's administration of its statutory licensing responsibilities. *See, e.g.*, Ranger v. FCC, 294 F.2d 240 (D.C. Cir. 1961). Unlike a cut-off procedure, the *Order* at issue does not seek to—nor does it—deny any applicant any hearing rights it may have under *Ashbacker*, or any rights it or any petitioner may have under Section 309(e) of the Communications Act. Such rights are fully preserved under our *Order* and the further processing order we are adopting today. *See* Memorandum Opinion and Order, FCC 83–185. Because we can no longer warrant the absence of mutual exclusivity, today's processing order will provide a 60 day notice period, from the publication of our Report and Order, for the filing of applications.

and duplicative pleadings being filed. Group processing procedures in the past have proven very useful.[17] Additionally, in assigning orbital locations, it is helpful to take into consideration a well-defined set of satellites so that launch schedules and particular design characteristics, such as cross-polarization and power levels, can be used to maximum effectiveness.[18] Finally, having a well-defined group of satellite proposals was necessary to effectively complete the technical and computer analyses required for our determinations on reduced orbital spacings in CC Docket No. 81-704.[19] Thus, to avoid the need to begin anew the complex evaluation process each time a new and interrelated application was filed, as well as to achieve an effective outcome in the associated rulemaking on orbital spacings, a group processing procedure was adopted.

22. Moreover, our decision to define the current processing group without prior notice was not erroneous. As we explained in the processing *Order*, we feared that prior notice would trigger the filing of many speculative and hastily prepared applications for new and expansion satellites.[20] This could have precluded the timely availability of any new satellites to meet growing service demand if lengthy hearings had to be conducted before any applications were granted.[21] Second, the necessity of undergoing the expense and delay

[17] *See e.g.*, Domestic Fixed Satellite Service, *supra* note 9.

[18] In the event orbital reassignment becomes necessary, it is easier and less disruptive to users to accomplish this at the time a satellite is launched and initially positioned in orbit, rather than halfway through the life of a satellite. Having a well-defined group of applications and launch dates allows the Commission to devise an orbit assignment plan in an orderly fashion. It also minimizes the contingencies for which the Commission must plan to minimize disruption of service to users.

[19] At the time the Commission adopted the present processing *Order*, it was in the midst of its CC Docket No. 81-704 rulemaking proceeding to reduce orbital spacing, as promised in the *1980 Processing Order*, *supra* note 9. CC Docket No. 81-704 was initiated to reduce satellite separations to the smallest practical values. This would permit the authorization of the largest number of satellites without excessive costs or delays. In the past, a more generalized approach had been used to determine orbital spacings. Adjacent satellites could be operated independently of nearby satellites under this licensing procedure. However, with the number of additional satellites needed to satisfy user requirements, this approach no longer works satisfactorily. To achieve its objectives, the Commission recognized in CC Docket No. 81-704 that the specific characteristics of the satellites and services should be taken into account.

[20] We note that there was no legal prohibition to our granting, without notice, each application as it became ripe for action. These applications could have been granted subject to the outcome of CC Docket No. 81-704. We opted, instead, for a group processing approach. This approach avoids the confusion and uncertainty that might have resulted from incremental adjustments to each succeeding version of the plan of orbital assignments as orbital locations were reassigned to accommodate each newly granted proposal.

[21] As a result of the reduced spacing criteria adopted today in CC Docket No. 81-704, there are sufficient orbital locations to satisfy all requests on file prior to the adoption of our processing *Order*. Additionally there will be several locations

of comparative hearings could have discouraged new entrants from prosecuting their applications.[22] Third, it could have complicated and delayed the making of informed determinations on reduced spacing in Docket No. 81-704 if comparative hearings had to be concluded before the new group of satellites could be finalized. Consequently, we believe these important public interest considerations justified our dispensing with prior notice before freezing the applications to be included in the current processing group.

23. Finally, we are unable to find that prejudice has resulted either to GSAT or to the public as a result of our procedures. The alternative processing plan advocated by GSAT would likely have encouraged speculative applications and resulted in the necessity of performing some type of comparative analysis of all applicants. Thus, it is not as a result of the procedure we have followed that GSAT may now be subjected to comparative hearings. If we considered together all applications on file, along with any applications that may be filed during the discrete period suggested by GSAT, conventional hearing delays and costs would likely be entailed. Thus, many years could have been required before the satellites are constructed and launched. Furthermore, since the entities to be accommodated would not be identified until the conclusion of the hearing, optimal orbital spacing criteria or deployment plans could not be established because we would not have a finite set of baseline transmission parameters and satellite designs to analyze. The result would be to the serious disadvantage of those applicants who filed prior to May 18, 1982, whose plans could be delayed substantially.[23] [24] Ultimately, it is service to the

remaining under the current deployment plan to satisfy at least some of the requests of applicants who file subsequent to the adoption of our *Order*. However, if we were to group together all applications filed both prior to and subsequent to the adoption of our *Order*, along with any filed during a notice period, there would likely be more applications filed than orbital locations available under present standards. Many of these applications could be expected to be of a speculative nature.

[22] Often long, drawn-out comparative proceedings discourage new entrants from prosecuting their applications. Thus, to encourage new entry, as has been our policy, we have attempted to fashion our licensing procedures in a way that avoids the administrative delay and expense of comparative hearings. *See also* note 24, *infra*.

[23] It should be noted that GSAT, having benefitted from our earlier *1980 Processing Order*, can hardly claim surprise at the current one. Additionally, GSAT had approximately two years in which to file applications for additional satellites. Applicants who have filed in opposition to GSAT's petition have had their applications for satellites in the 12/14 GHz band on file for at least two and one-half months before GSAT filed its applications, and in the case of one applicant, eight months.

[24] New entrants into the domestic satellite market are more likely to be vulnerable to long delays in the granting of their applications than are existing operators. Delayed market entry can only retard the development of a new operator's competitive position in the market and concomitantly strengthen the position of existing operators. If an operator has no facilities to offer, it cannot compete.

public that would be delayed. This would impede our ability to fulfill our responsibilities under Section 1 of the Act. Additionally, it is not evident that any overriding public benefit would accrue from considering all of these applications together. Even if we could thereby assure ourselves that grants are awarded only to the best qualified applicants, this possible benefit would be more than offset by the harm to the public interest that would result from incurring substantial delays in the commencement of any additional satellite service.[25] We will, of course, attempt to take action on GSAT's requests for additional locations, as part of the next processing group, within a time frame that does not unduly disrupt its planning process. However, we will not disrupt the plans of other applicants who require a decision at an earlier date, nor delay needed services to the public, to do so for GSAT's benefit.[26]

IV. *CONCLUSION*

24. Sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i) and (j), afford the Commission wide discretion in establishing procedures to facilitate the orderly conduct of its business. It is well settled that the choice of agency procedure is committed to the agency's discretion.[27] Such principles are particularly important in

GSAT has two orbital locations assigned to satellites currently under construction. Additionally, if Southern Pacific Company is permitted to transfer control of Southern Pacific Communications Company and Southern Pacific Satellite Company to GTE Corporation, GSAT's parent would control three additional orbital locations. Thus, GSAT, unlike the several new operators who are today being authorized their first orbital locations, will not be prevented from participating in the domestic satellite industry until its applications are acted upon. Delays to new entrants, on the other hand, would adversely impact the public interest to the extent that it would be antithetical to our competitive goals for domestic satellite service.

[25] We note that, through its passage of recent amendments to the Communications Act that allow the use of lotteries in initial licensing proceedings, Congress has expressly recognized the significant public interest in expediting service to the public, particularly in those instances where there may be a large number of mutually exclusive applications. House Report no. 97-765, 97th Cong., 2d Sess. 37 (1982). Therefore, whether or not we ultimately determine that lotteries are an appropriate mechanism for awarding licensees in the domestic satellite service, we believe that Congress has manifested a clear intention that the Commission, when fashioning its procedures, give appropriate recognition to the substantial public interest in assuring early commencement of service to the public. *See also* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[26] Actually, GSAT requests authority to construct its fourth satellite as a ground spare, which is "subsequently (subject to further Commission approval which GSAT will seek at a later date) to be launched and operated . . . at 100° W.L. or, contingently, at 98° W.L.". Application at p. 13. It has not been our practice to reserve orbital locations without a formal application before us. Thus, until GSAT files a formal application requesting authority to launch and operate its fourth satellite, we will treat its application in the same manner as we treat all applications for on-ground spares.

[27] FCC v. Pottsville Broadcasting Company, 309 U.S. 134 (1940).

the domestic satellite industry where start-up costs are high and lead times enormous.[28] Thus the Commission has consistently fashioned procedures and technical criteria to allow all qualified domestic satellite applicants to be accommodated with adequate orbital assignments. Frequency and orbital solutions have been devised that serve the public interest even if the resulting orbital assignments are not the same as those requested by the applicants.[29]

25. GSAT has not been deprived of any substantive rights by our *Order*. It has already been assigned two orbital locations in the portion of the orbital arc it finds most desirable. The applications it filed after that *Order* are not mutually exclusive with those we grant today. When processing of GSAT's applications for additional satellites is completed, GSAT will have been afforded all due hearing rights with those applicants in the next group of applications. The procedures we have used in authorizing additional satellite facilities are designed to satisfy unmet consumer demand in a timely manner and thus most consistent with our statutory responsibilities. To reconsider our *Order* and adopt GSAT's proposed modification could unduly delay satellite service and thus would not serve the public interest, convenience and necessity.

26. Accordingly, IT IS ORDERED, that the Petition filed by GTE Satellite Corporation for Partial Reconsideration of our May 18, 1982 *Memorandum Opinion and Order*, 90 FCC 2d 1 (1982), IS DENIED.

27. IT IS FURTHER ORDERED that the Secretary of the Federal Communications Commission shall cause this order to be published in the Federal Register at the earliest practical date.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

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[28] United States v. FCC, note 25, *supra*.

[29] *See, e.g.*, Orbit Deployment Plan, *supra* note 13. In particular, we have consistently declined to assign a single operator multiple orbital locations capable of serving all 50 states simply because the applicant requests such assignments. *See, e.g.*, RCA Global Communications, *supra* note 13; COMSAT General Corporation, 69 FCC 2d 1278 (1978); Western Union Telegraph Company, 47 FCC 2d 274 (1974).

Common Carrier, Interconnection
Common Carrier, International Record Carriers
Telex

Commission allows reconsideration for two issues relating to interconnection arrangements between and among domestic and international record carriers, as prescribed in *Interim Order*, 89 FCC 2d 928 (1982) but denies reconsideration on all other issues raised by petitions.
–*Interconnection Arrangements*
GC Docket No. 82–122

FCC 83–84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers	CC Docket No. 82–122

MEMORANDUM OPINION, ORDER AND REQUEST FOR FURTHER COMMENTS

(Adopted March 3, 1983 Released April 11, 1983)

BY THE COMMISSION:

1. Before the Commission are petitions for reconsideration of our *Interim Order* [1] which implemented the requirements of the Record Carrier Competition Act of 1981[2] (RCCA) and of our subsequent memorandum opinion and order which rejected tariff filings found to be in conflict with the *Interim Order* and the RCCA (*Rejection Order*).[3] (A list of the petitions, oppositions, and replies is set out in the Appendix.) For the reasons discussed below, we affirm the conclusions in the *Interim Order* in most respects, including the allocation formula for outbound international telex, the pro rata allocation for inbound international telex, the 15% discount for carrier-carrier interconnection, and the use of tariffs to implement

[1] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928 (1982), review pending, Western Union v. FCC, D.C. Circuit No. 82–1502, filed May 4, 1982.
[2] Pub. L. No. 97–130, 95 Stat. 1687 (1981).
[3] 91 FCC 2d 483 (1982), review pending TRT v. FCC, et al., D.C. Circuit Nos. 82–1658, 82–1698, 82–1699, filed June 14, 1982.

prescribed interconnection arrangements. We do grant reconsideration with respect to the lawfulness of two "grandfathered" contracts and a request that we allow carriers to agree, on a bilateral, tariffed basis, to accept termination charges lower than those prescribed. We also request further comments on achieving dialing stage access parity.

BACKGROUND

2. The Record Carrier Competition Act of 1981 (RCCA) repealed and replaced the former Section 222 of the Communications Act. The RCCA represents a ratification by Congress of the Commission's procompetitive initatives of recent years and an attempt to remove the restrictions upon entry and competition that the former Section 222 had imposed. Congress has concluded that, after a transitional period in which some rather complicated regulatory oversight will apply, most domestic and overseas record services will be competitive and will require minimal regulation.

3. The former Section 222, adopted in 1943, authorized the merger of Western Union with its domestic competitors so as to create a monopoly domestic record carrier; it also required Western Union to divest its overseas operations as part of the price for this monopoly. In the years following 1943, a relatively rigid division grew up between domestic and overseas record services. Western Union offered domestic services, and originated and delivered international traffic. But it could not offer overseas service and was required to hand off outbound overseas traffic to the international record carriers (IRCs) for delivery in countries overseas. The handoffs and divisions of revenues for such service were subject to complex formulas.[4]

4. The IRCs were not so rigidly confined. Although they concentrated on international service, they also operated offices in "gateway" cities and were authorized to pick up and deliver messages and other traffic in those cities without the participation of a domestic carrier. They did not offer purely domestic service, however.[5]

5. In recent years, the Commission has tried to erase the line separating domestic from overseas record communications and to inject new competition into each of these markets.[6] Part of its effort

[4] The former Section 222 had been interpreted as a perpetual bar to Western Union's participation in international service. *E.g.*, ITT v. FCC, 635 F.2d 32 (2d Cir. 1980).

[5] For background on the scope of IRC operations, see Western Union v. FCC, 665 F.2d 1126 (D.C. Cir., 1981).

[6] *See, e.g.*, Overseas Communications Service, CC Docket No. 80-632, 84 FCC 2d 622 (1980), seeking comments on whether AT&T should be authorized to provide international record service.

was to attempt to let Western-Union into the overseas business.[7] Another part was to get the IRCs into domestic service.[8] Still another part was to authorize new carriers, such as Graphnet, Inc., in both markets.[9] In part because of the reluctance of foreign governments to interconnect with new carriers, competition in the international market still is limited, with three carriers—ITT, RCA and Western Union International (WUI)—dominating the market.

A. *The Record Carrier Competition Act.*

6. The purpose of the RCCA is to "promote the development of fully competitive domestic and international markets in the provision of record communications service." 47 U.S.C. § 222(b)(1). See also H.R. Rep. No. 97-356, 97th Cong., 1st Sess 4 (1981). (House Report). The RCCA permits the FCC to authorize Western Union to compete with the IRCs in the international market. It authorizes the IRCs to compete with Western Union in the domestic market. It requires a record carrier having significant domestic and overseas operations to treat its own domestic and international services as if those services were provided by separate entities, and to interconnect with other carriers for domestic or international services upon the same rates, terms, and conditions it applies to its own services.

7. These are the permanent structural guidelines established by the RCCA. The RCCA also contains transitional mechanisms which are effective for three years after enactment. Specifically, the RCCA requires all record carriers to provide interconnection with other record carriers upon reasonable request and it directed the Commission to convene a meeting of the IRCs for the purpose of negotiating a "just, fair, and reasonable" interconnection agreement. 47 U.S.C. § 222(c)(1)(A)(i) and (c)(3)(A). Congress also provided that the agreement must contain both a formula for allocating revenues among the participating carriers and a method for distributing inbound traffic. Under Section 222(c)(2), the interconnection agreement must "establish a nondiscriminatory formula for the equitable allocation of revenues derived from [the use of interconnected facilities] between the parties to [the] agreement."

8. In adopting the RCCA, Congress was concerned that domestic competition might be limited by the continued unwillingness of foreign administrations to interconnect with new IRCs. House Report at 10. Accordingly, it devised a method by which a carrier without a foreign operating agreement could interconnect with

[7] Western Union Telegraph Co., 75 FCC 2d 461 (1980), *rev'd. sub nom.* ITT World Communications v. FCC, 635 F. 2d 32 (2d Cir. 1980).

[8] International Record Carriers' Scope of Operations, 76 FCC 2d 115 (1980), *aff'd. sub nom.* Western Union v. FCC, 665 F. 2d 1126 (D.C.Cir. 1981).

[9] Graphnet Systems, Inc., 71 FCC 2d 471 (1979), *aff'd. sub nom.* Western Union v. FCC, 665 F. 2d 1112 (D.C. Cir. 1981).

another IRC with such an agreement. That IRC would transit the outbound traffic to the foreign administration. The allocation of inbound traffic is governed by Section 222(c)(1)(A)(ii). In enacting that section, Congress was concerned that the foreign authorities' methods of allocating traffic inbound for the United States among the IRCs might have an inhibiting effect on competition. Believing that "in these situations, no free market exists" (House Report at 11), Congress provided that an originating carrier that has interconnected with another IRC (a "transiting carrier") to provide outbound international service is entitled to a pro rata share of the transiting carrier's inbound traffic. 47 U.S.C. § 222(c)(1)(A)(ii)(1). As noted above, the sections of the RCCA concerning interconnection arrangements, including international transiting and pro rata return flow, expire three years after enactment. The Commission would then retain its general regulatory authority over carrier interconnection, which is not diminished by the RCCA.

9. Congress insisted that these provisions be implemented rapidly. It directed the Commission to convene a meeting among record carriers within fifteen days, and required the carriers to conclude the agreement within a maximum of ninety days. 47 U.S.C. § 222(c)(3)(A). In the event of a failure to agree within that time, Congress directed the Commission to issue an interim or final order establishing an agreement consistent with the purposes of the Act no later than ninety days following the date that the meeting between the carriers was originally convened. 47 U.S.C. § 222(c)(3)(B).

10. Thus, the RCCA erased the ban on a single carrier providing both domestic and international record communications and it required full interconnection among carriers. Prior to 1981, domestic customers of the IRCs could not use their telex machines to call other domestic customers or to make international call via other IRCs. Western Union's customers could select an IRC for international calls, but were forced to pay higher rates than the IRCs' own customers because Western Union's domestic rate was added to the IRC's unbundled country-to-country rate. Now, the IRCs and Western Union compete both domestically and internationally. A telex customer of any domestic carrier may select any IRC that it desires to transmit a message overseas and the rates of both carriers are unbundled. That transmission may involve a single carrier or it may, under the RCCA, involve as many as three different U.S. entities: the domestic carrier, the IRC chosen by the customer (the originating IRC), and the IRC that carries the international call to the foreign administration (the transiting IRC). A telex customer may also call customers of other domestic record networks because the carriers are interconnected.

B. *The Commission's Proceedings.*

11. The Commission convened a meeting of the major record

carriers on January 8, 1982, but those carriers failed to reach an agreement within the forty-five day period. Accordingly, on February 25, 1982 the Commission issued a *Notice of Proposed Rulemaking* (NPRM) 47 Fed. Reg. 10863 (1982), which set forth tentative conclusions relating to the prescription of an interconnection agreement and requested comments. After receiving comments, and in light of the fact that the carriers still were unable to agree, the Commission issued its *Interim Order*. Among other things, that order provided an interim formula for allocating revenues from outbound traffic between interconnecting IRCs and an interim method for distributing revenues from inbound traffic. 89 FCC 2d at 961–67.

12. The *Interim Order* construed the RCCA as requiring each carrier which provides both domestic and international record communications services, and which has a significant share of the market for such services, to operate as if its domestic and international offerings were separate, and to interconnect with other carriers in a manner which is equal in type and quality to the interconnection between its separate domestic and international segments. Interconnection with other carriers is also to be made available at the same rates and upon the same terms and conditions. The *Interim Order* prescribed that carriers provide equal interconnection except in cases involving expensive system modification, technological impossibility or equipment unavailability, or unreasonable degradation of service. In those cases, generally equal or comparable interconnection was permitted.

13. For wholly domestic interconnected record traffic, the *Interim Order* adopted the carriers' view that the carrier on whose network the call was initiated would be the originating carrier. The originating carrier is responsible for setting forth the tariff rate, billing customers, and making an equitable allocation of revenues with the terminating carrier, i.e. the carrier on whose network the called party was located.

14. The Commission determined that the existing arrangement for handling interconnected international inbound transmission was reasonable and worth continuing. Under these arrangements, the U.S. international carrier hands off the call to a U.S. domestic carrier for delivery. The international carrier receives a payout from the foreign correspondent and compensates the domestic carrier. The *Interim Order* incorporated these arrangements into the prescription. In the case of outbound international calls, however, the carriers could not agree on which carrier (domestic or international) would perform the functions of the originating carrier. The *Interim Order* assigned this role to the international carrier selected by the customer to carry the message overseas. The international carrier is therefore responsible for tariffing through rates, billing the customer for through service, and compensating the domestic carrier for use of its network.

15. The RCCA also calls for the establishment of a nondiscriminatory formula for the equitable allocation of revenues derived from interconnection. To the extent possible, this allocation is to be based upon costs. The IRCs argued that there are substantial savings to Western Union in providing carrier-to-carrier interconnection, while Western Union contended that there are no significant savings. Without finally resolving this question, the Commission prescribed an interim 15% discount from a domestic carrier's publicly tariffed intra-network domestic rate, as the rate for the performance of interconnected terminating functions on inter-network domestic calls and as the rate for the domestic component of outbound or inbound international calls. The Commission emphasized, however, that this prescription would not prejudge any action that may be taken in any existing or future phases of CC Docket No. 78–97, an ongoing investigation of WU's rate of return and rate structures for telex and TWX services.

16. The RCCA also sought to overcome the difficulties experienced by new carriers in obtaining operating agreements with foreign administrations. It required the tariffing of transiting arrangements for outbound international record services and a pro rata traffic distribution for inbound international record services. The *Interim Order* applied these provisions to require that where IRCs interconnect to handle outbound transiting telex traffic, the originating outbound IRC without an operating agreement would pay the transiting carrier an amount equal to the foreign payout + 1:2 the domestic carrier's charge + 1:2 of the transiting carrier's international component after the foreign payout has been subtracted. In no case, however, may the originating international carrier's share remaining under the formula (i.e., 1:2 the domestic carrier's charge + 1:2 the international carrier's charge after the foreign payout has been subtracted) be less than the amount of the domestic component charge, which the originating outbound international carrier must pay the domestic carrier. For inbound international record traffic, the Commission prescribed that an originating outbound carrier lacking a foreign agreement would be allocated revenues based upon the same pro rata share of inbound traffic as it delivered for outbound carriage. This allocation would be calculated on a country-by-country, service-by-service basis. The allocation of revenues between originating and transiting IRCs would generally follow the arrangement prescribed for outbound traffic.

17. The Commission ordered the IRCs to implement the *Interim Order* by filing interconnection tariffs in conformity with its terms within twenty days. After the Common Carrier Bureau granted a brief extension of time, the IRCs complied. However, upon reviewing the IRC filings, the Commission concluded in the *Rejection Order* that they violated the *Interim Order* in numerous important respects. Consequently, it rejected the tariffs and required the IRCs

to file tariff revisions by June 16, to become effective on June 20. In order to resolve these matters promptly, the Commission prescribed specific tariff language for telex and TWX interconnection to implement the *Interim Order* and the goals of the RCCA. Application of the formula minimum (the requirement that the outbound originating carrier receive no less than the domestic component charge) and of the pro rata provision were stayed pending appeal by the Court of Appeals for the D.C. Circuit, TRT v. FCC, *et al.*, Docket Nos. 82–1658, 82–1698, 82–1699, decree entered July 2, 1982.

DISCUSSION

18. The petitions for reconsideration address a variety of issues arising from both the *Interim Order* and the *Rejection Order*. We will discuss the petitions and the positions of the parties on an issue-by-issue basis.

1. *Use of Tariffs to Implement the Interconnections Arrangements*

19. Under Section 222(c)(3)(A) of the RCCA, the major record carriers were made parties to negotiation meetings presided over by the Commission, and were allowed a total of ninety days to negotiate an interconnection agreement. Had the carriers reached an agreement, it would have been subject to Commission review to assure that it was consistent with the RCCA and did not unjustly or unreasonably discriminate against any record carriers. When the carriers failed to agree, the Commission became obligated "to issue an interim or final order which establishes a just, fair, reasonable and nondiscriminatory agreement . . ." *Id.* The Commission's *Interim Order* met this obligation by prescribing terms for interconnection. The order's conclusions were then implemented by requiring the filing of interconnection tariffs by the major record carriers upon an expedited schedule. As already noted, when the filed tariffs proved inconsistent with the *Interim Order*, the Commission rejected them and prescribed specific tariff language which the carriers were required to file in revised tariffs. Except for the provisions which were stayed by the Court of Appeal, the revised tariffs are currently in effect.

20. WUI contends that the Commission erred when it required that inter-carrier relationships be governed by tariffs. It asserts that when Congress stated in the RCCA that the Commission shall issue an order "which establishes an agreement," it was requiring that interconnection should be governed by intercarrier contracts. WUI contends that the Commission's actions have required WUI to submit to tariffs which might be changed unilaterally, and deprived WUI of a contractual remedy in the event of a unilateral change or a breach of the interconnection agreement. While WUI has no objections to "explanatory" tariffs which inform the public of the

interconnection arrangement, it requests that interconnection terms be embodied in written carrier contracts.

21. We think it clear that WUI misunderstands the regulatory process we have instituted. Although embodied in tariffs, interconnection arrangements are not subject to unilateral carrier action, as WUI believes, but are constrained by the prescriptions in our *Interim Order* and *Rejection Order*. Those orders are binding on record carriers. Any attempt to change the tariff in violation of the formula prescribed by the Commission would be subject to rejection unless and until the Commission modifies its prescription or the prescription becomes stale or the Commission grants a waiver. Thus, the prescriptions embodied in the tariffs cannot be altered by a unilateral filing, as WUI contends, but only by the Commission's decision that a change is just, reasonable, and non-discriminatory. The tariffs are thus in operational effect indistinguishable from the "explanatory" tariffs of which WUI approves. They give public notice of the terms of the Commission's prescription and may not vary therefrom. For example, when we found that the tariffs filed by WUI and the other IRCs did violate the *Interim Order*, we rejected them promptly and out of hand.

22. As a practical matter, use of the tariff process provides a sound and well understood procedural mechanism for implementing interconnection prescriptions. Tariff filings allow for full public scrutiny of the implementation of our prescriptions and enabled us to take immediate action to enforce the prescriptions. Although we could have used contracts for this purpose, we have no specific provision in our Rules for review of carrier contracts. Cf. 47 C.F.R. § 43.51. In order to allow the necessary opportunity for public examination and comment on contracts, we would have been forced to establish a contract review process to perform the same function the traditional tariff review process already performs so well. It also would have resulted in no difference in procedural rights. Either contracts or tariffs could be rejected as unlawful under our orders, and any aggrieved party could bring a complaint under Sections 206–209 of the Communications Act before a federal district court or this Commission seeking damanges for any unlawful act.

23. This Commission has discretion to regulate the interrelationship between carriers by means of either tariffs under Section 203–205 of the Act or contracts under Section 211. *Lincoln Telephone and Telegraph Company v. FCC*, 659 F.2d 1092 (1981). See also *ENFIA*, 71 FCC 2d 440 (1979). Nothing in the legislative history indicates that Congress had any preference for one form of regulation or the other. Nor does the legislative history indicate any intent to alter the Commission's discretion as to which procedural tool (tariffs or contracts) it would employ. Rather, the House Report, at 7, expressly states that the RCCA "should not be construed as affecting the

Commission's authority under any of the other sections of the Communications Act of 1934, as amended."[10]

24. In sum, the use of tariffs to implement the prescribed interconnection arrangements is a reasonable means, and we believe the best means, of carrying out the Commission's responsibilities, as our actual experience has confirmed. The prescribed interconnection tariffs currently in effect guarantee full interconnection to all record carriers on equal terms. We find no merit in WUI's objections.

2. *Allocation Formula*

25. The RCCA allowed the major record carriers to negotiate a just and reasonable formula for allocation of revenues as part of a interconnection agreement. When the carriers failed to reach such an agreement this Commission assumed the responsibility to prescribe such a formula and other terms for interconnection within the 45 day period specified in Section 222(c)(3)(B). This action was undertaken on an expedited basis in response to the Congressional concern that any revenue allocation formula for interconnected traffic be implemented promptly. House Report at 11.

26. In developing the formula for outbound traffic between interconnecting IRCs in the *Interim Order* the Commission first reviewed the legislative history. It concluded that the existing formula for splitting revenues reflected "the greater bargaining power of carriers that have obtained the necessary foreign operating agreements" and that Congress intended "to redress the imbalance between those carriers which have managed to enter into agreements with foreign operating authorities and those carriers which have not." 89 FCC 2d at 961–62. With this Congressional intent in mind, the Commission adopted a formula which was similar to one proposed by RCA and explicitly endorsed by ITT. No other IRC objected to RCA's proposal. Under this proposal, two IRCs interconnecting to provide international service would share equally the revenue remaining after the payout to the foreign government (i.e., there would be a 50;50 split) with a minimum payment to the transiting IRC of 30 cents per minute. *Id* at 962.

27. The Commission accepted the IRC's proposal with certain modifications. The Commission adopted a formula which first required the originating outbound IRC to pay the transiting IRC the amount of the payout to the foreign administration. Second, the originating outbound IRC would pay the transiting IRC 1;2 of the applicable domestic rate plus 1;2 of the transiting carrier's international rate after subtracting out the amount of the foreign payout. Third, the originating outbound IRC would also pay the domestic

[10] See, Cong. Rec. E1034 (daily ed. March 17, 1982) (remarks of Rep. Wirth):

"All of the powers of the Commission remain, those in Section 201, as well as those contained in other sections of the act."

carrier the applicable rate for the domestic haul. In effect, the formula, like the one proposed by RCA, required a 50;50 split of the post-settlement collection, and required the originating outbound IRC to pay the domestic charges out of its half. Fourth, the originating carrier's division under the formula is subject to a "floor" which requires in all cases that such share must be no less than the domestic charge.[11]

28. The major IRCs, ITT, RCA, WUI, TRT, and FTC have expressed varying degrees of opposition to the formula itself. However, their primary challenge centers about the addition of the "floor." The IRCs argue that the floor will often leave the transiting carrier with less than a 50% share of the total U.S. retained revenue and, in some cases, with an amount which does not cover the costs of providing service. They also assert that the Commission's proposal appears to premise the compensation for the transiting carrier on the revenue actually collected and argue that the originating carrier could set its customer rate so low that the transiting carrier would be denied any compensation.

29. We believe the objections raised by the IRCs to the floor are based to a large extent upon a misunderstanding of how the floor in the Commission's formula will operate. The formula determines how much the originating international carrier must pay the transiting carrier and the domestic carrier. The decision of an originating carrier to raise or lower its rates will affect the amount it receives for handling an international call but will have no impact upon the amounts it must pay to the other carriers who participate with it carrying this traffic. This is because the formula, including the floor, is based solely on the charges of the transiting carrier and the domestic carrier and is completely independent of the rates charged by the originating international carrier to its own customers. In this respect, the Commission's formula is identical to the formula proposed by RCA. There is thus no substantial possibility of manipulation of the formula by the originating carrier to secure an unfair advantage over the transiting carrier.

30. The establishment of a floor was necessary to protect the originating carrier from either out-of-pocket losses or erosion of its revenues for providing the domestic haul. Although, as already noted, the amount the originating carrier receives is based on its own rates and not upon the division under the formula, we believe that as a practical matter the rates the originating carrier can charge are

[11] There is no similar "floor" for the foreign payout, because where the domestic floor applies a transiting IRC will not in any case get less than the share of the international rate that it had negotiated with the foreign administration in question. In some cases, the negotiated foreign payout exceeds the United States IRC's total international segment rate even without regard to the floor. The IRC makes up the loss from traffic in the other direction. The floor would not change this negotiated revenue loss, but it also would not cause it.

constrained by the rates of other international carriers—primarily the IRCs who have operating agreements. Customers are unlikely to rely upon a carrier without an operating agreement when they can obtain the same service directly and more cheaply from the carrier which has the necessary foreign authority. For this reason, we have assumed that a carrier requiring transiting cannot realistically charge more for its service as a general rule (and it may well be compelled to charge less) than the rates of the transiting carrier itself.

31. Assuming that the originating carrier charges the same rate as the transiting carrier, the floor insures that the originating carrier will not suffer an out-of-pocket loss in handling traffic for which the domestic portion of the charge must be paid to a separate carrier.[12] Where the originating carrier is also the domestic carrier, the floor seeks to ensure that the originating carrier is not penalized for being selected by the customer as the carrier to provide international service. Thus, with the floor, the carrier providing the domestic haul does not lose part of its domestic revenues because it is also selected as the international carrier.

32. In all cases where the floor is applied, the originating carrier receives nothing for the provision of the international haul. On the other hand, in all cases where the floor is applied, the transiting carrier receives the same amount as it would have received had it been selected by the customer to provide international service. In other words, the transiting carrier will receive no less revenue when the floor is applied than if it had provided the service itself rather than as a transiting carrier.

33. Properly understood, the floor cannot be regarded as inequitable or unfair to the transiting IRCs. To the contrary, we believe that the floor is a necessary adjustment to any reasonable formula, that it will help promote competition by fostering open entry, and that it will help carry out the intent of Congress in enacting the RCCA to redress the imbalance between carriers that have operating agreements and those that do not.

34. The one example that ITT has proposed to show how the floor supposedly would harm it provides an excellent illustration of why the floor is necessary. Under ITT's tariffs, the charge for service to Japan is $1.83 for the international segment. The foreign payout to the Japanese administration is $1.81. The domestic segment,

[12] Conversely, where the originating carrier decides to charge a lower rate than the transiting carrier, it is not protected from suffering an out of pocket loss. There is accordingly no possibility of manipulation by the originating carrier through charging very low rates. As a general matter, it cannot pass its losses off to the other carriers participating with it in the haul of international traffic.

which may be provided by any domestic carrier including ITT, is approximately $.40.[13] If no transiting arrangement were involved, ITT would pass on the $.40 to the domestic carrier, pay Japan $1.81 as the foreign payout, and retain two cents as its own share of the revenues. Under the formula, where another carrier was the originating international carrier, ITT would receive the foreign payout of $1.81 to pay the Japanese administration, plus half the domestic charge and half the two cent retention, or $.21 ($.40 plus $.02 divided by two.) However, because this would leave the originating carrier with only $.21 under the formula and the originating carrier, not ITT, would have to pay $.40 to the domestic carrier, the floor would be applied. As a result of the floor, the originating carrier would be entitled under the formula to the amount of the domestic charge, $.40, but would then pay all of this to the domestic carrier. It would have zero net revenue. ITT, on the other hand, would retain the same two cents it would have gotten if it had provided the service itself without the participation of another carrier using its transiting services.

35. Without the floor, ITT would retain $.21, or more than ten times as much as it retains for an ordinary call made by a customer of its own. Assuming the originating carrier would have to match ITT's rate to be competitive it would suffer a $.19 out-of-pocket loss while ITT would receive a $.19 windfall. As ITT's own example shows, when corrected to apply the floor accurately, the floor is far from being unfair.

36. The effect of the formula without the floor would be much worse for interconnecting carriers than the pre-RCCA arrangements for interconnection made available by the IRCs. Before implementation of the RCCA, the originating carrier received a discount of 12 cents from ITT's end-to-end rate. Since the originating carrier provided the domestic haul to its customer in gateway cities it did not have to pay anything to another domestic carrier. It could match ITT's end-to-end rate and provide the domestic service with the additional 12 cents, though this might not necessarily cover its full costs. Under the RCCA, the originating carrier must ordinarily interconnect with all other domestic carriers on the same terms as with its own domestic component. It cannot keep the domestic haul for itself and must therefore incur an actual out-of-pocket expense on the domestic portion every time it transmits a message from an interconnected domestic carrier. This is likely to be a large part of a carrier's traffic. Even in cases where the carrier handles the domestic haul itself or lacks a substantial market share and need not interconnect on equal terms with other carriers, the carrier would

[13] In the *Interim Order* at 962–63 we used a domestic rate of $.2954 a minute in this example. That figure did not reflect the 1.3 holding time factor. Domestic rates have also been increased.

incur all the costs of any other domestic carrier for the domestic portion but would be forced to accept much less than carriers such as ITT for the same call. Carriers who offered only international service would of course be wholly unable to recover any of this loss since they would have no domestic revenue at all.

37. Moreover, the application of the IRC's proposed formula could have meant that in some cases the domestic carrier would receive less if a customer chose it to handle the international segment than if the customer chose another carrier. In the case of Japan, for example, the domestic carrier would be assured of receiving its full domestic rate of $.40 from the international carrier unless the domestic carrier was also chosen to provide the international segment. In that case the domestic carrier would receive only $.21. This anomaly, that a carrier must suffer a loss of revenue if it is successful over its competition in obtaining overseas business, plainly discourages the domestic carrier from serving this international route, and would penalize it if it did. It also would frustrate the statute's goal of fostering open entry and would specifically defeat the RCCA's mandated separation of domestic from international services.

38. The formula, even with the floor thus seems to us quite fair to the IRCs, which is natural enough since it is basically the formula they themselves proposed. As Graphnet points out, it is far more favorable to them, for example, than the usual international transiting agreements the IRCs have entered into voluntarily. See para. 49 *infra*. For all the reasons mentioned, we believe that the floor is a minimal and necessary adjustment to the base formula.

39. Even if the IRCs did lose money on some routes as a result of the formula, as they claim but do not demonstrate, this does not necessarily mean the formula is unlawful. The applicable legal test for the adequacy of rates is not whether the carrier will earn a fair return on each and every international route, in both directions, but whether it earns a fair return overall.[14] The IRCs do not claim that they will fail to earn a fair return overall. Moreover, since the formula is based on the IRCs own rates, where they are providing transiting they remain free to alter the revenues they receive by filing to increase their customer rates.[15] They are also free to renegotiate their divisions with foreign administrations.

40. WUI argues that the outbound transiting formula is unfair and unnecessary. It is unfair, WUI claims, because it does not

[14] *See, e.g.*, New England Divisions Case, 261 U.S. 184, 201–03 (1923), Federal Power Commission v. Hope Natural Gas, 320 U.S. 591, 602 (1944).

[15] There is no need to increase customer rates simply because of the floor, however. If those rates are inadequate to meet the IRCs' costs, the fault is not in floor. The IRCs receive precisely the same share per call with the floor as they receive when they are themselves the originating carriers and the formula is inapplicable.

promote the obtaining of foreign operating agreements but only allocates more revenue to the originating carrier than the current practice of allowing originating carriers a 12 cent retention of the total end-to-end rate. It is unnecessary because the originating carrier can now interconnect its domestic network with international carriers to deliver international calls, and retain the full domestic rate. WUI claims that the Commission has no evidence that the 12 cent retention should be increased.

41. This argument misses the point of what the RCCA seeks to accomplish. The RCCA requires that domestic and international operations generally be treated as separate for purposes of interconnection. Thus, domestic carriers receive a specific rate for interconnected calls. The 12 cent retention was for the total end-to-end call and in effect meant that the carrier requiring transiting received only 12 cents for the total haul since it matched the other IRCs' rates. As WUI recognizes, the RCCA does not permit unfavorable terms of interconnection of this sort. But the RCCA also requires that the IRCs provide transiting for the purely international portion of the call, to allow new carriers to enter and to eliminate the effect of operating agreements as barriers to competitive entry. The function of the outbound transiting formula is to establish fair charges which accomplish these purposes. The present 12 cent retention clearly defeats this purpose, as would accepting the argument that domestic carriers can simply hand off traffic to other carriers. The RCCA requires more than this of the IRCs - it requires that they interconnect to provide transiting to any carrier seeking to provide international service during the three year transition period, not simply that they interconnect with domestic carriers. The transiting formula is necessary to accomplish this purpose and does so, we believe, at a fair rate.

42. WUI also argues that the effort to impose a revenue division formula is in violation of the due process protections of the Fifth Amendment to the Constitution of the United States, which it says are embodied in Section 204 and 205 of the Communications Act, 47 U.S.C. § 204, 205. It characterizes the outbound formula as an arbitrary decision to protect the revenue of the originating carrier at the expense of a fair return by the transiting carrier, without the support of an articulated rationale and in violation of the requirements of Sections 204 and 205. ITT also implies that the Commission is requiring it to provide service at a rate which will not allow it to recover its costs, and that the Commission is bound to conduct a hearing under Section 201 of the Communications Act, 47 USC § 201, to determine the transiting carrier's costs before it can prescribe a compensation scheme.

43. We see no constitutional infirmity as a matter of procedural or substantive due process. Procedurally, due process requires notice and an opportunity to be heard. All interested persons have been

afforded both. We gave notice of our interest to prescribe a formula in the *NPRM* and the IRCs took full advantage of that opportunity. They have also filed comments with their tariff filings and in this proceeding. This procedural scheme was mandated by Congress in the RCCA to meet the special circumstances of record carrier interconnection. We fail to see how the procedure under the RCCA could be constitutionally suspect even if it differed from the procedures under other sections of the Communications Act, as the IRCs argue. Indeed Sections 204 and 205, cited by WUI, have no relevance at all. This formula involves division of revenues between interconnected carrier. Sections 204 and 205 concern review of carrier filings and practices and in any event require only "a full opportunity for hearing", which can be a notice and comment hearing. Section 201(a) governs carrier interconnection and revenue divisions. That section also requires, procedurally, only an opportunity for hearing which the IRCs have received, as our orders in this docket demonstrate.

44. We are also confident that the formula is not confiscatory and does not require the IRCs to provide service at a rate below costs, in violation of substantive due process. As we have pointed out above, the formula only divides rates in a manner largely similar to that proposed by the IRCs themselves, and is based on the IRCs own rates. The IRCs remain free to increase their transiting and overall revenues by increasing their rates. As we have also explained, the effect of applying the floor, the IRCs' major objection, is only to limit the IRCs to the same revenues they receive from their own customers under their own voluntary rates. Such rates can hardly be considered governmental confiscation.

45. Ironically, ITT seems to urge that we undertake a full investigation of IRC transiting costs before prescribing any formula. Yet, ITT has vigorously opposed the Commission's efforts to determine ITT's own costs.[16] The IRCs generally do not keep the detailed books or records which would be necessary to prescribe, with any degree of confidence, cost based rates for specific services. The proceeding required to develop this information could probably not be completed within the three year expiration period which Congress has established for the prescription of rates under Section 222(c) of the RCCA. Congress directed that interconnection was to be based so far as possible on costs, but that a division of revenues formula be implemented within 90 days at all events if the carriers themselves could not agree. The IRCs have provided no data on costs, either in response to the *NPRM* or in this proceeding, which would indicate that the formula would cause them to suffer a loss on any route or in any direction, except to the extent that they choose to accept losses under their own tariffs. Manifestly, they have not shown that the

[16] See ITT World Communications Inc., CC Docket No. 80-633, 88 FCC 2d 701 (1981).

formula is confiscatory under the constitutional test that the carrier may not be deprived of a fair overall return.

46. We thus do not perceive that the formula with the floor could operate unfairly toward the IRCs. But in any event the formula is interim in nature. If the IRCs can demonstrate unfairness in fact we can modify it. Finally, each IRC has another remedy. If it believes that the formula is unfair to transiting carriers, it can operate instead as an originating carrier. Thus, if an IRC believes that it would receive an inadequate division as a transiting carrier, it can cease to provide service over its own facilities to a particular point, or even generally, and use the facilities of the remaining carriers who would continue to provide transiting service. These carriers would presumably charge, and, if necessary, raise rates to a level sufficient to cover the cost of providing such transiting service. Accordingly, under the reserve settlement that we have prescribed, the transiting IRC with its own international facilities and operating agreements with foreign countries can be no worse off than the carriers without such specific operating authority. If an IRC perceives that the carriers without operating authority are receiving undue benefits, it can place itself in the same position and use the transiting facilities of other carriers.

47. TRT also points out that the RCA proposal contemplated that the IRCs would retain all inbound traffic, while the Commission applied the formula to inbound traffic under the pro rata requirement. However, this does not make the formula unreasonable. The IRCs may be less well off because the benefits they obtain from outbound traffic are reduced during the transition period. But this was Congress' intent in implementing the pro rata requirements, as we discuss in the next section. We point out again that whatever the division of revenues between the carriers, the IRCs remain free as usual to adjust their customer rates to achieve an adequate return, or to seek transiting arrangements themselves.

48. We recognize that the interim formula is not based on specific evidence as to cost of service. It was obviously not possible to develop the data required to set such rates in the brief period available to us to meet the Congressional deadlines. The House Report clearly expresses the Congressional intent:

> In the event that the carriers are unable to negotiate an agreement for the division of revenues within the timetable established by the bill, the FCC is empowered to prescribe a division rate that, to the extent possible, is cost based. The Committee's overriding concern, however, is that such prescription takes place within the timeframe established by the bill.

By accepting the IRCs' proposed formula, with what we believe are necessary modifications, we hoped to implement the mandate of the RCCA in a practical fashion. The IRCs make no showing that the formula as modified fails at this purpose.

49. Graphnet proposes an alternative formula which it says

approximates presently established worldwide transiting arrangements. Graphnet claims the generally accepted practice for international transiting is that the originating carrier pays the transiting carrier 2;3 of the established accounting rate. The transiting carrier would then retain 1;6 of the accounting rate and pay 1;2 to the foreign administration. The originating carrier would retain 1;3 of the accounting rate. The effect of this proposal would be to increase the amount retained by the originating carrier at the expense of the transiting carrier. The other IRCs oppose this proposal as overly generous, but do not appear to dispute Graphnet's contention that it represents generally accepted international practice. In our view, Graphnet's proposal is not objectionable as a matter of principle. It could be reasonable to adopt an industry practice particularly as an interim measure. However, it is unclear what the actual effect of Graphnet's proposal would be. As is the case with other aspects of our *Interim Order*, we are not disposed to modify what seems a workable, interim approach in the absence of clear evidence that another approach is superior. For example, we are not entirely certain (despite the IRCs' silence on this point) what the established international practice is, whether the practice is consistently applied, whether such practice represents anything more than the raw bargaining power of the parties involved, or whether the practice is somehow related to costs. In any further proceeding to consider the outbound interconnection formula Graphnet may present evidence that its proposal is more suitable than our own. Since the interim prescribed formula seems to us to strike an equitable balance and since, notwithstanding their objections, it tracks the IRCs' own proposals, we deny the petitions to reconsider it at this time.

3. *Pro Rata Return Flow Provisions*

50. Section 222(c)(1)(A)(ii) of the RCCA provides that interconnection agreements for international record carriers service

> shall require that the allocation of record communications service between points outside the United States and points of entry in the United States shall be based upon a pro rata share of record communications service between points of exit out of the United States and points outside the United States provided by the carrier making such request for interconnection.

There is one exception. The requirement does not apply

> in any case in which the customer requesting any record communications service between a point outside the United States and a point of entry in the United States has the option to specify the international record carrier which will provide such record communications service.

51. In applying this provision in the *Interim Order*, the Commission traced the Congressional intent to allow open entry and full competition in international markets. The pro rata requirement is intended to reduce the inhibiting effect on competition of restrictive

practices of foreign administrations, notably the refusal to negotiate operating agreements. The Commission noted that the means of implementating this intent are less than clear (for example, because network operations are based on delivery of inbound traffic by the foreign administrations at mid-ocean), but rejected IRC arguments that its implementation be delayed or ignored. The Commission also rejected the notion that Congress intended to require the actual physical distribution of traffic at midocean so that it could be divided among the different IRCs in proportion to their outbound traffic. Rather, the Commission concluded that it could

> best accomplish the intent of Congress here by dividing the economic benefit that carriers are entitled to receive for inbound international traffic, so that a carrier, which would otherwise be foreclosed from actually handling inbound international traffic due to the lack of a foreign agreement, may participate in the economic benefits associated with the carriage of such traffic. 89 FCC 2d at 965.

52. We prescribed that carriers who are unable to obtain foreign operating agreements be allowed to receive a pro rata share of the economic benefits of inbound traffic for all record communications service, and concluded that the allocation of revenues should follow the transiting arrangements prescribed for outbound traffic. We also allowed the transiting carrier to elect to effectuate physical delivery to the called party when this would avoid involving an extra U.S. carrier and an additional U.S. switch in the transmission. In these cases, the carrier entitled to the pro rata traffic would receive the same allocation as that prescribed for outbound traffic. We emphasized "that our revenue allocation prescription is interim in nature and one which must necessarily change as circumstances warrant." 89 FCC 2d at 967.

53. The IRCs repeat essentially the same arguments on reconsideration which they raised in their comments to the *NPRM*. ITT argues that the statutory language is so vague as to be a legal nullity, and that the Commission should therefore ignore it. TRT argues that the formula is not authorized by the RCCA because it is a revenue allocation formula and the RCCA provides for a traffic allocation formula. As we said in the *Interim Order*, we believe it is incumbent upon us to discern the intent of Congress with respect to the pro rata provision and to apply the provision in a manner consistent with the overall purposes of its statute. As the legislative history makes clear, that purpose is to facilitate entry into these markets by counteracting the competitive disadvantage that some carriers face because they are unable to obtain operating agreements with foreign administrations. This purpose, we believe, can be reasonably accomplished by a revenue allocation formula. Since it is physically impossible to actually make a distribution of traffic at mid-ocean, we do not read this statute as requiring that this be done.

54. The IRCs argue that the return flow provision of our formula is not consistent with the statutory intent and is unfair. Some IRCs

contend that Congress intended the pro rata provision to apply only in instances where a U.S. IRC actually obtains a benefit in the form of increased inbound traffic from the overseas administrations. ITT argues, for example, that the formula should apply only to increased inbound traffic which is a direct and measurable result of increased outbound traffic provided by the carrier claiming a pro rata benefit; it claims that under this standard a relatively small percentage of overseas points would even be eligible for pro rata treatment. RCA argues similarly that traffic which an IRC handles on a transit basis for foreign administrations should be excluded from the allocation because this traffic is based on negotiated agreements independent of U.S. outbound traffic. RCA argues that since the IRC receive no benefit from foreign administrations for this traffic, the traffic should be excluded from pro rata allocations. WUI says that overseas administrations route inbound traffic in many cases without regard to the IRC's outbound traffic such as a "carrier-of-the-month" arrangement, or a system based on the number of assigned trunks rather than the calls. Moreover, WUI argues that there is always a time lag between increased outbound traffic and the realization of increased inbound return, and suggests that the acquisitions of additional operating agreements by Western Union will dry up any pool of unrouted inbound traffic. WUI submits that the interim inbound formula should apply only when the transit carrier actually receives inbound traffic in excess of the share it would have received as the result of outbound traffic initiated by another carrier.

55. We cannot agree with the contention that Congress intended the pro rata provisions to apply only when the transiting carrier received a benefit from the foreign administration as a result of the outbound traffic received from the originating carrier. The pro rata provision of Section 222 contains no such restriction. By its terms, it applies to all inbound traffic unless the foreign administration allows the customer the option to specify the international record carrier which will provide the service. The IRCs seek to have the Commission add an additional restriction to the statute based on the House Report, which states that the carrier without an operating agreement should receive the benefit of any increased inbound allocation. However, it appears to us that the House Report cites the case where the transiting IRC receives the benefit of increased return traffic as an example of the need for the pro rata provision, not as a limitation on its operation. If Congress had intended the statute to be limited in its effect to countries which allocate traffic in proportion to traffic received it would presumably have said so, by adding a further restriction or exception. It appears to us that Congress intended the transitional, 3 year operation of the pro rata provisions to assure a full opportunity to new, small carriers to gain

a foothold in the international record communications market, despite the difficulty in obtaining operating agreements.[17] We have applied the pro rata provision to give effect to this intent.

56. More fundamentally, the calculation of pro rata shares based on benefits to the transiting IRC is administratively unreasonable, indeed impossible. The IRCs concede as much. ITT states that

> 30 of the countries with which we have direct operating agreements permit subscriber choice of the U.S. record carrier by which the traffic should be routed. This category of traffic is specifically excluded from the *pro rata* return provisions by Section 222(c)(1)(A)(ii)-(II) of the Record Carrier Competition Act. In another 61 countries, the administration allocates traffic among the U.S. IRCs on bases generally known only to the administration; it can, however, reasonably be concluded that such allocations are based on a number of factors other than (or possibly in addition to) the traffic received from the U.S. IRCs, particularly as regards any short term changes in such traffic. Thus, for this group of countries, even if a significant increase in a given IRC's outbound traffic (resulting from traffic routed via that IRC by another U.S. international carrier) were to produce, over the long term, some increase in that IRC's traffic allocation by a given country, it is impossible to measure the specific "benefit" of this increased outbound traffic or to isolate that traffic from other factors which may have influenced the administrations decision. Finally, only 15 countries allocate traffic among the U.S. IRCs in proportion to the amount of traffic which they receive from each of the IRCs.

ITT states that even in the 15 countries which allow proportionate returns there would be substantial administrative problems in applying the pro rata provision based on the benefits theory. At least three different methods are used for determining traffic quotas, and the administrations provide no information on whether the traffic handed off is derived from the quota system or allocated on some other basis. TRT frankly admits that it does not see how a pro rata system based on benefits to the IRCs from outbound traffic could be implemented. It suggests we seek further comments.

57. The pro rata provision applies to all international routes where the overseas customer cannot select the international record carrier to handle the inbound haul. We cannot assume that Congress intended that this broad language be narrowed to a virtual nullity, totally ignored, applied in an unworkable fashion, or delayed indefinitely. These are the options the IRC admit are inevitable under their benefit theory. Moreover, we believe it likely that the carriers do generally derive benefits from outbound traffic even if

[17] *See, e.g.*, Cong. Rec., H8906 (daily ed. Dec. 8, 1981) (remarks of Rep. Markey):

> We have crafted legislation which provdes for a group for which there is no powerful or well-financed lobby—new entrants into the record carrier industry. In this regard, this bill takes a tremendous step beyond just squaring off the vested interests of a cartel against a monopoly.
>
> We have applied the spurs of competition to a technology which, until now, has fallen victim to monopoly complacency. My hope is that providers of record carrier service and new entrants into this industry will seek to advance this technology and will aggressively and creatively foster the development of new markets.

they are often inchoate. On some routes, the IRCs obtain virtually all of their revenue from the inbound traffic. Japan is one instance. The IRCs necessarily depend upon receiving a fair share of the inbound traffic to make a profit on that route. On this route as on others, the IRCs are very likely to receive more inbound traffic and other favorable treatment from the foreign administrations if they deliver more traffic, even if there is some time lag before this happens, or there is not a direct correlation, or those advantages are difficult to quantify.

58. RCA states that it has no present dispute with the way the Commission has applied the pro rata provisions, but it seeks clarification on the traffic subject to the formula. First, it argues that three types of transit traffic should be excluded from the inbound traffic subject to pro rata: 1) traffic originating in one country and handed off to the IRC by a second country for termination in the United States (e.g., a call from Nigeria, via the U.K., handed off to an IRC for delivery to the U.S.); 2) traffic originated in one country and delivered to a U.S. IRC on a transit basis for termination in a third country (e.g., a call from the U.K. handed off to an IRC for delivery to Japan); and 3) traffic where two carriers provide transiting (e.g., a call from Nigeria, routed via the U.K. and the U.S. to Japan, where a British and a U.S. IRC both provide transiting).

59. We agree with RCA that traffic in cases 2 and 3 which does not terminate in the U.S. should not be subject to the pro rata requirement. Pro rata is to apply to traffic "between points outside the United States and points of entry in the United States." Section 222(c*1*A*ii*1). Traffic which happens to be physically transmitted through the U.S. to a third country should not be included, for it is not traffic terminating in the U.S. However, upon the same reasoning, traffic which an IRC receives from a foreign administration for delivery in the U.S. is governed by the pro rata provisions even if the traffic originated in another country. Thus, in RCA's case number 1, the traffic should be included in the pro rata allocation. Moreover, since we have directed that the pro rata allocation be determined on a service-by-service, route-by-route basis, the traffic should be included in the file for the actual originating country. For the case mentioned, for example, the Nigeria-U.S. call or its revenues would be allocated in pro rata proportion to outbound U.S.-Nigeria traffic handed off to RCA by the originating IRC.

60. We recognize, on this point, that the IRCs have in the past claimed that they do not know where a call originates. For example, the IRCs have represented that they would not know whether a call handed off to them by the British administration actually originates in the U.K. or in another country. In general, we believe the IRC will in fact know where a call has originated because of its operational and contractual arrangements with the foreign administration. If the IRC actually does not know, however, the call should be allocated

as though it originated at the first foreign point the IRC knows that it passed. Thus, to use the example above, if RCA does not know the call originated in Nigeria, the call should be allocated as though it originated in the U.K.

61. RCA also argues that traffic addressed to the domestic network of the IRC which provides the inbound haul should be excluded from pro rata allocations. It notes that foreign administrations automatically route to each IRC the traffic directed to its domestic network. Only traffic to Western Union's network has in the past been allocated. RCA contends that this practice means that when a foreign customer calls the number of an IRC's domestic customer, the option to specify the U.S. carrier is being effectively exercised. Therefore, it urges, the call is subject to the exception to pro rata contained in Section 222(c)(1)(A)(ii)(II).

62. RCA's argument amounts to a claim that a foreign customer "chooses" an IRC when the foreign administration routes traffic to that IRC in a consistent manner even though the customer knows nothing about it and has no actual option. Unless the U.S. addressee has telex machines connected to more than one U.S. carrier's network, the foreign customer has only a Hobson's choice - if he wants to make the call he must accept the fact that the international portion will be handled by the international operation of the carrier providing the domestic portion. This was not the choice Congress had in mind. We concluded in the *Rejection Order* that the pro rata provision applies except where the foreign administration allows its subscribers to select *any* U.S. international carrier, including those without operating agreements. In the case RCA presents, the foreign customer's choices would be slim or none. Moreover, RCA implies that the pro rata allocation can be based solely on traffic directed to Western Union customers. Of course, Western Union is also now an IRC and unless the entire burden of pro rata is to be placed entirely on its international operations - a result totally at odds with the RCCA's goal of eliminating barriers to entry and flatly discriminatory - the RCA proposal would again render the pro rata provisions practically meaningless. We find no reason to reconsider our implementation of pro rata.

63. The objections of the IRCs to the inbound revenue allocation formula are essentially identical to their objections to the outbound formula, because, of course, the formula itself is identical. We need not repeat our discussion of this point. We would note, however, that using the same formula for traffic in both directions would not only appear to be logical from a cost standpoint, but might also prevent inequitable manipulation of settlement agreements. If different allocation formulas were used for outbound and inbound traffic, the carriers with operating agreements might be able to renegotiate the terms of foreign agreements to take advantage of the disparity for their own benefit and that of the foreign administration, but to the

detriment of the carriers requesting transiting. For example, if the 50–50 split were replaced by a 25–75% split for outbound transiting and a 75–25% split for inbound pro rata, the transiting IRC would have a strong incentive to renegotiate its operating agreements so that it retained all or most of the outbound revenue, while the foreign administration retained a corresponding share of the inbound revenue. Assuming 40 cents per minute is the revenue to be divided between the originating and transiting IRCs, and this is the same for traffic in both directions, each carrier would receive 40 cents in the case of either a 50–50 or 25–75 split. But if the transiting IRC renegotiated the operating agreement with the foreign administration to switch to sender-keep-all arrangement, it would receive 80 cents for outbound calls and nothing for inbound. Under the 25–75% split, the originating IRC would receive only 20 cents altogether and the transiting IRC 60 cents, though there is no difference in cost. Congress sought to eliminate this sort of discrimination and the barrier to entry it represents.

4. *15% Discount for Carrier-Carrier Interconnection*

64. The RCCA provides that "To the extent possible . . . the Commission shall require that [the] equitable allocation of revenues [in the interconnection agreement] be based upon the costs of the record communications service or facility employed as a result of such agreement." Sec 222(c)(2). In the *NPRM*, the Commission noted that there was no creditable evidence of significant cost differences between the services Western Union provided to customers and those it provided to the IRCs. We also recognized that this issue was the subject of an evidentiary hearing in Docket No. 78–97. We invited parties to provide cost data and stated that in the absence of such data we could not conclude that an interim discount from the customer rate was justified. Shortly thereafter, the Administration Law Judge released on initial decision in Docket No. 78–97. The ALJ determined, *inter alia*, that there are cost savings on the order of 20 to 25 percent in providing service to the IRCs as compared with domestic subscribers, because domestic and international Telex/TWX services are provided differently.

65. In the *Interim Order* we noted that the issue of prescribing an interim discount presents a difficult problem because no final resolution of this matter has been made in Docket No. 78–97. Nevertheless, we recognized that the ALJ did find that a substantial discount was warranted and that the House Report disclosed a legislative intent that some discount should be part of a carrier-to-carrier interconnection arrangement. Accordingly, we prescribed an interim discount of 15%, while emphasizing that this decision in no way prejudges any action the Commission might take in Docket 78–97. The discount applies to 1) terminating interconnected domestic calls; 2) initiating and handling off to a second U.S. carrier

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international outbound calls; and 3) accepting for delivery from another U.S. carrier international inbound calls.

66. TRT and Graphnet are the only parties seeking reconsideration of the interim 15 percent discount.[18] TRT claims that cost data in the record indicates that a discount of up to 50 percent would be appropriate and that other cost studies showed that a minimum of 20 percent was required. Graphnet similarly argues for a 50;50 split for domestic interconnected traffic or at least a 20 percent discount. Graphnet's petition is largely addressed to the difficulties faced by a new carrier attempting to enter the domestic telex market. It argues that a higher discount is needed to allow new carriers to compete profitably.

67. We find no basis in either TRT or Graphnet's petitions for modifying the interim discount at present. The other carriers have not challenged the reasonableness of the discount and TRT presents no new arguments or information. Graphnet's arguments largely amount to a request for favored treatment to new domestic carriers in order to reduce their costs and rates. The directive of the RCCA, however, is to require interconnection based so far as possible on costs. This should ensure a fair opportunity for new carriers to compete, certainly an opportunity equal to that of a company seeking to enter a typical competitive market. Any modifications of the interim discount should be to align it more closely with costs, not to favor certain carriers regardless of costs. In the absence of any demonstration that some other discount better reflects costs, or of a final determination of that issue in Docket 78–97, we will not disturb the present interim discount.

68. TRT and RCA also raise a related issue. They argue that the Commission should permit carriers voluntarily to implement, on a mutual basis, domestic division arrangements under which the payout to the terminating carrier is less than that prescribed by the Commission. They argue that Western Union will not provide rates and terms of interconnection which open up its near-monopoly network to interconnected traffic, and that if other carriers are allowed to interconnect with one another on more favorable, mutual terms, they will be able to provide a meaningful alternative to Western Union's network. In particular, they may be able to offer increased incentives for customers to join their networks rather than Western Union's. TRT and RCA also contend that there is no basis in the record to prohibit carriers other than Western Union from voluntarily accepting a lower terminating charge than that prescribed. The IRCs and Graphnet had entered into agreements to terminate domestic interconnected traffic at the rate of 10 cents per

[18] Western Union also requests that the Commission rule that refunds will be ordered if the interim discount is modified. Since the issue of refunds, if any, will be decided in Docket No. 78–97, we do not address the issue here.

minute and RCA by letter of April 9, 1982 requested a clarification of whether such bilateral agreements were allowed under the *Interim Order*. The Chief, Common Carrier Bureau, by letter of April 27, responded that he interpreted the 15 percent discount as applying to all interconnected carriers. He noted that no IRC had provided costs and stated "For the time being, therefore, until the Commission has the opportunity to consider this matter further, carriers' interconnection tariffs should reflect the 15 percent discount notwithstanding any pre-existing bilateral agreements." The Commission also rejected such provisions in the *Rejection Order*.

69. Western Union opposes reconsideration of this issue. It points out that the IRCs have still not provided cost data, and argues that they have not shown they will be better off, noting that under a mutual agreement carriers will receive the same net revenue as under the 15 percent discount so long as a carrier's originating and terminating traffic are about equal. Western Union also reasons that if a carrier can show that a 10 cent charge is cost-based, the carrier should offer it to all carriers, not only to those carriers willing to agree to a reciprocal arrangement.

70. The basic choice presented us on this issue is between two policies of the RCCA which are in some tension. On the one hand, the RCCA requires that interconnection be based so far as possible on costs. The bilateral 10 cent arrangements are not based or claimed to be based on the costs of terminating calls. On the other hand, the RCCA seeks to promote competition, minimal regulation, and open entry. The IRCs apparently believe that they can compete more effectively with lower, bilateral domestic interconnection rates, and that entry into the market long dominated by Western Union would be facilitated. Elimination of this restriction would also reduce our regulatory role. Moreover, to the extent that the IRCs lack market power in domestic telex, it can be argued that they should be allowed to discriminate.

71. Weighing these opposing factors, it appears reasonable as a policy matter to allow bilateral arrangements of the sort proposed by the IRCs, so long as the same terms are offered to all carriers seeking interconnection. This course should foster competition and reduced regulation, yet should not substantially depart from the goal of cost-based interconnection. So long as traffic flows between carriers are relatively even in both directions, the overall revenue effect of the bilateral agreement would be the same as the 15 percent discount, as Western Union itself points out. Although use of the 15 percent discount was a reasonable first step to establish functional interconnection, and to prevent abuse by Western Union of its dominant domestic position, we perceive no convincing policy reasons why a carrier may not now voluntarily accept less for interconnection as part of a bilateral agreement, where the overall effect of the agreement, assuming relatively even traffic flows, is as close to costs

as the 15 percent discount. Of course, it is somewhat anamalous for a carrier to make the offering of a tariffed service contingent upon the offering of a similar service by the carrier-customer. But in this case, with its unique problems of carrier-to-carrier interconnection, the practice seems justifiable. However, the IRCs' proposal also presents troubling practical issues. It would, for example, require the IRCs to impose different terminating charges for calls received from different carriers, about 30 cents for some and 10 cents for others. Moreover, since the bilateral rate applies only to domestic calls, terminating carriers would apparently charge 30 cents for terminating all international calls, including those from carriers who are charged the 10 cents rate for domestic calls. The carrier would thus have to know whether a call was domestic or international to determine what the charge should be. In the past, the IRCs have represented to the Commission that they are unable to determine where a telex call originates. To the extent that this is so, we are uncertain how the IRCs would determine the proper termination charge for each call. Accordingly, if the IRCs wish to implement the bilateral 10 cent termination arrangement in their interconnection tariffs, they should provide a full explanation of how the arrangement would be implemented as part of a request for waiver of the interim discount. We will grant the Chief of the Common Carrier Bureau discretion to determine whether the carrier has demonstrated that the 10 cent arrangement can be implemented in a practical manner and, in such case, to allow appropriate waiver of the terms prescribed in our *Interim* and *Rejection Orders*. If the waiver is granted, the record carrier may then file a transmittal proposing corresponding revisions to its interconnection tariff. The revised tariff should expressly include both the 15 percent discount, without condition, and the offer to terminate domestic traffic at a lower rate, subject to reciprocal arrangement, as service options available to all record carriers. It should also list the carriers interconnecting under the reciprocal offering.

72. One important caveat should be noted. The RCCA allowed the carriers 90 days to reach voluntary interconnection agreements. They failed to do so. This Commission was then required to prescribe interconnection terms to be effective during the three year transition period. Our prescription of interconnection arrangements is the exclusive interconnection mechanism allowed by the RCCA. Carrier arrangements other than those prescribed are not permitted and are of no effect under this plan. Carriers seeking modification of current interconnection requirements must request a modification of our prescriptions in the *Interim Order* and the *Rejection Order*. Thus, carriers may not implement lower, bilaterial charges or other modifications of the prescriptions until and unless the Commission specifically allows it.

6. *Market Share and Reports*

73. The RCCA exempts record carriers which "[do]" not have a significant share of the market for record communications services" from requirements that their domestic and international operations be treated as separate carriers for purposes of interconnection, and that such interconnection be offered to other carriers equal in type and quality and upon the same rates, terms and conditions as to the separated carrier. Section 222(c)(1)(B). In the *Interim Order* we concluded that this exception applied to FTC and noted that there seemed to be no question among the the parties that it also applied to Graphnet. We therefore did not require Graphnet to separate its domestic and international segments, but invited further comments on this determination. 89 FCC 2d at 956.

74. Graphnet provided no information on its market share or the extent of its operations and indeed did not comment at all on this issue. TRT and ITT contend that there is insufficient publicly available information to make a conclusive determination of Graphnet's market share. TRT suggests that on the basis of what is known, such as the number of listed Graphnet subscribers, it would appear that Graphnet has a greater market share than FTC, and perhaps greater than TRT's own. TRT, ITT, and Western Union urge that carriers such as Graphnet, which currently do not file financial, service, and traffic reports under the Commission's Rules, should now be required to do so in order to determined their relevant market shares. WUI also claims that such filings should be made affirmatively to demonstrate that the carrier is eligible for interconnection as a record carrier within the meaning of revised Section 222. In addition, it urges that such carriers should provide this information to establish their *bona fides*, i.e., to provide the public and carriers who may be required to interconnect with information about the financial backing and health of new carriers and their financial, technical, and legal qualifications. It notes that it was forced to write off obligations from another resale carrier which recently went bankrupt. CCI states that it is not required to file reports under its special permission, but will file required reports when it receives permanent operating authority. It also says that it has been reluctant to submit such information voluntarily because it claims the IRCs could use this information for what CCI describes as unrestrained, predatory conduct aimed at driving it out of business. But it states that it is prepared to make such filings if the Commission deems it necessary.

75. As the IRCs point out, the RCCA requires us to differentiate the regulation of record carriers according to their market shares. Applying the RCCA's definition of a record carrier also may require revenue information.[19] To implement these provisions information

[19] Under Section 222(a)(2) the definition of a record carrier "does not include any common carrier which derives a majority of its revenues during any calendar

on a carrier's operations will inevitably be necessary, especially market share data. However, we are not convinced that implementation of the RCCA requires the effective expansion of filing requirements beyond those presently required by our rules and orders. The IRCs suggest that it is possible Graphnet could be considered to have a significant market share; but they don't even raise the possibility that any other carriers would be found to have market shares approaching those of the four major IRCs or Western Union, the carriers apparently designated as having significant market shares by Congress. It is also unlikely that any information we might receive from carriers on the share of their revenues derived from record communications services would be of actual value. The interconnection and other requirements of the RCCA are largely supplements to the Commission's existing authority to regulate carrier interconnection. It is doubtful that the Commission would impose different requirements on certain small carriers who provide record service, but are not technically record carriers in the sense of deriving a majority of their revenues from such services. Thus, the market share data could well be unnecessary as a practical matter.

76. We have also been reluctant to require the filing of Commission reports by new small carriers because of the burdens such reports would impose, the possible adverse effects of such requirements on their ability to compete vigorously, and the fact that there seemed no substantial public need for such information. The RCCA directs us to forbear from unnecessary regulation and promote competition "to the maximum extent feasible." Section 222(b)(1). Imposing additional and largely unnecessary information requirements on small carriers would disserve this clear policy directive.[20] We believe that the few instances in which such information may prove necessary can be dealt with on a case-by-case basis.

77. We also find no merit in WUI's proposal that the filing requirements be extended to additional small carriers in order to demonstrate the carriers' *bona fides*. Our information requirements are imposed for public purposes, to provide the Commission with data necessary to carry out the goals of the Communications Act. We do not collect data to suit the private interest of particular carriers or to enable them to make better business decisions. This is particularly the case where the data might be used for competitive purposes.

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year from the provision of services other than record communications services." The legistative history indicates that this was intended to exclude such companies as AT&T and Comsat. House Report at 10.

[20] None of the petitions suggest that any of the small record carriers are presently required to file reports and are violating our Rules by failing to do so. Our discussion is thus limited to the question of whether we should impose additional filing requirements to implement the RCCA.

78. For these reasons, we deny the request that we impose new filing requirements on all carriers offering record services. However, we do believe that further information is required in the case of Graphnet. Although, we specifically requested comments on the issue of Graphnet's market share in the *Interim Order*, Graphnet itself ignored this request completely. It is likely that a brief filing by Graphnet could have resolved this question. We will therefore direct Graphnet to provide a full record from which the issue can be decided. Graphnet is ordered to file the Commission's Form O Annual Report, as provided in Section 43.21 of the Commission's Rules, and the semi-annual report of overseas telecommunications traffic under Section 43.61, no later than March 31, 1983 and May 15, 1983 respectively. It is also required to make an affirmative declaration of its status as a record carrier under Section 222(a)(2) of the RCCA and, if exemption is claimed under Section 222(c)(1)(B), of its shares in the domestic and international markets. This declaration should be based on identified sources derived from the filed reports or other reports submitted by Graphnet. In general, the filing should contain all the information upon which Graphnet seeks to rely. Other record carriers may not deny interconnection because of the failure of Graphnet or any other carrier to file reports, or of any defects therein, unless the Commission has so ordered.

7. *Contracts*

79. The RCCA provides a comprehensive scheme for regulation of record carrier interconnection, but it also "grandfathers" certain intercarrier contracts. Section 4 of the Act provides that "The amendment made in Section 2 [adopting new Section 222] shall not affect the validity of the terms of any otherwise lawful contract relating to the distribution of outbound international record traffic between any domestic record carrier and any international record carrier if such contract was entered into before June 23, 1981." The House Report indicates that this provision is intended to permit enforcement of contracts by which Western Union agreed to distribute international traffic to certain international carriers such as TRT, if the contracts are "otherwise lawful". House Report at 7, 14. TRT sought to include a contract with Western Union in its interconnection tariff, but this was rejected pending a determination based on an appropriate record[21] that the Commission should reverse or modify its earlier order filed in compliance with the mandate of the Second Circuit Court of Appeals[22] that the contract

[21] Western Union Telegraph Co., 84 FCC 2d 150 (1980).
[22] *ITT World Communications* v. FCC, 635 F. 2d 45 (2d Cir. 1980).

was unlawful.[23] The Common Carrier Bureau accordingly requested all carriers who had entered into contracts which they claimed were "grandfathered" by Section 4 to file them with the Commission for public comment. The comments were to address the issue of whether each contract is subject to Section 4 and is otherwise lawful within the meaning of that section. This inquiry was limited to the lawfulness of the contract under the Communications Act. The Bureau stated that issues of contract law should properly be decided by a court.[24]

80. TRT and FTC filed contracts in response to this notice. The TRT contract is a letter agreement with Western Union dated May 19, 1980, with a minor modification on July 1, 1980. TRT agrees to provide transiting facilities to Western Union, on a non-exclusive basis, for overseas telex traffic as to which Western Union assumes tariffing, billing, and collection responsibilities. Western Union agrees to route a minimum of 50 million minutes during the first five years of the agreement at a rate of $.30 per minute (or $.10 for traffic to the U.K.) plus the amounts due foreign correspondents. The five year period was scheduled to begin August 15, 1980 (subject to modifications in the July 1, 1980 letter), but all obligations and duties under the agreement would be postponed if the agreement were prohibited or enjoined by this Commission or a court.

81. The FTC agreement, embodied by a letter of November 10, 1980, contains similar terms except that Western Union does not agree to deliver any particular amount of traffic during the five year period. Western Union agrees to transfer to FTC all traffic routed by the sender via FTC and not to discourage such routing by charging rates higher than for traffic routed via any other carrier.

82. Comments were filed by Western Union, RCA and WUI. All of the comments agree that both contracts are of the type encompassed within Section 4 of the RCCA and were entered into before the date specified. Western Union notes that it has previously defended the agreements as lawful under the Communications Act, and does not contest their current lawfulness. RCA and WUI argue that the contracts contravene express provision of the Act and thus are not "otherwise lawful." First, RCA states that the agreements provided different, lower charges for interconnected calls than the formula prescribed in the *Interim Order*, and argues that the contracts therefore violate amended Section 222. But this argument is clearly baseless. Section 4 of the RCCA states that "the amend-

[23] This part of the *Rejection Order* was stayed pending appeal by the court of Appeals for the D.C. Circuit, TRT v. FCC, Docket No. 82-1658, decree entered October 25, 1982.

[24] The House Report states, at 14: "In the event that the agreements are challenged, their legality shall be determined by the courts on well-established issues of contract law, such as the intent of the parties and the nature of the consideration."

ment in Section 2 (of the RCCA) of shall not affect the validity of the terms" of such contracts. It is Section 2 of the RCCA which enacts the amended Section 222, including the requirement that an allocation formula be adopted. Thus, the interim formula implementing amended Section 222 cannot affect the validity of these agreements. Section 4 allows the agreements to differ from any regulatory scheme adopted under the amended Section 222 provided the agreements are "otherwise lawful".

83. Next, WUI argues that the agreements are unjust and unreasonable in violation of Section 201(b) of the Act, and both WUI and RCA assert that they are discriminatory in violation of Section 202(a). Before considering these arguments we should first address TRT's position that Congress intended the "otherwise lawful" provision in Section 4 of the RCCA as a reference only to any remaining questions of contract law, not to whether the agreements might violate other provisions of the Communications Act such as those relied on by WUI and RCA. In support TRT cities language in the House Report that issues of contract law should be decided by the courts.[25] However, the terms of Section 4 "grandfather" the contract only with respect to Section 2 of the RCCA, which repealed and replaced Section 222, not with respect to any other provisions of the Communications Act. If Congress had intended to "grandfather" the contracts against all violations of other provisions of the Communications Act, it presumably would have said so and not limited the exception in Section 4 to amended Section 222.[26] Moreover, in the sentence following the language relied on by TRT, the Report states, p 7; "This legislation should not be construed as affecting the Commission's authority under any of the other sections of the Communications Act of 1934, as amended" Thus, while Congress apparently did not perceive any objection in policy to these agreements, it also has not altered the Commission's traditional responsibility to assure that intercarrier agreements comply with other provisions of the Communications Act.

84. We turn then to the issue of whether the contracts are "otherwise legal" under other provisions of the Communications Act. WUI and RCA argue that the TRT agreement is discriminatory, because Western Union has refused to offer a minimum traffic guarantee to any other carrier; that it is anti-competitive and violative of Commission policy by analogy to prohibitions on exclusive agreements between U.S. international carriers and foreign administrations; that it implements charges and practices which are not just and reasonable under Section 201(b); that it is an illegal market division scheme in *per se* violation of Section 1 of the

[25] See footnote 17 supra.

[26] The House Report also states at p. 7: "The bill does not take a position on the legality of the contract absent the restrictions in Section 222."

Sherman Act; and that it constitutes a denial of reasonable, and non-discriminatory access to an essential facility. First, the discrimination argument is unpersuasive. All of the IRCs have transiting arrangements established by contracts. The fact that a carrier did not make a public offering of its transiting requirements and terms before agreeing to a contract has never to our knowledge been held sufficient to render a transiting agreement unjustly or unreasonably discriminatory. Absent the requirements of amended Section 222 (which of course do not apply to these contracts), the other IRCs would also be free to compete for transiting Western Union or other carriers' traffic.

85. Next, we do not see the relevance to these contracts of our policies preventing foreign administrations from favoring selected U.S. carriers by means of exclusive agreements. These contracts are not exclusive contracts, because either party can make similar arrangements with other carriers, except as presently barred by amended Section 222. There is also not the same likelihood of harm to U.S. national interests as in the case of exclusive agreements with foreign administrations, which can be used to "whipsaw" carriers and eliminate competition. Moreover, the contracts themselves are not anti-competitive on their face. They allow Western Union easier entry into international markets and provide traffic to the small international carriers, who at the same time continue to compete with Western Union and the other IRCs.

86. Nor can we conclude that the transiting charges agreed to would be unjust and unreasonable under Section 201(b). This argument is based on the bald fact that the charges would be different than those under the interim formula. This does not establish the unreasonableness of other, different charges. We might of course seek cost justification of the charges, but it is difficult to see what public benefit would be served by trying to protect one side or the other from what might appear to us an improvident bargain. The IRCs themselves have requested that we allow them to make mutual agreements for domestic interconnection charges which are lower than the interim prescription to facilitate their competition in the domestic market. It is difficult to perceive why we should on the other hand void a voluntary contract to facilitate Western Union's entry into the international market. In the absence of any sign of abuse or harm to the public interest we see no reasons to disturb the bargain reached by the contracting carriers, and certainly no illegality.

87. Finally, we do not find that the agreement violates the Sherman Act.[27] RCA and WUI claim that each agreement is to share

[27] Although the Commission does have the responsibility to enforce the antitrust provisions of Section 11 of the Clayton Act, 15 U.S.C. § 21 (1976), it is doubtful that the Commission has specific authority to enforce the Sherman Act upon common carriers, except insofar as they are also radio licensees. Sections 313, 314

traffic and as such constitute a horizontal market allocation scheme in per se violation of Section 1 of the Sherman Act. They cite *U.S. v. Topco Associates*, 405 U.S. 596 (1972) as authority. However, we do not see how the agreement can be said to have this effect, and the *Topco* case is not in point.[28] Western Union, TRT, and FTC are free to compete for international traffic in all parties of the world, as they presently do in fact. There are no market areas which are reserved for or allocated to one or the other contracting party, as was the case in *Topco*. Both parties are also free to set whatever rates they wish to customers. The agreements only allow Western Union access to facilities in order to compete with other carriers, including those which provide the facilities. The agreements are also non-exclusive. Western Union can transit via other carriers, while TRT and FTC can offer transit service to other carriers (indeed they are required to do so under the RCCA). We perceive no antitrust violation.[29]

88. For these reasons, we conclude that the TRT and FTC agreements are "grandfathered" under Section 4 of the RCCA and otherwise lawful under the Communications Act.

89. One related question remains. Although Western union and TRT differ somewhat on how important inbound, return traffic was as part of the consideration for their agreement, they do both agree that their expectation was that TRT would not hand off inbound traffic to Western Union and would retain any benefits in the form of increased allocations of inbound traffic which might result from the Western Union's outbound transiting traffic. The TRT contract provides "that all outbound overseas telex routing service (or similar) traffic transmitted by TRT pursuant to this Agreement will be considered TRT's traffic for purposes of obtaining allocations of return telex traffic from foreign correspondents." The FTC contract contains an identical provision. The issue of whether the pro rata requirement for inbound traffic should apply to "grandfathered" outbound traffic was not specifically raised in the *NPRM*, but in the *Interim Order* the Commission stated, 89 FCC 2d at 970, "Such contracts for the routing of outbound traffic will be included in the

of the Communications Act, 47 U.S.C. §§ 313, 314. However, we also recognize that competitive considerations are an important element of the public interest standard which governs our decisions. Northern Natural Gas Co. v. FPC, 399 F. 2d 953, 961 (D.C. Cir. 1968), United States v. FCC, 652 F. 2d 72 (D.C. Cir. 1980).

[28] In *Topco*, a group of supermarkets had allocated among themselves exclusive territorial franchises to market a line of products, in order to minimize competition at the retail level. They also imposed limitations upon reselling at the wholesale level. The Court found these territorial restrictions to be a per se violation of Section 1 of the Sherman Act.

[29] RCA is also incorrect that the agreement prevents reasonable and non-discriminatory access to an essential facility, Western Union's domestic telex network. All international carriers are guaranteed equal access to that network by the RCCA. The TRT and FTC agreements only allow Western Union's international operations access to the international networks of TRT and FTC. Neither of these networks are essential facilities in an antitrust sense.

pro rata calculation. We note that [Section 4 of the RCCA] does not grandfather' contracts for the delivery of inbound record communications service."

90. TRT and FTC seek reconsideration of this language. They argue that the Commission should not and may not nullify or modify these provisions of the grandfathered contract by granting the benefit of return traffic to Western Union under the pro rata provision. Having examined this issue more closely, we will grant TRT and FTC's petitions on this point. The pro rata provision is one of the amendments made in Section 2 of the RCCA. Section 4 of the RCCA provides that amendments in Section 2 "shall not affect the validity of the terms of any otherwise lawful contract relating to the distribution of outbound international record traffic. . ." Although the return traffic provisions in the contracts do not concern outbound traffic itself, they are "terms of contracts relating to the distribution of" such traffic. Under Section 4, therefore, they are not subject to amendments adopted in Section 2 of the RCCA, including the pro rata provision.

8. *Resale carriers and carriers without operating agreements.*

91. ITT urges that the Commission clarify its intent as to the applicability of the outbound transiting arrangements and pro rata return provisions to resale international carriers who lack agreements with foreign administrators.[30] Typically, these carriers operate a U.S.-based operations center where traffic is collected, and use leased private lines to transmit messages overseas, e.g., to London. The messages are then retransmitted via the domestic telex network, e.g., British Telecom. By using computerized storage and high speed forwarding, and possibly by arbitrage of IRC services, service economies, and willingness to accept lower returns, these carriers can offer telex rates lower than the major IRCs. For example, International Relay Inc. (IRI) has a present rate to the U.K. of 40 cents a half minute or 80 cents a minute. ITT's rate is $1.03 a minute. ITT contends that the outbound formula would be unequitable as applied to these carriers. It calculates for example that it would receive less for transiting IRC traffic to the U.K. than it is required to pay to British Telecom. ITT also argues that Congress did not contemplate or intend an extension of the benefits of interconnection to carriers whose method of operations is outside the normal international communications process. ITT proposes that the Commission require such carriers to elect either to continue their present method of operations without benefit of outbound transiting arrangements, or to abandon their present method of operations and route all overseas traffic via a transiting IRC or a foreign administration.

[30] ITT characterizes them as "private network carriers."

92. Consortium Communications International, Inc. (CCI) and IRI oppose ITT's proposal. We need not discuss their opposition in detail, because ITT's position is manifestly in direct conflict with the language and purpose of the RCCA. Section 222(c)(1)(A)(i) states that:

> In implementing its responsibilities under section 201(a), the Commission shall require each record carrier to make available to any other record carrier, upon reasonable request, full interconnection with any facility operated by such record carrier, and used primarily to provide record communications service. Such facility shall be made available, through written agreement, upon terms and conditions which are just, fair, and reasonable, and which are otherwise consistent with the purposes of this section.

Section 222(c)(1)(A)(ii) requires that this agreement implement pro rata sharing of international inbound traffic.

93. This language is unambiguous. It requires full interconnection with any other record carrier during the three year transition period in which it is effective. There is no basis for restricting its operation to carriers who, in ITT's view, engage in "normal international communications arrangements." Indeed, a clear Congressional intent in adopting the RCCA was to allow open entry and free competition and to eliminate so far as possible the competition-inhibiting effects of operating agreements. We affirmed IRI's right to interconnection in the *Rejection Order*.[31]

94. ITT's claim that it must operate at a loss to provide transiting to IRI is also wrong. ITT's calculation is based on IRI's service to London. ITT claims that assuming a 39 cent domestic telex rate, it would receive only 41 cents per minute for transiting, less than the 60 cent payout to British Telecom. This claim is based on use of IRI's rate to determine whether the floor should apply. As we explained above, IRI's rate is irrelevant. In fact, ITT would receive $1.01 per minute under the formula,[32] far more than the 60 cent foreign payout and only two cents less than it receives from its own customers.

95. In sum, CCI, IRI, and all other record carriers are entitled to interconnection at the interim formula rate, and to the benefit of the pro rata provision.

9. *Mandatory use of U.S. IRCs for transiting*

96. RCA proposed in its comments to the *NPRM* that we require the mandatory use of U.S. carriers for transiting. The Commission

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[31] We are not considering here the issue raised by Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, 77 FCC 2d 831 (1980).

[32] ITT would receive the foreign payout ($.60) plus half the remaining revenue ($1.03-$.60) ÷ .39 ÷ 2 = $.41. Since the total of the domestic rate and transiting carrier ITT's rate is 1.42 ($.39 + $1.03) IRI would retain a total of $.41, and would be required to pay the domestic rate of $.39 for an actual net revenue of $.02. ITT's actual net revenue would be $.41.

rejected this proposal in the *Interim Order* as anticompetitive. 89 FCC 2d at 963, n. 36. RCA repeats this proposal in its petition for reconsideration. It urges that foreign transit services are diverting millions in rate payers' dollars to foreign communications entities which are typically state owned, and contends that proscribing this outflow would cause higher investment in the facilities of U.S. carriers, which, it is claimed, would benefit U.S. users. As RCA states it, this would be a mandatory "Buy America" policy for record communications services. As an alternative, RCA proposes that U.S. carriers be given a right of first refusal to match foreign transit charges. Western Union and Graphnet oppose RCA's request.

97. We continue to find no basis for RCA's proposal. The RCCA makes no provision for such a policy. To the contrary it espouses open entry into the international market and reduced regulation, not additional, restrictive regulations which would deter new entrants in order to benefit U.S. carriers with foreign operating agreements. RCA's proposal would provide a regulatory subsidy to IRCs with operating agreements at the expense of consumers, would impose cartelization upon U.S. transit traffic, and would be likely to initiate protectionist record communication trade wars. It would also represent further regulation in an effort to restrict the access of new and existing U.S. carriers to lower price service options and methods of international operations. Moreover, any such "Buy America" policy would be a significant act of foreign policy with implications for American treaty commitments. Graphnet states that such a regulation would effectively revoke its sole international operating agreement with the Philippines, because under the agreement the Philippines provides transiting services. Graphnet also argues that the proposal is beyond the scope of this proceeding. In fact, the proposal is directly inimical to the purposes of this proceeding and of the RCCA, and it is denied. We also see no purpose in imposing the alternative right of first refusal upon carriers. The Congress directed us to promote competition in the international market, not to impose barriers to its operation by eliminating the right of new carriers to enter into contracts of their choosing. The policy of the RCCA is to replace regulation with competition, yet RCA seeks to have us protect it from competition by additional regulations whose burden would lie on new entrants and whose effect would be to protect established oligopolists. RCA remains free, within the bounds of the RCCA, to compete for transit traffic on the same basis as other carriers.

10. *Classification of Puerto Rico*

98. In the Technical and Technical Related Issues section of the *Rejection Order*, the Commission noted that it was uncertain whether Puerto Rico, which has "commonwealth" status, should be considered a domestic U.S. point under Section 3(g) of the Communi-

cations Act. In view, of this uncertainty, the Commission permitted an agreement by the major carriers to proceed. Without classifying Puerto Rico, the agreement treats it "as if" it were an international point, when the Puerto Rico Communications Authority (PRCA) is not the carrier involved in the calls. In the case of calls originating or terminating on the PRCA, the *Rejection Order* instructed the U.S. carriers to develop technical and rate arrangements appropriate to meet the goals of the RCCA. The Commission reserved the right to determine the ultimate classification of Puerto Rico as "domestic" or "foreign". The PRCA requests reconsideration and a declaration that Puerto Rico is a domestic point for record services. In a recent order, the Commission had occasion to consider this issue directly and determined, as the PRCA contends here, that Puerto Rico is a domestic point under the Communications Act. *Puerto Rico Communications Authority*, FCC 83–28, released February 8, 1983. It also directed carriers to make appropriate corrections in their tariffs.

99. We still do not wish to alter the "as if" technical arrangements for interconnection with the PRCA at this time. To avoid uncertainty, however, we do believe that we should clarify application of the RCCA in one respect, at least until new interconnection arrangements are established. The PRCA is a domestic carrier and its local intra-island telex charge should be used as the domestic component for outbound, international telex calls originating on the PRCA network. The interconnecting IRC would then add its international component charge to yield the total, end-to-end rate. Each carrier would bill its own charges for these calls, as is the current practice. In order to implement this, each IRC must list the PRCA as an other common carrier in its public tariff and reference the PRCA's local tariff to obtain the domestic component.

11. *Settlement for Domestic Termination of Inbound Calls.*

100. Historically, in settlements between the IRCs and Western Union for the domestic handling of inbound international telex calls, the IRCs have paid Western Union its full charge based on actual domestic minutes. ITT claims that its settlements with foreign administrations generally reflect less than the total number of traffic minutes received from each administration because of administrative traffic, accounting charges, and errors. It claims that the IRCs have absorbed a shortfall in settlements in the past, but proposes that settlements should now be based on international settlement minutes. It contends that Western Union will necessarily be bound by accepted international settlement principles in its own international operations, and argues that it would be fair and equitable to require interconnected inbound traffic to be based on these principles. Although the *Interim Order* provides that domestic minutes be used to calculate the domestic segment of international calls (89 FCC 2d at 970), ITT argues that this determination applied

solely to outbound calls. Western Union opposes ITT's request, arguing that ITT has presented no evidence in support of its proposal and that it is merely an attempt to increase IRC revenues which are already far above costs. It contends there is no reason why any domestic carrier should be compensated for less than the actual usage of its domestic network as a result of billing disputes between foreign administrations and the U.S. international carrier.

101. As an initial matter, ITT is incorrect that the treatment of inbound minutes was left unresolved in the *Interim Order*. The Order stated that the carrier providing the domestic segment of any international call may base its cost on domestic minutes. This determination was not limited to outbound traffic. Moreover, the *Interim Order* also determined "that the existing arrangement for handling interconnected international inbound transmission was reasonable and worthy of continuance" 89 FCC 2d at 957. The existing arrangement uses domestic minutes. ITT also presents no evidence or information on the effect of its proposal, such as the number of minutes or amount of revenue involved, the delay necessary to determine international settlement minutes, or other factors. On the face of it, the logical basis for calculating a settlement for use of a domestic network is the actual domestic usage, and we believe that such an approach is at least most consistent - and perhaps actually required - by the dichotomy between domestic and international services mandated by the RCCA. The claim that the IRCs use international settlement minutes for settlement with their own domestic operation provides no persuasive basis for imposing that same regime upon other carriers. Indeed since ITT Worldcom is a single company and all international and domestic revenues go into a single "pot" the contention appears to be meaningless. None of the other carriers supported ITT on this point. In the absence of any evidence or persuasive argument in favor of the use of international settlement minutes, we deny ITT's request for reconsideration on this issue.

12. *Maritime Marine*

102. Maritime Marine Radio, Inc. (MMR) is a carrier providing voice and record maritime services, including telegram and telex, between vessels at sea and points on land both in the United States and abroad. It requests the Commission to extend the scope of the *Interim Order* to apply to record maritime communications carriers and services. Specifically, MMR submits that it is entitled to the benefits of the pro rata return flow provision for traffic originating abroad and routed via a record maritime communications carrier to ships at sea; that the Commission should act concerning outbound, unrouted maritime traffic; that the 15 percent interim discount should apply to traffic originating on a domestic network and interconnected with MMR for completion and to traffic from a vessel

to MMR interconnected with a domestic network for domestic or foreign delivery; and that the 1.3 holding time factor should not apply to maritime traffic, or should apply only to directly connected traffic, not to store and forward telex.

103. Western Union states that its telex and TWX networks interconnect with MMR on a customer paid subscriber-line basis, i.e., Western Union subscribers dial MMR in the same fashion as any other subscriber. It argues that the 15 percent discount applies only to carrier-paid access and in any event that physical limitations in its network preclude giving its subscribers a 15 percent discount on customer-paid calls to MMR. It also contends that if MMR is eligible for carrier-paid access, it should be required to reimburse Western Union fully for the necessary interconnection costs. ITT argues that inbound international traffic routed to a U.S. carrier radio station for delivery to ships at sea is not within the contemplation of the pro rata requirement of the RCCA, and that the Commission itself has limited applicability of this provision to carriers authorized to provide point-to-point international record services, but unable to obtain operating agreements. In response to Western Union, MMR argues that the details of interconnections, including cost reimbursement, are beyond the scope of this reconsideration proceeding. It also states that clarification of the application of the 1.3 factor to maritime traffic should be resolved prior to any request for carrier-paid interconnection. MMR also argues that ITT's position on the pro rata requirement is an overly technical and impractical reading of the statute. It contends the pro rata provision should be read as requiring allocation of international inbound traffic among all interconnecting carriers, including domestic carriers, for subsequent delivery.

104. Specialized record services such as mobile marine service may well require special consideration to give practical effect to the RCCA, and the scant record before us on reconsideration provides no adequate basis for such an undertaking. We limit these comments to the specific issues raised by MMR. First, all record carriers, including marine carriers, are subject to the RCCA. See *Rejection Order*, 91 FCC 2d at 498, n. 38. For example, they are entitled to interconnection with other record carriers. However, it appears that MMR is taking service under customer tariffs. There is no provision for a carrier discount in customer tariffs and no apparent cost difference which would justify such a discount. The prescribed 15 percent discount is available to MMR under the interconnection tariff, but we see no reason to require such a discount in the customer tariff. We express no view on the hypothetical question of how costs for interconnection should be apportioned if MMR chooses to request interconnection as a carrier.

105. Next, MMR is not entitled to any allocation of traffic under the pro rata provision in the circumstances it describes. The pro rata

provision allocates service "between points outside the United States and points of entry in the United States" (Section 222(c)(a)(ii)(I)), i.e., inbound international traffic. MMR does not seek interconnection to provide this traffic. It interconnects with and exchanges traffic with domestic carriers. In the case of messages received by the domestic carrier from overseas, the pro rata provision applies to the international carriers handling the inbound portion, not to the domestic carrier who then receives it or to any subsequent interconnected carriers.[33] Properly, MMR's concern that it may be disadvantaged if domestic carriers favor their associated mobile marine services should be considered under Section 222(c)(1)(B). As we pointed out in the *Rejection Order*, n. 38, mobile marine service is a "foreign service" under 47 USC § 153(g) and thus an international service under the RCCA. See Section 222(a)(i). Domestic carriers offering mobile marine services are therefore required by Section 222(c)(1)(B) to treat their mobile marine operations as separate international operations for purposes of interconnection, and to make interconnection available to MMR and other carriers which is equal in type and quality, and available at the same rates and upon the same terms and conditions as that afforded their own mobile marine operations.[34] MMR's petition does not indicate whether this is the case, or whether it has requested such interconnection. MMR also makes no specific request for action regarding outbound unrouted maritime tarffic, and it is not clear that Commission action is necessary or desirable. Finally, the question of whether to apply the 1.3 holding time factor to store and forward telex traffic is being considered in a separate proceeding decided this day.

13. *Prepublication Review of Other Carriers' Telex Directories*

106. WUI proposed in its comments responding to the *NPRM* that the Commission require each carrier to give all other carriers the right to pre-publication review of telex directories. Western Union opposed the proposal, arguing that WUI had shown no genuine need and that the proposal would involve carriers in each other's business affairs to an extent far beyond anything remotely contemplated by the RCCA. The Commission decided in the *Interim Order* that this tangential issue did not require disposition, 89 FCC 2d at 970. WUI repeats its request, and Western Union repeats its opposition. We have no more information on the competing considerations of fair competition and interconnection as opposed to the

[33] *See* House Report at 10: "The Committee intends that this provision will only affect the distribution of traffic between the point of interconnection with a foreign correspondent and the point of entry into the United States, that is, the purely international segment of these circuits."

[34] We also directed that the domestic and international charges for marine services be unbundled in the *Rejection Order*, n. 38.

avoidance of unnecessary and intrusive regulation than at the time of the *Interim Order* and therefore do not believe that the issue should be decided at this time.

14. *Technical Issues*

107. Several of the petitions for reconsideration of the *Interim Order* raise various technical issues, such as conditions for TWX 110 Baud domestic interconnection, implementation of 3 digit TWX access for international service, and treatment of store-and-forword services. Many of the issues were resolved by agreements among the carriers reached in the course of meetings under the Commission's aegis. The Commission prescribed these agreements as binding upon all affected carriers in the *Rejection Order*. The technical issues raised in the pending petitions for reconsideration are resolved in a separate order issued this day and need not be considered here.

15. *Single Stage - Double Stage Dialing Access*[36]

108. The telex networks of Western Union and the IRCs were of course engineered before enactment of the RCCA. At that time, Western Union generally did not interconnect with other domestic carriers, but did allow its customers to choose among interconnected international carriers. The IRCs carried all calls from their own customers in the authorized gateways but did not interconnect with other IRCs. This difference in functions was reflected in different methods of operation and network design. Western Union's customers were directly connected with the Western Union network and could call other domestic subscribers on the network simply by dialing the subscriber's number. This is referred to as single stage dialing. To make an international call, a Western Union customer would first dial the three digit code for one of the IRCs. Once the customer was connected with the IRC, it would then dial the number of the foreign customer. This is called double stage dialing. The IRCs' customers could not make domestic calls, but were directly connected with the IRC's international network, which used single stage dialing for international calls.

109. In the *Interim Order*, the Commission sought to apply, in a practical fashion the RCCA's requirement that record carriers provide domestic-to-international interconnection to other record carriers on terms equal to those it gives itself. We specifically addressed the issue of parity in dialing stages, and, in view of the differently designed and configured networks, prescribed only generally equal or comparable interconnection. For example, we recog-

[36] Because Western Union and TRT's letters concerning single stage-double stage access raised new issues and were received only shortly before the Commission's review of the petitions for reconsideration, this section was not included in the order approved by the Commission at the March 3, 1983 meeting. The section was adopted by the Commission on circulation for inclusion with this order.

nized that additional digits might be necessary to reach interconnected carriers by means of single stage dialing. For domestic service, we prescribed universal single stage access with a maximum of three additional digits. For international service, we allowed a choice of single or double stage access, so long as generally comparable access was offered to other carriers. If Western Union wished to maintain its double stage access to the IRCs service, it was required to use double stage access to reach its own international services. If the IRCs wished to maintain single stage dialing to their own services, they were required to offer comparable single stage access to Western Union's international services, possibly with additional digits.

110. In reaching this result, the Commission balanced two competing principles. A basic tenet of the RCCA is that equal interconnection with other carriers is essential to full and fair competition. If a carrier gave its domestic customers more desirable single stage access to its own international network, and required less convenient double stage dialing to reach other carriers at the same price, the effect would be to undermine this tenet. The practice would tend to promote cartelization among integrated, end-to-end carriers rather than competition among interconnected carriers. On the other hand, we did not wish to impose unreasonable expenses or degrade service to customers by requiring unnecessary dialing stages to achieve parity. We expected that allowing carriers a choice of access arrangements, so long as comparable access was offered to all other record carriers, would strike a reasonable balance.

111. RCA and WUI seek reconsideration on this issue. Each argues that the IRCs should be permitted to maintain their use of single stage dialing for their own domestic customers, but to offer only double stage dialing for calls via other IRCs, including Western Union's foreign services. They claim in support that the single stage access which can be offered to other carriers (without expensive system modification and service degradation to their own customers) cannot duplicate all the functions or pass all the information possible with double stage access. They have offered to provide Western Union with a basic single stage access lacking features such as departmental billing, but Western Union believed the the lack of such features prevented use of this sort of access in a competitively viable offering. Western Union initially opposed reconsideration of this issue. It had proposed protocols for single stage access which were being considered in technical meetings with the IRCs and argued that the Commission properly applied the RCCA's "equal in type and quality" requirement.

112. In the subsequent technical meetings, the IRCs continued to insist that offering single stage dialing access of a quality comparable to that offered their own customers was prohibitively expensive. The IRCs in fact continued to offer single stage access selectively to

their own international networks after the adoption of the *Interim Order* although none requested a stay or waiver of the *Interim Order's* resolution of this issue. Western Union, on the other hand, has complied with the *Interim Order since it began offering international service in August 1982. It offers double stage dialing access to all international carriers, including its own international operations. No solution to this problem was reached in the technical meetings chaired by Commission staff.*

113. In a February 8, 1983 letter to the Commission, Western Union now advises that it wishes to change its position on this issue. It states that it no longer opposes RCA and WUI's request for reconsideration and endorses the view that each record carrier should be allowed to favor only its own customers with single stage international dialing. Western Union believes that the effectuation of parity in dialing stages is not possible within a reasonable period of time without considerable sacrifice in the quality of service, and it does not favor requiring the IRCs to provide double stage access to their own subscribers unnecessarily. However, Western Union also believes that single stage dialing is a distinctly superior form of access which gives the IRCs a clear competitive advantage in obtaining the outbound international traffic of their own subscribers. To mitigate its present competitive disadvantage, Western Union proposes to permit its subscribers to elect a new procedure which would allow them to route calls in the same manner as the IRCs' customers, i.e, by single stage access to Western Union's foreign service and by double stage access to the IRCs' foreign services. It states that this alternate procedure is intended primarily for customers whose traffic is predominantly international, and it expects only a minor fraction of its customers to elect to use it. Western Union also states that the same kinds of technical difficulties cited by the IRCs preclude it from making this form of single-state access available to the IRCs.

114. TRT has responded to Western Union by letter, dated February 15, 1983. It contends that while it would be unduly burdensome to require the IRCs to establish costly new arrangements for single-stage access because their subscribers are connected to a single switching center, this does not necessarily apply to Western Union's multiple-switch domestic network. It believes the Commission might reasonably conclude that the IRCs need not offer equal connection in these circumstances, but that Western Union may not install new equipment to accord a similar interconnection advantage to its own international services. TRT argues that Western Unions' proposal to establish new arrangements for the purpose of favoring its own international service is clearly opposed to the language and intent of the RCCA and requests that the Commission direct Western Union not to implement the proposed

arrangement at least until the conclusion of a separate proceeding to determine whether the arrangement is lawful under the RCCA.

115. Although the problem of access stage parity is plainly a difficult one, as this background demonstrates, we are not willing to abandon the effort to achieve a solution, as the IRCs and now Western Union urge. All of the carriers apparently agree that single stage dialing is a significantly superior form of access. Western Union, for example, believes that it suffers under a significant competitive disadvantage because the IRCs favor their customers with single stage dialing. TRT believes that discrimination in dialing stages plainly violates the RCCA, though it claims justifiable hardship in its own case. The RCCA's requirement (which is not sunsetted) that record carriers with significant market shares offer interconnection equal in type and quality might as a practical matter be severely eroded or defeated if carriers are permitted to favor their own operations in this way. The effective interconnection intended by Congress might never develop. At the same time our continuing efforts to seek a solution to this problem through negotiated development of uniform or mutually acceptable technical arrangements have not been successful. In the meantime, the IRCs have not complied with the *Interim Order* and have not sought a stay or a waiver.

116. Under these circumstances, we think it may be necessary to consider alternative approaches which will carry out the Congressional intent in a practical manner, at least on a temporary basis. If actual equipment modifications are prohibitively expensive, it may be appropriate to allow carriers to offer a better grade of service to their own customers, as the IRCs request, but to require that a compensating rate differential be applied where the more desirable interconnection is not afforded customers of other carriers. Imposing an appropriate rate differential would compensate for the carrier's failure actually to offer equal interconnection while implementing the intent of the RCCA, and would provide an incentive to develop interconnection arrangements which are equal in fact. We propose for comment a flat rate differential of $.25 per message. We have used a similar approach to adjust for differences in quality of long distance telephone company access to local exchanges. *MTS/WATS Market Structure*, Third Report and Order, FCC 82-579, released February 28, 1983. Alternatively, carriers might be able to develop more nearly equal interconnection on a bilateral basis even if the development of an industry-wide plan presents a more difficult problem. TRT, for example, presented a plan for a kind of compromise arrangement at the last of the technical meetings. We request comments on whether either or both of these possibilities might accomplish the Congressional purpose. We specifically request the views of carriers and other interested persons on an appropriate rate differential to reflect the difference in quality of interconnection

between single and double stage dialing, especially as this is perceived by telex customers. Comments are to be filed within 15 days of the publication of this order in the Federal Register. Reply comments are to be filed within an additional 15 days.

117. While this proceeding is underway, we will waive enforcement of the *Interim Order's* prescription of either full single or full double stage dialing for all interconnected carriers, to the extent of allowing carriers to offer single stage international dialing to their own domestic customers. This interim waiver will apply to Western Union as well as to the other record carriers. We reject TRT's argument that we in effect should single out Western Union for disparate treatment. Fair competition requires that the same rules be applied even-handedly to all record carriers. So long as the IRCs are allowed to deny equal interconnection because of limitations in their systems, we will allow Western Union the same option. To grant the IRCs a competitive advantage so long as they are unable to change would give them a permanent incentive never to acquire the ability to change. It is our intention, and the directive of the RCCA, that the record carriers eventually provide equal interconnection even if this cannot be accomplished immediately.

ORDERING CLAUSES

118. Accordingly, IT IS ORDERED, That the Petitions for reconsideration ARE GRANTED to the extent indicated above, but ARE OTHERWISE DENIED.

119. IT IS FURTHER ORDERED, That all IRCs interconnecting with the Puerto Rico Communications Authority are directed to file tariff revisions implementing paras. 98 and 99 of this order no later than seven days after release of this order, to be effective on seven days' notice.

120. IT IS FURTHER ORDERED, That this order be printed in the Federal Register.

121. IT IS FURTHER ORDERED, That comments are to be filed concerning single stage-double stage dialing access, paras. 108–117 of this order, within 15 days of the publication of this order in the Federal Register. Reply comments are to be filed within an additional 15 days.

122. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96–354) IT IS CERTIFIED, That Sections 603 and 604 of that act do not apply because this prescription will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. § 605(b) (1980 Supp.). The primary economic impact of this order will be upon carriers, not users.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendix may be seen in the FCC Dockets Branch.

Interlocutory Ruling
Review Board, Review Function

Review Board denied petition for extraordinary relief, seeking Board reversal of an Administrative Law Judge's interlocutory ruling that added a financial misrepresentation issue in a comparative broadcast proceeding. Leave to appeal had been denied, and the Board found no flagrant abuse of discretion or other extraordinary circumstances warranting Board intervention.

–Jan-Di Broadcasting, Inc.
BC Docket No. 82–627

FCC 83R–14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of JAN-DI BROADCASTING, INC. Fruita, Colorado	BC Docket No. 82–627 File No. BPH-810316AP
John G. Gayer d/b/a FRUITA BROADCASTING COMPANY Fruita, Colorado	BC Docket No. 82–628 File No. BPH-810819BB
For Construction Permits for a New FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted: February 25, 1983; Released March 1, 1983.)

BY THE REVIEW BOARD:

1. The Review Board has under consideration a petition for extraordinary relief (and a supplement), a request for stay of the above-captioned comparative broadcast proceeding, and a request for expeditious Board consideration, all filed by Jan-Di Broadcasting, Inc., and responsive pleadings filed by Fruita Broadcasting Company. The petition relates to contested interlocutory rulings made by presiding Administrative Law Judge Joseph Chachkin in this proceeding, but much of the controversy has been mooted by the ALJ's action in Memorandum Opinion and Order, FCC 83M-317, released January 24, 1983, resolving in Jan-Di's favor a financial

issue previously added against it by the ALJ. What remains is a financial misrepresentation issue added against Jan-Di by Memorandum Opinion and Order, FCC 83M-119, released January 11, 1983, the ALJ's denial of Jan-Di's petition for leave to appeal the addition of the issue (FCC 83M-317, *supra*), and Jan-Di's contentions that the issue was added arbitrarily and capriciously by the ALJ and that justice requires that we intervene at this point to abort litigation of the issue.

2. The addition of hearing issues is a matter specifically entrusted to presiding administrative law judges by the Commission's Rules, 47 CFR §1.243(k), and this type of interlocutory action is not appealable as of right, 47 CFR §1.301(b). Where, as here, leave to appeal has been denied by the ALJ, pursuant to 47 CFR §1.301(b), the interlocutory ruling is final unless there has been egregious error or flagrant abuse of discretion and the appealing party has met the burden of establishing that such has occurred. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971). The burden on the would-be appellant is heavy to ensure orderly procedure and prevent the continual delays that could occur if proceedings were halted every time a party was dissatisfied with an ALJ's interlocutory ruling and sought Commission or Board intervention. *Id.* at 534. We do not believe that Jan-Di has met its burden under *Communications Satellite Corp.*, *supra*, and similar cases, nor has Jan-Di shown any other extraordinary circumstances warranting Board intervention.[1] *Compare Arcatel, Inc.*, FCC 82R-74, 92 FCC 2d 893 (Rev. Bd. 1982) (no Board intervention), *with Hanover Radio, Inc.*, 52 RR 2d 403 (Rev. Bd. 1982) (Board reverses ALJ order refusing to suspend procedural dates). Moreover, we note that there is still pending before the ALJ a further motion for summary decision, in which Jan-Di seeks a ruling resolving the misrepresentation issue in its favor on the merits. Favorable action thereon by the ALJ would completely moot Jan-Di's petition, and, to that extent, Jan-Di's petition is also premature. *Arcatel, Inc.*, *supra*.

3. ACCORDINGLY, IT IS ORDERED, That the petition for extra-ordinary relief filed by Jan-Di Broadcasting, Inc. on January 17, 1983, as supplemented on January 28, 1983, IS DENIED, and the requests for expedition and stay filed by Jan-Di Broadcasting, Inc. on the same date ARE DISMISSED as moot; and

4. IT IS FURTHER ORDERED, That the motion to strike the January 28, 1983 supplement to Jan-Di Broadcasting, Inc.'s petition

[1] Of course, this preliminary observation does not foreclose Jan-Di from renewing the argument as an exception to a subsequent Initial Decision or other final order in this proceeding. See 47 CFR §1.301(b)(1).

for extraordinary relief, filed by Fruita Broadcasting Company on February 1, 1983, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Grant Without Hearing
License, Assignment of, Voluntary

Applications for voluntary assignment of TV station granted and petitions to deny denied. No substantial and material questions of fact were presented that would warrant a hearing.
-KSDK, Inc.

FCC 83-79

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KSDK, INC. (Assignor) and MULTIMEDIA, INC. (Assignee) For the Assignment of License for Station KSDK-TV, Channel 5, St. Louis, Missouri.	File No. BALCT-820219HF
MULTIMEDIA, INC. (Assignor) and KSDK, INC. (Assignee) For the Assignment of Licenses for Station WFBC-TV, Channel 4, Greenville, South Carolina, related translators, and Station WXII(TV), Channel 12, Winston-Salem, North Carolina.	File Nos. BALCT-820219HD; BALTTV-820219HN through BALTTV-820219HZ; BALTTV-820219EZ; and BALCT-820219HE

MEMORANDUM OPINION AND ORDER

(Adopted: February 17, 1983; Released: February 23, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration: (1) the above-captioned applications in which KSDK, Inc., a subsidiary of the Pulitzer Publishing Company (Pulitzer), seeks to assign the license for station KSDK-TV, Channel 5, St. Louis, Missouri, to Multimedia,

Inc. (Multimedia), in exchange for Multimedia's stations WFBC-TV, Channel 4, Greenville, South Carolina, and WXII(TV), Channel 12, Winston-Salem, North Carolina; (2) a timely petition to deny the applications filed by the National Black Media Coalition and others (hereinafter referred to collectively as NBMC);[1] (3) a timely petition to deny the application for the assignment of station KSDK-TV, St. Louis, Missouri, filed by the St. Louis Broadcast Coalition; (4) oppositions to the petitions filed by Pulitzer and Multimedia; (5) replies filed by the petitioners; and (6) various related pleadings.

2. The petitions seek the denial or designation for hearing of the above-referenced applications on issues involving Multimedia's execution of a settlement agreement with the Attorney General of South Carolina; lack of candor by Multimedia in reporting this settlement to the Commission; employment and programming matters; Pulitzer's request for a waiver of the five VHF station limitation of the multiple ownership rules, Section 73.636(a)(2); and a lack of candor by Pulitzer in connection with its waiver request. Additionally, NBMC believes that the lack of candor and employment issues raised in its petition require the institution of revocation hearings, pursuant to Section 312 of the Communications Act, regarding all of the broadcast licenses controlled by Pulitzer and Multimedia. These issues and other matters are considered below.

Procedural Matters

3. Multimedia contends that neither NBMC nor its Chairman, Pluria Marshall, have standing because supporting affidavits do not state that NBMC has members or affiliates in the three communities involved in this transaction. We note, however, that the petition itself identifies the affiants as members of NBMC or its affiliates and that the petition is supported by affidavits from those parties. Additionally, the affidavits establish that at least three of these individuals are residents of the service areas of the stations being exchanged in this transaction. Under these circumstances, we conclude that NBMC and these other petitioners have standing. *See, KSDK, Inc.*, 85 FCC 2d 797 n.1 (1981). Additionally, Pulitzer alleges that NBMC's petition was improperly certified because the pleading is dated April 1, 1982, while the supporting affidavits are dated several days earlier. In response, NBMC indicates that the text of the petition, with the exception of minor editorial changes, was reviewed by these affiants prior to execution of the affidavits. We find this explanation plausible and, in the absence of any evidence to the contrary by Pulitzer, will accept the affidavits.

[1] The other parties to the NBMC petition are as follows: Pluria W. Marshall, Chairman of NBMC; The Cause, an affiliate of NBMC in Greenville, South Carolina; L. R. Byrd, President of The Cause; Dr. Phillip Jeter, a senior member of NBMC; the Greater St. Louis Black Media Coalition, an affiliate of NBMC; and Matthew Knuckles, President of the Greater St. Louis Black Media Coalition.

4. We further note that, although NBMC's pleading is styled as a petition to deny the above-referenced applications, it also requests the Commission to designate for revocation hearings, pursuant to Section 312 of the Communications Act, all of the broadcast licenses controlled by Pulitzer and Multimedia. However, Section 312 of the Act gives the Commission discretion to institute revocation hearings on its own motion but does not specifically create rights in third parties such as NBMC to file petitions to revoke licenses. *Salem Broadcasting Co.*, 1 FCC 2d 655, 657–658 (1965). Rather, such pleadings have been treated as informal requests for Commission action, pursuant to Section 1.41 of the Commission's Rules. *See, e.g., Puerto Rican Media Action and Educational Council, Inc.*, 51 FCC 2d 1178, 1179 (1975); *Radio Para La Raza*, 40 FCC 2d 1102 n.1 (1973); and *LeFlore Broadcasting Co., Inc.*, 36 FCC 2d 101 n.2 (1972). Therefore, we will consider NBMC's pleading as a petition to deny the above-captioned applications and, to the extent that it seeks revocation of the licenses of other stations of Pulitzer and Multimedia not involved in this transaction, we will treat the pleading as an informal request for Commission action under Section 1.41 of the Rules.

5. As a final procedural matter, Pulitzer challenges the standing of the St. Louis Broadcast Coalition. However, the Coalition's petition explains that it consists of various community organizations, representing a cross-section of the viewing audience of station KSDK-TV, St. Louis, Missouri. The petition identifies these groups and is supported by the affidavit of the Coalition's chairperson, who is a resident of the service area of KSDK-TV. Consequently, we find that the Coalition has standing with respect to the application for the assignment of station KSDK-TV, St. Louis, Missouri. *See, e.g., KSDK, Inc., supra.*

Multimedia's Executing and Reporting of a Settlement

6. On August 18, 1980, the Attorney General of South Carolina executed a Release which discharged Multimedia from any claim that may have been asserted by the Attorney General under South Carolina's Unfair Trade Practices Act with respect to contracts between Multimedia and other radio stations constituting the Clemson Football and Basketball Networks. According to the Release, Multimedia has for a number of years originated football and basketball games of Clemson University on its station WFBC-AM, Greenville, South Carolina, and has contracted with various radio stations in South Carolina to carry these broadcasts. The Release states that the Attorney General had determined that a claim should be made against Multimedia and/or various employees asserting violations of the Unfair Trade Practices Act due to contractual arrangements in which stations willing to carry both football and basketball games were favored in the selection of

stations for the networks. The Release points out that Multimedia denied any violation of this law but agreed to settle this claim for $20,000 in order to avoid the costs of litigation that would likely exceed this amount. Finally, the Release concludes that Multimedia has entered into revised agreements with its affiliated stations that have been approved by the Attorney General of South Carolina to assure that there would be no violations of state law.

7. NBMC believes that Multimedia's conduct described in this Release amounts to a coercive tying arrangement under which the stations of its sports network were required to purchase Clemson University basketball games in order to obtain the rights to air the football games. NBMC argues that this arrangement violated Section 1 of the Sherman Act, 15 U.S.C. Section 1, and is similar to the conduct found anticompetitive in *Midcontinent Broadcasting Co. of Wisconsin, Inc.*, 11 R.R. 2d 1081 (1967), where a licensee required national advertisers to purchase time on two Wisconsin televison stations in order to acquire time on either station. NBMC also asserts that this practice undermined licensees' discretion in selecting programming and would have resulted in violations of the Commission's network exclusivity rule, Section 73.132, in that any station desiring to carry Clemson basketball games but not football games, or vice versa, could not do so as long as Multimedia's contracts required other stations to buy the games in combination. As a result, NBMC requests, citing *Abbey J. Butler*, 47 R.R. 2d 852 (1980), that the Commission institute an inquiry of this conduct notwithstanding the settlement.

8. NBMC further states that it has reason to believe that Multimedia was aware sometime in late 1980 or early 1981 that it was being investigated by the Attorney General of South Carolina but did not advise the Commission of the substance of this investigation until it filed renewal applications for stations WFBC-AM-FM-TV, Greenville, South Carolina, on July 31, 1981. NBMC asserts that, by this time, the investigation had been completed in secrecy and the Commission and the public had been effectively precluded from participating in this matter. NBMC believes that this delay in reporting the investigation constitutes a lack of candor similar to that found in *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), and adversely affects Multimedia's qualifications to be a licensee. Therefore, NBMC concludes that the Commission should designate for revocation hearings all of the broadcast licenses controlled by Multimedia.

9. In its opposition, Multimedia asserts that NBMC has misconstrued the contractual arrangements mentioned in the Release as coercive tying agreements. Rather, Multimedia states that stations willing to carry both football and basketball games were favored in selecting stations for the networks, but no stations were forced to carry both football and basketball games. To further support this

position, Multimedia has submitted an affidavit from A. Bruce Buchanan, the General Manager for the past twenty years of station WFBC-AM, Greenville, South Carolina, stating that "if in a particular locality, there was no station willing or able to carry both football and basketball games, WFBC would then contract for football and basketball broadcasts by separate stations, if possible." As a result, Multimedia points out that during the last season in which the preference was accorded (i.e., 1978–1979), 26 out of a total of 54 network stations contracted to carry only football games. In any event, Multimedia states that when these arrangements were questioned, they were revised to the satisfaction of the Attorney General without the institution of any litigation or administrative proceeding; that Multimedia has not admitted any violation of law; and that the Commission has, in the past, held that the act of consenting to a settlement does not imply a wrongful act requiring a hearing.

10. With respect to NBMC's allegation that this matter was not reported in a timely manner, Multimedia contends that it properly advised the Commission of the Release in full compliance with applicable rules. Specifically, Multimedia states that Section 1.65 of the Commission's Rules, which provides that information in pending applications be kept current, does not require the reporting of complaints or preliminary investigations and that no reporting obligation arose until the Release was executed. Multimedia further points out that, at the time the Release was executed, it had no renewal or other applications pending before the Commission that required a litigation report. However, Multimedia states that it submitted copies of this Release with four renewal applications filed on July 31, 1981, which were its first applications requiring a litigation report that were filed after the Release was executed. Multimedia adds that these four applications were granted routinely, as were four other subsequently filed renewal applications that contained the Release. As a result, Multimedia argues, citing *Radio Para La Raza*, 40 FCC 2d 1102 (1973), that these grants represent final Commission determinations that the Release did not adversely affect Multimedia's broadcast qualifications. Therefore, Multimedia concludes that, in the absence of any new evidence submitted by NBMC, these prior Commission findings as to the effect of the Release should not be reopened and that NBMC's request for revocation hearings and for denial of the instant assignment applications should be denied.

11. We are of the view that the timing of Multimedia's reporting of the Release does not present a lack of candor issue requiring a hearing. Rather, we believe that Multimedia has made a good faith effort to comply with the Commission's Rules involving the reporting of investigations and settlements. In this regard, it has been established that a bare complaint or informal investigation by an

agency does not trigger a reporting obligation under Section 1.65 until it "ripens and becomes the subject of a formal proceeding, the outcome of which could reflect adversely on the character of one of applicant's principals." *Payne of Virginia, Inc.*, 66 FCC 2d 633, 643 (1977); *see also, Lake Erie Broadcasting Company*, 33 FCC 2d 1009 (Rev. Bd. 1972). In the present case, Multimedia has shown that no such formal proceeding was ever commenced regarding the contractual arrangements described in the Release. The Attorney General of South Carolina never filed a lawsuit, and no administrative agency instituted any proceeding. Consequently, it was reasonable for Multimedia to conclude that no reporting obligation arose under Section 1.65 until the Release was actually executed. However, at that time, Multimedia had no applications pending and was not a party to any Commission proceeding that would require the reporting of the Release pursuant to Section 1.65. Under these circumstances, we believe that it was reasonable for Multimedia to report the Release in its next application that required information on litigation. Furthermore, no evidence has been presented to show an intent by Multimedia to deceive the Commission. Unlike *RKO* and *Payne of Virginia*, *supra*, Multimedia was not involved in a license hearing in which the disclosure of the Release could be prejudicial. Therefore, we find that no lack of candor issue is warranted.

12. Similarly, Multimedia's execution of this settlement does not, by itself, adversely affect its qualifications as a broadcast licensee. We note that the Release was submitted with eight renewal applications with which any interested parties had the opportunity to file pleadings and that these applications were all granted by the staff, pursuant to delegated authority, in November and December 1981, and March, 1982. NBMC has presented no facts to show that these grants were in error. Rather, NBMC is speculating that the contractual arrangements between Multimedia and its affiliated radio stations were coercive tying arrangements. However, Multimedia has maintained through the sworn statement of WFBC's General Manager that no stations were required to purchase both football and basketball games and that the contractual arrangements in question were later revised to the satisfaction of the Attorney General of South Carolina without Multimedia admitting any wrongdoing. Finally, in the absence of any other evidence by NBMC, we do not believe that this settlement can be construed to imply that Multimedia lacks the requisite qualifications to be a licensee. *See, Katy Communications, Inc.*, 87 FCC 2d 764, 766 (1981). Therefore, we conclude that Multimedia's executing and reporting of the settlement does not raise any hearing issues.

Employment Matters

13. NBMC next contends that the equal employment opportunity performances of Multimedia and Pulitzer are seriously deficient,

mandating a hearing. In support of this position, NBMC has submitted data from the 1981 Annual Employment Reports (FCC Form 395) for all of the stations controlled by Pulitzer and Multimedia. NBMC believes that these figures show that Pulitzer's hiring of women in the upper-four job categories at all of its stations and the employment of minorities in the upper-four job categories at KSDK-TV, St. Louis, Missouri, is below NBMC's suggested standard for the broadcast industry.[2] NBMC further contends that Pulitzer does not presently contact minority or female organizations for job referrals at KSDK-TV, St. Louis, Missouri, and that it does not propose to retain Multimedia's training program at station WFBC-TV, Greenville, South Carolina. NBMC also alleges that Pulitzer's employment of minorities at stations KTAR(AM) and KBBC(FM), Phoenix, Arizona, is below the Commission's current processing standards.

14. With respect to Multimedia's broadcast stations, NBMC asserts that only five of thirteen reporting units are in compliance with the Commission's processing guidelines for the employment of women or minorities in the upper-four job categories. Additionally, NBMC believes that Multimedia's Annual Employment Reports for Cable Television Systems (Form 395A) show that Blacks and women are underrepresented on the full-time staffs and in the upper-four job categories at most of its CATV systems. As a final matter, NBMC contends that both Pulitzer and Multimedia have proposed little more than the Commission's Model EEO Program; that their current and proposed EEO programs at the three television stations being exchanged in this transaction do not contain certain practices that NBMC believes are important; and that Multimedia does not intend to retain Pulitzer's training program or contributions to local minority organizations at KSDK-TV, St. Louis, Missouri.[3]

15. We are of the view that NBMC's allegations about the equal employment opportunity performance of Pulitzer and Multimedia do not raise a substantial and material question of fact that would require a hearing. Specifically, NBMC's discussion of alleged employment deficiencies at Pulitzer's station KSDK-TV, St. Louis, Missouri, ignores the fact that the Commission, in reviewing the station's

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[2] NBMC suggests that minorities and women should be employed on stations' full-time staffs at a ratio of 75% of their availability in the labor force overall and 75% in the upper-four job categories. By comparison, the Commission's revised processing standards provide that renewal applicants with 11 or more full-time employees "will have their EEO programs reviewed if minority groups and/or women are not employed full-time at a ratio of 50 percent of their availability in the labor force overall and 50 percent in the upper-four job categories" (*i.e.*, officials and managers, professionals, salesworkers, and technicians). *See, Public Notice*, FCC 80-61, 46 R.R. 2d 1693 (1980).

[3] The St. Louis Broadcast Coalition joins in NBMC's contention that the adoption of the Model EEO Program by both Pulitzer and Multimedia is not sufficient.

performance during the 1977–79 license term, recently found that the licensee had: "sought vigorously and positively to implement its EEO program . . . and employed women and Blacks in reasonable numbers throughout the past license term." *See, KSDK, Inc.*, 88 FCC 2d at 1445–1446. We have reviewed the station's employment reports for the 1980–83 license term.[4] That review reveals that the employment of women and Blacks at KSDK-TV has continued to be reasonably related to their representation in the available labor force.[5] In addition, the station's current EEO program appears to have been effectively implemented. The KSDK-TV renewal application reveals the station's use of an assortment of recruitment techniques which, during September 1, 1981, to August 31, 1982, resulted in the hiring of 22 persons for full-time positions. Of the 22 persons hired, 15 (68%) females and 4 (18%) minorities were selected to fill various responsible station positions. Similarly, there were six station employees promoted during that period. Five of these employees were female. In addition, a Black woman and a Black male were promoted to the positions of "regular engineer" and director of creative services, respectively. With respect to Pulitzer's other stations, the renewal applications for stations KTAR and KBBC(FM) are due to be filed by June 1, 1983. At that time, the stations' profiles during their license term, as well as their EEO programs, will be reviewed. Similarly, we find no compelling reason to depart at this time from our customary EEO monitoring practices. The EEO performances of Pulitzer's remaining stations will be examined at the time of their next regularly scheduled renewals. Finally, we note that Pulitzer's proposed EEO program for station WFBC-TV, Greenville, South Carolina, clearly indicates that Pulitzer intends to retain Multimedia's training program even though the Commission does not require licensees to have such programs. Multimedia has also indicated its intention to continue a training program at KSDK-TV and to provide assistance to students and

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[4] According to the Annual Employment Reports (FCC Form 395) and a renewal application filed on September 29, 1982, the full-time employment percentages for KSDK-TV, St. Louis, Missouri, are as follows:

	Overall		*Upper-Four*	
	Female	*Minority (Black)*	*Female*	*Minority (Black)*
1980 Form 395	25.1%	13.8% (12.6%)	16.2%	9.2% (7.7%)
1981 Form 395	31.0%	14.6% (13.5%)	21.1%	10.5% (9.0%)
1982 Form 395	33.3%	14.4% (12.6%)	23.8%	10.4% (8.2%)
1982 Renewal App.	34.3%	12.8% (11.0%)	25.5%	10.9% (8.8%)

The Missouri Division of Employment Security reported 1982 St. Louis SMSA labor force levels of 42.9% women and 18.7% minority (including 16.9% Black).

[5] NBMC's analysis of the employment profiles at KSDK-TV, as well as at Pulitzer's other stations, is based upon its own suggested standard. To apply such a standard in the present proceeding, however, would be inappropriate.

educational institutions to enhance the qualifications of minorities and women for positions in the broadcast industry.

16. We also believe that no hearing is required as to Multimedia's EEO performance at its broadcast stations. In this regard, we note that NBMC bases its allegations upon the 1981 Annual Employment Reports filed by Multimedia's stations. However, Multimedia subsequently filed renewal applications for 16 of its 18 stations which contained updated EEO programs. Based on this information, the licenses for the two television stations that are being assigned to Pulitzer - stations WXII(TV), Winston-Salem, North Carolina, and WFBC-TV, Greenville, South Carolina - were regularly renewed on November 20, 1981, and on December 9, 1981, respectively. Furthermore, review of the latest employment reports for these stations shows that they are continuing to employ women and minorities in a reasonable relationship to their representation in the available labor force.[6] Additionally, we take notice of the fact that three other Multimedia stations were renewed in November, 1981, and five in March and May, 1982. In view of these recent actions, and in the absence of any additional information by NBMC, we do not believe that further consideration of these stations is necessary.[7] We do recognize that NBMC has pending two petitions to deny the license renewal applications of various stations, including five other Multimedia stations, but since these petitions only deal with the operation of these specific stations, we believe that it is more appropriate to consider such issues in the context of the renewal proceedings.

17. We also find that NBMC has not presented sufficient information to warrant a hearing on Multimedia's EEO performance at fourteen cable television systems. Rather, NBMC is merely relying upon employment figures and has submitted no evidence of

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[6] According to the 1982 Annual Employment Reports, the full-time employment percentages for the two television stations being assigned to Pulitzer - stations WXII(TV), Winston-Salem, North Carolina, and WFBC-TV, Greenville, South Carolina - are as follows:

	Overall		*Upper-Four*	
	Female	*Minority (Black)*	*Female*	*Minority (Black)*
WXII(TV)	39.5%	11.6% (10.4%)	25.0%	8.8% (8.8%)
WFBC-TV	32.0%	15.7% (12.7%)	22.6%	16.7% (13.0%)

The Departments of Labor of North Carolina and South Carolina reported SMSA labor force levels for 1981 as follows:

Winston-Salem, North Carolina - 42.1% women and 16.5% minority (15.9% Black)

Greenville, South Carolina - 40.9% women and 16.0% minority (16.0% Black)

[7] We also note that license renewal applications are currently pending for other Multimedia stations: WBIR-TV, Knoxville, Tennessee; WAKY(AM) and WVEZ(FM), Louisville, Kentucky; and WEZW(FM), Wauwatosa, Wisconsin.

any discrimination at these CATV systems. In any event, Multimedia only controls eleven of these systems, and our review of their EEO records indicates that no substantial and material questions of fact concerning Multimedia's qualifications exist.[8] Accordingly, Multimedia's EEO performance at these CATV systems is no bar to Commission approval of the instant transaction.

18. As a final matter, we note that both Pulitzer and Multimedia have proposed the Commission's Model EEO program for the three stations involved in this transaction; that this clearly complies with the Commission's EEO policies and rules; and that the Commission does not require EEO programs to contain the other practices that NBMC believes are important. *See, e.g., Georgia State Board of Education*, 70 FCC 2d 948, 968 (1979), *recon. denied*, 71 FCC 2d 227 (1979); *Storz Broadcasting Co.*, 88 FCC 2d 641, 644 (1981). Therefore, no issue is warranted regarding the employment practices of Pulitzer or Multimedia.[9]

Programming Matters

19. The St. Louis Broadcast Coalition contends that hearing issues are warranted due to inadequacies in the present and proposed public affairs programming on station KSDK-TV, St. Louis, Missouri. Specifically, the Coalition alleges that the station's local public affairs programs are aired at times with the lowest potential audience (*i.e.*, Sunday mornings), and that the discussion format of two of these programs is the "least expensive and least interesting" way to present public affairs programming. The Coalition also claims

[8] Although Blacks are not represented on the full-time staffs of six of the eleven CATV systems that are controlled by Multimedia and challenged by NBMC, we note that the employment of total minorities is within the zone of reasonableness at five of these eleven systems (*i.e.*, Warr Acres, Nichols Hills, Yukon, and Del City, Oklahoma; and Wichita, Kansas); that one CATV system is located in McPherson, Kansas, where there is an insignificant representation of minorities in the available labor force (*i.e.*, 1.4%); and that the systems located in Herington and Lyons, Kansas, have less than five employees. With respect to the remaining systems, we note that they are located in areas where the total minority and Black representation in the labor force is about 13% and 8%, respectively, and that the size of their full-time staffs is so small (*i.e.*, El Reno and Bixby, Oklahoma - staffs of 5 employees; and Edmond, Oklahoma - staff of 12 employees) that the addition of one minority employee would approximate or exceed parity. *See, Teleprompter of Worcester, Inc.*, 67 FCC 2d 643, 655 (1978).

[9] In its petition, the St. Louis Broadcast Coalition also contends that women and Black men as a combined group are underrepresented on the staff of station KSDK-TV, St. Louis, Missouri, in comparison with their presence in the available labor force. The Coalition believes that this is evidence of an inadequate affirmative action program. However, as explained in the text, above, and documented in footnote four, the employment of women, Blacks, and total minorities at KSDK-TV is well within the zone of reasonableness, and its affirmative action program appears to have been positively and effectively implemented during the current license term. We do not find that this result is altered by the Coalition's combining employment figures from different groups.

that Multimedia proposes a substantial reduction in the amount of total public affairs programming, as well as decreases in the amount of news and other non-entertainment programming. The Coalition believes that these proposals by Multimedia will result in a significant diminution of the present service of KSDK-TV.

20. We are of the view that the Coalition's programming allegations are without merit. In this regard, the Coalition has not shown that the overall programming of the station is not responsive to community needs. Furthermore, it is well established that the amount, scheduling, and format of programming are matters within a licensee's discretion and that the Commission will not substitute its judgment for that of a licensee unless there has been a showing of an abuse of discretion. *See, RadiOhio, Inc.*, 38 FCC 2d 721, 738–739 (1973), *aff'd sub nom. Columbia Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 327–328 (D.C. Cir. 1974); and *Stone* v. *FCC*, 466 F.2d 316, 328 (D.C. Cir. 1972). In the instant case, the Coalition has made no showing that the scheduling or format of KSDK-TV's current public affairs programs constitutes an abuse of the licensee's discretion. Rather, we note that KSDK-TV currently produces two public affairs programs that are aired on Sunday mornings from 9:30 to 10:00 a.m. and 10:00 to 10:30 a.m., respectively. The station also broadcasts other local public affairs programs, including a 30-minute program that is aired one Sunday per month at 9:00 a.m. We find, consistent with past cases, that the the licensee has not abused its broad programming discretion. *See, e.g., District of Columbia Broadcast Renewals*, 77 FCC 2d 899, 908 (1980); and *SRD Broadcasting, Inc.*, 57 FCC 2d 354, 356 (1975).

21. Similarly, the Coalition's allegations concerning Multimedia's proposed news, public affairs, and other non-entertainment programming do not raise a substantial and material question of fact that would require a hearing. Contrary to the Coalition's allegations, the assignee's proposed programming percentages compare favorably with those of the assignor.[10] In any event, an assignee's proposed program percentages need not be identical with those of the previous licensee. *Evening Star Broadcasting Co.*, 42 R.R. 2d 117, 134 (1978), *reaff'd as modified*, 42 R.R. 2d 729 (1978). Rather, the burden is on the petitioner to make a *prima facie* case that the programming proposal cannot reasonably be expected to serve the

[10] On April 23, 1982, the assignor submitted revised program percentages reflecting its current programming in various non-entertainment categories. A comparison of these figures and the assignee's proposed program percentages is as follows:

	Assignor	Assignee
Total Hours/Week	139.5	140
News	9.8%	10.9%
Public Affairs	5.2%	4.5%
Other Non-entertainment	8.7%	9.0%
Local	11.6%	15.8%

public interest. *See, North American Communications Corp.*, 44 R.R. 2d 1208, 1212 (1978); *RadiOhio, Inc., supra*, 38 FCC 2d at 738; and *Evening Star Broadcasting Co., supra*. The Coalition has not met this burden. Accordingly, no issue is warranted.[11]

The Five VHF Rule

22. In connection with its applications to exchange station KSDK-TV, Channel 5, St. Louis, Missouri, for Multimedia's stations WFBC-TV, Channel 4, Greenville, South Carolina, and WXII(TV), Channel 12, Winston-Salem, North Carolina, Pulitzer filed a request for a one-year waiver of Section 73.636(a)(2) of the Rules. That section provides that no party may own, operate, or control more than five VHF television stations. Pulitzer's waiver request was necessitated by the fact that, at the time these applications were filed, Pulitzer controlled five VHF television stations[12] and would control six VHF stations after consummation of the proposed exchange of stations with Multimedia. However, since these applications were filed, Pulitzer submitted an additional application (File No. BALCT-821012FI) to assign station WLNE-TV, Channel 6, New Bedford, Massachusetts, to Freedom WLNE-TV, Inc. This application was uncontested and was granted on December 15, 1982, by the Mass Media Bureau, pursuant to delegated authority.[13] Thereafter, the parties consummated the sale of WLNE-TV on February 2, 1983. As a result, Pulitzer now controls only four VHF stations and, after exchanging VHF station KSDK-TV, St. Louis, Missouri, for two of Multimedia's VHF stations, would end up controlling five VHF stations. Accordingly, the request for waiver is moot, along with NBMC's concerns about the waiver request.[14]

[11] In a reply pleading, the Coalition also suggests that a fairness doctrine complaint, submitted to the Commission on April 6, 1982, by the YES Committee, affects Pulitzer's qualifications as an assignor. However, we note that the complaint was withdrawn by the YES Committee on June 9, 1982, after a settlement was reached with the licensee. Under this settlement, KSDK-TV agreed to broadcast at no charge the views of the complainant on the need for a nuclear power plant in Central Missouri to rebut the advertising of a local utility company. Under these circumstances, no further inquiry appears warranted.

[12] These stations were: KSDK-TV, Channel 5, St. Louis, Missouri; KOAT-TV, Channel 7, Albuquerque, New Mexico; KETV(TV), Channel 7, Omaha, Nebraska; WGAL-TV, Channel 8, Lancaster, Pennsylvania; and WLNE-TV, Channel 6, New Bedford, Massachusetts.

[13] The staff of the Mass Media Bureau was advised on December 9, 1982, by Pluria Marshall, Chairman of NBMC, that NBMC had no objections to the staff granting the application for the sale of WLNE-TV, New Bedford, Massachusetts.

[14] NBMC also contends that Pulitzer made two misleading statements in its waiver request that raise a lack of candor issue. First, Pulitzer stated that, "to the best of its knowledge, the FCC has never denied a request for a temporary waiver of the five VHF limit." NBMC contends that this statement is misleading because it believes that Pulitzer knew that no such request had ever been presented to the Commission. In response, Pulitzer reaffirms that its statement is correct but "does not know whether such requests . . . might have been presented to the

Miscellaneous Matters

23. In a supplement to its petition, NBMC challenges the late filing of Pulitzer's response to certain questions in the assignment application form dealing with pending litigation. NBMC also contends that the amendment does not describe all relevant lawsuits and that the pendency of several civil antitrust suits should be examined in a hearing. However, we can find no violation of Section 1.65, which requires the updating of material in applications. Rather, Pulitzer stated in its application that an updated litigation report would be submitted later when available from corporate counsel and there is no evidence to indicate that Pulitzer delayed in filing this material. Furthermore, the assignment application form does not require the reporting of all pending litigation, and, in our view, Pulitzer has provided adequate descriptions of the type of suits required by the form. Finally, in the absence of any other evidence by NBMC, the mere pendency of several civil antitrust suits is not a bar to grant of the instant applications because the Commission routinely awaits the outcome of such suits before assessing their effect on a licensee's qualifications. Therefore, Pulitzer's litigation report presents no hearing issues.[15]

Commission and were either not decided or not reported in case decisions." We find that no substantial and material question of fact has been raised that would require a hearing. NBMC has not cited any cases to contradict Pulitzer's position and is merely speculating as to Pulitzer's intent.

NBMC also believes that Harold Grams, a director of Pulitzer, made misleading statements in an affidavit in which Pulitzer's reasons for the sale of station KSDK-TV, St. Louis, Missouri, were explained. Specifically, NBMC refers to a section of the affidavit in which Mr. Grams acknowledges that Pulitzer's newspaper/broadcast combination in St. Louis was grandfathered under the Commission's one-to-a-market rule adopted in 1975 but adds that "since then, there have been additional efforts in Congress and before the FCC to amend the Communications Act or the FCC Rules and Regulations on multiple ownership and to modify the policy on diversification of ownership of media." As a result, he concludes that Pulitzer was uncertain about future regulations and "did not want to be in a position in which it had to divest KSDK in the future under unforeseen circumstances . . ."

NBMC believes that this portion of the affidavit is misleading because it is not aware of any recent efforts at the Commission or in Congress to amend the multiple ownership rules so as to require divestiture of newspaper/broadcast combinations. However, Pulitzer argues that the statements in question represent merely an opinion of the affiant based upon his many years of broadcast experience and that it is irrelevant whether NBMC disagrees with these opinions. We agree with Pulitzer. The statements constitute a business judgment by Pulitzer that it should sell the station, and, although others might disagree with the basis for this judgment, we are unable to infer a lack of candor that would warrant resolution in a hearing. Accordingly, the requested issue is denied.

[15] NBMC also questions whether Pulitzer sufficiently described two ownership matters in its amendment of April 23, 1982. We find, however, that no Section

Tax Certificates

24. Both Pulitzer and Multimedia have requested the issuance of tax certificates, pursuant to Section 1071 of the Internal Revenue Code (26 U.S.C. Sec. 1071), on the basis that aspects of the instant transactions are necessary or appropriate to effectuate compliance with Section 73.636 (a)(1) of the Rules, which limits a party to ownership, operation, or control of one television station, or one daily newspaper, or one AM-FM combination in a market. We find that the tax certificates are warranted because Pulitzer and Multimedia are voluntarily terminating grandfathered cross-ownership of television stations with daily newspapers and/or aural stations. *See, Issuance of Tax Certificates*, 59 FCC 2d 91 (1976). Specifically, grant of these applications will terminate Pulitzer's cross-ownership of station KSDK-TV, St. Louis, Missouri, and *The St. Louis Post Dispatch*, a daily newspaper. Additionally, this transaction will eliminate Multimedia's cross-ownership of station WFBC-TV, Greenville, South Carolina, with stations WFBC-AM-FM, Greenville, South Carolina, and daily newspapers in this market - *The Greenville News* (morning); *The Greenville Piedmont*, (evening); and *The Greenville News-Piedmont* (Saturday and Sunday). Accordingly, the requested tax certificates will be issued.

Conclusion

25. We find that neither NBMC nor the St. Louis Broadcast Coalition have raised any substantial and material questions of fact that would require a hearing on the above-captioned assignment applications. We further find that NBMC has not shown sufficient grounds, pursuant to Section 312 of the Communications Act of 1934, as amended, for the institution of revocation hearings with respect to the broadcast licenses controlled by Pulitzer and Multimedia. Finally, we conclude that the assignors and assignees are qualified to effectuate these transactions and that grant of the above-captioned applications would serve the public interest.

26. Accordingly, IT IS ORDERED, That the petitions to deny filed by the National Black Media Coalition and the St. Louis Broadcast Coalition ARE DENIED.

27. IT IS FURTHER ORDERED, That the applications (BALCT-820219HD through BALCT-820219HF; BALTTV-820219HN through BALTTV-820219HZ; and BALTTV-820219EZ) filed by KSDK, Inc., its parent corporation (The Pulitzer Publishing Company), and Multimedia, Inc., to exchange station KSDK-TV, St. Louis, Missouri, for stations WFBC-TV, Greenville, South Carolina, and WXII(TV), Winston-Salem, North Carolina, ARE GRANTED.

1.65 issue is warranted. Rather, Pulitzer appears to have made a good faith effort to correct and/or update previously reported information concerning voting rights in minority interests of 0.1% and 0.3% of Pulitzer's stock.

28. IT IS FURTHER ORDERED, That a tax certificate will be issued to Pulitzer for the assignment of station KSDK-TV, St. Louis, Missouri, and another tax certificate will be issued to Multimedia for the assignment of station WFBC-TV, Greenville, South Carolina, because these transactions will result in the break-up of grandfathered combinations of television stations and daily newspapers or radio stations in the same markets.

29. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by *Certified Mail - Return Receipt Requested*, a copy of this Memorandum Opinion and Order to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Domestic Public Land Mobile Radio Service
Frequency Allocation
One-Way Communications
Paging Service

Memorandum Opinion and Order on Reconsideration (Part 2) adopted which deals exclusively with network, nationwide paging. Commission rejected the unanimous sharing requirement and extended cut-off procedures adopted in the *First Report and Order*, 89 FCC 2d 1337. Commission preempted state authority over technical standards, entry and rate regulations for three network frequencies.
–Mobile Radio Service
GEN. Docket No. 80–183

FCC 83–146

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service	General Docket No. 80–183 RM-2365 RM-2750 RM-3047 RM-3068

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2)

(Adopted April 7, 1983; Released: May 4, 1983)

I. *Preliminary Statement*

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER FOGARTY ABSENT.

1. We have before us informal comments and four petitions for reconsideration[1] of our *First Report and Order (the Order)* in General

[1] Petitions were filed by Telocator Network of America (Telocator); Mobile Communications Corporation of America (MCCA); Page America Communications, Inc. (Page America); and Beep-Beep Page, Inc. (Beep-Beep Page). Informal comments were filed by American Telephone and Telegraph Company (AT&T) and United Telephone System, Inc. (UTS).

Docket 80–183, allocating three MHz of spectrum from 929 to 932 MHz for private radio and common carrier one-way paging systems.[2]

2. On November 16, 1982, we released a *Memorandum Opinion and Order on Reconsideration (Part 1)*, FCC 82–503, resolving issues pertaining to the local, non-network frequencies and deferring reconsideration of network (regional or nationwide) issues to a subsequent Order. With respect to the non-network frequencies, we affirmed the requirement of need showings for existing carriers requesting an additional paging frequency, and we adopted a fixed forty-mile separation criterion for purposes of determining whether an applicant is entitled to an initial or additional paging frequency without demonstrating need. We also waived the submissions of topographic maps and profile graphs with 900 MHz paging applications.

3. We now address issues which pertain to the network frequencies. All four petitioners request that we change the network policies and procedures adopted in the *First Report and Order*. Page America and UTS also request that we preempt state authority over technical, entry, exit and rate regulations for the three network frequencies. We agree with the petitioners that certain changes are necessary and will better serve the public interest. Therefore, as discussed below, we have decided to alter the regulatory framework for network paging and preempt state authority for the three network frequencies.

II. *BACKGROUND*

A. *Current Network paging policy and procedures*

4. In our *First Report and Order*, we allocated three frequencies for common carriers to use to provide inter-city network paging.[3] An inter-city network paging system would enable a subscriber to receive pages when outside his local service area. If the subscriber travels to an area that is part of an inter-city system, he could be paged through the radio common carrier (RCC) or wireline carrier in that area.

5. Of the three network frequencies, one was restricted to nationwide use and the other two were designated for either nationwide and/or regional paging. Extended cut-off procedures (six months from public notice of the first filing on a channel) were adopted for all three channels, with a single date applicable to the nationwide-channel and different dates applicable for each region on the regional channels.

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[2] 89 FCC 2d 1337.

[3] The three common carrier frequencies allocated for network paging service are 931.8875, 931.9125 and 931.9375 MHz. *See* revised 47 C.F.R. § 22.501(p)(1), in Appendix A of this Order.

6. In addition, because of the limited frequencies devoted to network paging, we decided to require network licensees to share these frequencies instead of licensing only one applicant on a frequency. In an effort to encourage sharing agreements, we determined that applicants must reach unanimous agreement as to the method of interference-free use and technical operation of the frequencies within one year, or all applications would be rejected and those applicants would be barred from reapplying for those frequencies for one year. We also decided to prohibit local paging on the network frequencies. However, if after a three year period the non-network frequencies were exhausted, any nonassigned network frequencies could be applied for and used for local paging.

B. *Pleadings*

7. The petitioners request numerous changes in the regulatory framework for network paging. MCCA and Telocator argue that all three frequencies should be designated for nationwide use, since a nationwide network has the capacity to service both nationwide and regional demand. Telocator and MCCA claim that under our present allocation, the Commission will simultaneously receive both regional and nationwide applications for each frequency. They argue that this will create severe practical and regulatory problems and will only complicate the applicants' task of reaching unanimous agreement as to interference-free sharing of the frequencies. Moreover, MCCA asserts that with the Commission's recent lowband frequency allocations, licensees have already assembled many regional paging systems and do not need frequencies exclusively for that purpose.

8. All four petitioners reject the unanimity concept as unrealistic and unworkable. They argue that it is unrealistic to assume that applicants will voluntarily resolve the complex technical, financial and managerial problems associated with network paging. MCCA, Telocator and Page America emphasize the distinctions between licensing considerations and the technical decisions involving signaling format and network protocol. They argue that it is unreasonable to expect applicants with differing goals and interests to agree unanimously to all aspects of network paging operation. Moreover, the petitioners claim that the unanimity requirement will encourage obstructionists or applicants wishing to obtain unwarranted concessions from those seriously interested in providing network paging to the public.

9. Telocator and MCCA also object to the cut-off procedures adopted in the *First Report and Order*. They argue that the 180 day cut-off period gives applicants who are seriously interested in providing network paging a short period to prepare applications, while "me too" applicants or obstructionists are given twice as long to prepare mutually exclusive applications. Further, MCCA claims that the cut-off procedures will result in smaller cities receiving

network service on a much delayed schedule because time and economics will force applicants to first file applications for network paging authority in major markets. Thus, applicants who fail to file for the smaller cities and towns initially will be precluded from doing so for the entire year that the applicants negotiate organization of the network.

10. Further, MCCA and Page America assert that the cut-off period coupled with a three year reversion for local paging will be the deathknell of network paging. MCCA claims that at least one year-and-a-half will be required to complete one cycle of network paging applications: 180-day cut-off period, followed by one year of negotiation. Since MCCA believes that network paging will be provided first to major markets and will progressively spread to smaller communities, it is concerned that it might take two cycles, or more than three years, for smaller communities to obtain network paging. Therefore, since petitioners believe that allowing local paging on network frequencies would frustrate this service, they are concerned that smaller communities might never obtain nationwide paging.

11. All four petitioners propose alternative regulatory schemes for the network frequencies. Beep-Beep Page, Inc. suggests that we adopt a plurality proposal similar to that implemented in Docket 21039, 77 FCC 2d 212, 215 (1980).[4] Page America suggests a two level approach. It claims that on one level the local licensees of nationwide paging frequencies should agree upon a method of coordinating interference-free sharing of the frequencies, and on a second level agreement should be reached among the managers of the network services.[5] It proposes that we issue construction permits to qualified applicants soon after the cut-off date and condition the permits on the establishment of a frequency sharing plan. With respect to the network managers, Page America suggests that we not require them to cooperate with one another, or file any applications with the Commission since the network plan will be included with the affiliate's applications. It also recommends that the carriers licensed on the nationwide paging frequency be allowed to affiliate with more than one manager.

12. Telocator recommends a "hybrid" form of rulemaking. It suggests that all applicants desiring to operate inter-city networks submit applications pursuant to Section 214 of the Act,[6] containing

[4] Under a plurality plan, if unanimous agreement as to technical coordination is not reached by a certain deadline, the plan supported by the largest group of applicants that reach an agreement would be placed on public notice and opened to comments. Subsequently, the Commission can adopt the plurality plan if it is found to be reasonable and non-discriminatory. All pending applications could then be amended to comply with the accepted form of technical coordination.

[5] Page America's proposal is vague. It does not explain who the "managers" are, or what they should agree to and why.

information including applicant's legal, technical and financial qualifications; its sharing concept; its ability to initially serve 30 metropolitan areas and expand nationwide; and its ability to accomodate both nationwide and regional service on one frequency. The Commission would then issue a public notice listing qualified applicants. The public notice would trigger 30-day periods for comments and reply comments, which would culminate in the Commission's adoption of rules and policies for initiation of inter-city service and licensing of network stations. Telocator states further, that if a negotiated settlement is not reached for operating on the three network channels, the Commission should select the plurality proposal which best serves the public interest, convenience and necessity.

13. MCCA proposes a two-step regulatory process, in which the problem of organizing each channel is solved initially and then the processing of applications for individual stations becomes routine. MCCA suggests that we distinguish between two types of network paging entities, the network organizer and the network operator. The network organizer for each channel would be an RCC or affiliated group of RCC's and would be responsible for defining the signaling format and network protocol for its channel. On the other hand, the network operator would be licensed on one of the three network channels, would interconnect with the existing network and would conform its application to the technical standards established by the network organizer.

14. In the first step, MCCA proposes that the Commission accept applications on a date certain, 90 days after adoption of the Reconsideration Order, only from applicants seeking to organize a network channel. MCCA details the information which should be included in the application. This list is similar to the information requested by Telocator in its proposal; however, it also includes the mode of operation for the network channel, types of service offered, signaling format and network interconnection scheme, and the method by which the applicant would provide open and nondiscriminatory access to the network. MCCA further suggests that if fewer than three network applications are filed, the excess channels could either revert to local use or be held in reserve. If more than three network applications are filed, and if the applicants are unable to align themselves into three groups, MCCA proposes that we conduct written hearings to select the three superior proposals. Further, approximately ninety days after selection of the three network

[6] Although AT&T concurs with Telocator's hybrid rulemaking approach, it states that Section 214 applications are not necessary because the radio license granted under Title III of the Communications Act carries with it Section 214 authority if the lines constructed and operated are the same as those that would be the subject of a Section 214 application. Communications Satellite Corp., 20 FCC 2d 405, 411 (1969); Domestic Fixed Satellite Transponder Sales, 88 FCC 2d 1419, 1424 (1982).

organizers, the Commission should accept applications for the local network paging stations. Each local applicant would be free to select the network with which it wishes to affiliate.

III. *Discussion*

15. We have decided to modify our network paging rules with respect to the channel designations and licensing policies and procedures. When we adopted the network policies in our *First Report and Order*, we were aware of the demand for inter-city paging, but we were unpersuaded by the proposals before us. The petitioners have outlined network proposals which differ significantly from the plan adopted in our *First Report and Order*. Moreover, two groups of experienced carriers have publicly announced proposals to establish nationwide paging systems significantly different from what was contemplated at the time of the *First Report and Order*.[7] Based upon the proposals now before us, we find that certain revisions to the regulatory framework will result in less burdensome procedures, and will lead to the establishment of more economic and efficient network paging systems. We turn first to channel designations and licensing policies, and then to application and authorization procedures.

A. *Channel Designations and Licensing Policies*

16. We agree with Telocator and MCCA that all three frequencies should be designated as nationwide channels.[8] In the *First Report and Order* we designated two of the three channels for nationwide or regional use in the belief that we would thereby "offer users a greater choice of service." We also expressed the view that many potential users might desire service just within a particular

[7] One group consists of MCI Communications, Metromedia, Communications Industries and American Express. They propose to offer "national electronic message delivery service," primarily over MCI's long distance network and the local distribution facilities of the partners. The other group consists of MCCA and National Public Radio (NPR), which would use excess capacity in NPR's earth stations and satellite transponders for intercity distribution, with local distribution handled by any local paging company that wished to join the network. Our mention of these proposals, in no way indicates our approval of them. No action has or will be taken on these proposals until they are submitted in conjunction with the procedures articulated in this Order.

[8] Local paging was prohibited on the three network frequencies in the *First Report and Order*, at para. 29. None of the petitioners requested that we allow local paging on the network frequencies and we continue to believe that local use of these frequencies, could stifle their development for network use at least in the initial period of development. *But see* para. 25, *infra*. Nevertheless, once the network frequencies are licensed and in operation, economic or operational efficiency may militate in favor of loosening the absolute prohibition against local service. We will entertain requests from the three network licensees to provide local paging as long as it can be offered without displacing or otherwise reducing the quality of service to nationwide customers.

geographic region, such as Washington/Baltimore, rather than between regions or nationwide. However, after reviewing the petitions for reconsideration, we are persuaded that regional service can be provided on the nationwide networks and that separate regional systems on two of the channels will result in less efficient use of the spectrum and will engender difficult licensing and frequency coordination problems.

17. The regional systems we envisioned were modest expansions of the wide-area systems in existence today throughout the Northeast Corridor and other parts of the country. It is quite possible to construct a new regional system by interconnecting transmitters on a single frequency in the newly allocated 35, 43 or 900 MHz channels. In fact, a number of the hundreds of applicants for the lowband and 900 MHz channels have proposed exactly that. Our substantive requirements for network applicants, discussed below, assure that regional paging will be available to augment existing wide area service on local paging channels. Therefore, we find no need to set aside channels specifically for regional paging on the ground that such demand as may exist can readily be satisfied by both wide-area and network systems.

18. A second major change we will adopt is MCCA's proposal to license the three network channels to three common carrier "network organizers" whose services will be distributed through local "network operators" in each community. The "network organizer" will be a common carrier or group of common carriers who will organize the network, *i.e.*, determine among other things, the mode of operation, signaling format, interconnection and interference-free sharing schemes, and who will be licensed by the Commission. The "network operator" will be a local common carrier who agrees to coordinate with the technical parameters of a network organizer, and who will provide network services to its subscribers.

19. We believe, based on the information before us at this time, that this "carrier's carrier" approach is the easiest and most effective way to implement network paging. Unlike the plan adopted in our *First Report and Order* or the proposals submitted by Telocator, Page America and Beep-Beep Page, MCCA's plan no longer relies on interference-free sharing arrangements among potential competitors (whether by unanimity or plurality agreement) as prerequisites to network implementation. This eliminates the complicated and time-consuming cut-off procedures and negotiation periods associated with sharing arrangements. One licensee will be responsible for organizing each network and detailing the legal and financial arrangements and technical parameters of the system. We are hopeful that licensing three separate network organizers - as opposed to requiring sharing among all or a plurality of applicants - will foster technically diverse, competitive networks to the benefit of the public.

20. Under this structure, we tentatively find that the "network operators" should be afforded open and nondiscriminatory access to the network paging systems. In essence, there will be three intercity network systems whose services will be retailed through local outlets. Under our previous plan, the issue of nondiscriminatory access was insignificant because anyone who wanted to participate in nationwide service had an opportunity to share a frequency. Now that we will choose only three network licensees from a potentially large number of mutually exclusive applicants, there appears to be justification for ensuring the right of local operators to feed traffic into the networks and to participate in the distribution of traffic originating outside their service areas to the extent that it is technically feasible. If we do not, the network organizers will theoretically be able to select individual local operators, to exclude all local participants except those already affiliated with the network organizers, or to give their affiliates and subsidiaries favored treatment. We tentatively find that ceding such comprehensive control over local operation to the three organizers would not be in the public interest.

21. On the other hand, affording local carriers open and nondiscriminatory access, provided they agree to abide by the network organizer's technical specifications, will encourage competition at the local level and will increase the diversity of user choices. We also foresee benefits to paging subscribers in smaller cities and towns who will be able to obtain access to a network through a local paging company which might not otherwise have chosen to participate in the network under our previous plan for sharing. In sum, we believe the plan advanced by MCCA, with some modifications, is preferable to any other plan we have considered in terms of expediting service to the public, fostering competition in the provision of network services, and reducing the administrative burdens on the applicants and the Commission.

22. Our network licensing policies are only tentative at this time because we want to solicit further comment on the nondiscriminatory access feature in our companion. Further Notice of Proposed Rulemaking. There may be significant operational or economic reasons, of which we are not now aware, militating against the nondiscriminatory access requirement. It may also be that nondiscriminatory access is not necessary to assure a competitive environment for nationwide paging because substitutable services will be available to consumers. These substitutes could influence the three network licensees to offer and price their services competitively in the absence of nondiscriminatory access, which is, after all, nothing more than unrestricted resale of network service. We do not, however, want to delay the licensing process while we continue to consider the access question. Accordingly, applicants should prepare their applications based on the assumption that the policies stated

here will become final. Should we later decide not to require nondiscriminatory access, we will allow those who have filed timely applications an opportunity to amend. No new applications will be accepted after the cut-off date established here regardless of our disposition of the issues in the Further Notice.

B. *How the System Works*

23. As presently conceived, nationwide paging works fairly simply. The nationwide subscriber has a telephone number assigned to him in his home area by the local carrier (network operator) from whom he takes service. When he travels, he leaves the number with persons who need to reach him, for example, his employer. The employer initiates the page by dialing the local number. The network operator recognizes the number as a nationwide paging number and sends it through terrestrial facilities to the network licensee (network organizer) at the network control center. At that point the signal is routed over the network to terminal points in every city in which the network organizer operates. (The page can also be sent to selected cities, depending upon the configuration of the network). From there, the page is transmitted over terrestrial links to the transmitters of participating network operators and then over the air to the subscriber's paging receiver. Because nationwide and local paging do not share the same frequency, the subscriber initially has to have two pagers for local and network service. However, dual frequency papers are now under development and should soon obviate the need for two pagers.

C. *Application and Authorization Procedures*

24. To effectuate the revised plan for network paging, we will adopt MCCA's two-step process, with some minor modifications. First, we will accept applications from, and license, the common carrier network organizers as set forth below. The organizers will control the use of the frequencies and will have all the rights and responsibilities under the Act and the Commission's Rules associated with such control. Second, we will accept abbreviated applications from, and authorize, the local paging companies who have chosen to participate in a network. These companies will have no right to use the frequency other than in the manner specified by the organizer. As explained below, the application form for local operators will be abbreviated, and only a minimum amount of technical information will be required.[9]

25. Those seeking to organize a network must submit their applications no later than 90 days after publication of this Order in the Federal Register. At the close of the 90 day period, we will review the applications to determine their acceptability for filing, and we

[9] *See* para. 25, *infra*.

will then issue a Public Notice announcing any mutually exclusive applications and beginning the thirty day pleading period.[10] If fewer than three applications are received, we will hold the remaining channels in reserve to revert to local use if they are not used for network paging within three years as provided in the *First Report and Order*. If more than three applications are received, as expected, and if the applicants do not align themselves into three groups under the procedures in Section 22.29 of the Rules, the three licensees will be selected by whatever comparative selection process is in effect at the time.[11]

26. Because only three network licenses are available, we agree with MCCA that the network organizers ought to submit something more than bare-bones applications on Form 401.[12] These networks are likely to be complex and expensive to organize and construct, so it is important for us to examine financial and technical ability in evaluating the applications. Furthermore, to insure that the networks are truly nationwide in scope, we find that there should be a minimum number of communities served from the initiation of service. Telocator suggested 30 cities, but we believe that may be too many considering this is a new service with which no one has any experience. We find instead that it is reasonable to require each applicant initially to propose to serve at least fifteen metropolitan areas of its choice, and to submit its plans demonstrating how it will expand service nationwide[13] within two years of the start of service. We will define "metropolitan areas" as the Standard Metropolitan Statistical Areas (SMSAs) listed in the U.S. Department of Commerce's Statistical Abstract of the United States - 1981 (102 Ed.) at pp. 920–925. We do not anticipate updating this SMSA list or accepting markets from any other source.[14] The following is a summary of the information that must be filed as part of the application:

[10] Applicants should *not* designate a specific channel in their applications. All applications filed for the three network channels will be deemed mutually exclusive because we consider the channels to be fungible. *Contrast* Digital Electronic Message Service, 88 FCC 2d 1716 (1982).

[11] We do not rule out random selection at this time; however, we anticipate receiving disparate proposals, which may militate in favor of traditional or modified comparative procedures.

[12] It is not necessary for applicants to demonstrate need for network service because we found such need when we allocated three channels in our *First Report and Order*.

[13] By "nationwide" we do not mean literally everywhere in the country. We leave it to the applicants to forecast demand for service; however, we anticipate that the scope of the network service proposed by each applicant could be a comparative criterion in awarding licenses.

[14] There are no minimum coverage areas or any similar requirements as there are in the cellular radio rules, 47 C.F.R. § 22.901 *et seq*. Applicants need only propose at least one nationwide transmit/receive point within their chosen SMSAs.

(a) the applicant's projected costs of organizing and constructing the network and its technical and financial ability to start up and operate the network;

(b) the proposed mode of operation and technical plan for implementing the network channel, including but not limited to the types of services offered, signaling format and network interconnection plan;[15]

(c) the method and extent to which the proposed network would provide for interference-free operation on the channel in each local area;

(d) the method by which the applicant would provide open and nondiscriminatory access to its network;

(e) the initial service proposal for at least fifteen Standard Metropolitan Statistical Areas;

(f) the applicant's plans for expanding network service from its initial markets to nationwide coverage within two years from the initiation of service;

(g) a model tariff showing, among other things, how it intends to provide nondiscriminatory access to network operators;[16] and

(h) how the public interest, convenience and necessity would be served by a grant of the particular application.

27. The second stage of processing will be the licensing of the local operators on the network organizer's frequencies. Immediately after selection of the network organizers, we will begin taking applications from the local participants, the network operators.[17] We contemplate issuing a Public Notice formally establishing the opening application date; there will be no cut-off date because there is no mutual exclusivity. This licensing requirement is only necessary to insure compliance with our technical rules for transmitters and antenna structures. Accordingly, from carriers who already hold FCC licenses for paging or two-way mobile service, we will require only that pages 1 through 3 and the signature on page 6 of the Form 401 be submitted. These applicants may also omit answers to items 12, 13, 14, 15, 24, 25, 27, and 28, unless answers are needed to correct out-of-date information on file with the Commission. However, new entrants must complete the entire form to enable us to assess all of their qualifications to be Commission licensees. One additional

[15] As part of the proposal, each applicant is expected to describe how it will achieve efficient use of its channel.

[16] Our approach to rate regulation is still under consideration. See paras. 29 and 36, *infra*. Consequently, applicants may not be able to formulate comprehensive tariff proposals by the filing deadline. We will accept model tariffs after the filing deadline as amendments to applications if we have not decided upon the method of rate regulations before then.

[17] Since our ultimate decision on access requirements will affect the licensing of local operators, we will not accept stage two applications until that question is resolved. However, if we retain the open access requirement, the network operator would be free to affiliate with any or all of the network organizers licensed, as long as it agrees to adhere to the specifics of each carrier's network paging proposal. Furthermore, there would be no requirements as to the number of markets an individual operator may serve.

requirement for all applicants will be a statement on the Form 401, asserting their willingness to comply with the network organizer's technical specifications. We anticipate that this type of *pro forma* licensing will speed service to the public with a minimum of paperwork for the Commission and the applicants.[18]

D. *Federal Preemption*

28. In our *First Report and Order*, we decided not to preempt state authority for the 900 MHz frequencies. We concluded that since paging systems are basically local in nature, the states should not be preempted from decisions concerning entry, technical and rate regulations for paging common carriers.

29. In their petitions, Page America and UTS urge the Commission to preempt state authority with respect to entry, technical, and rate regulation for the three network frequencies.[19] Page America argues that by prohibiting local service on these frequencies we have created a new interstate communications service, and the states should be prohibited from regulating the operations on these three frequencies. It claims that without federal preemption, the development of an effective and feasible nationwide paging service will be delayed and its growth may be prevented. We believe Page America and UTS have raised valid concerns.

30. Federal preemption may occur in two instances. First, Congress may either expressly order preemption in a statute or implicitly command preemption by the statute's structure and purpose. Second, valid federal regulation may preempt state law or regulation whenever the state action creates an obstacle to the implementation of the purpose of the federal regulation. *Fidelity Federal Saving and Loan Association v. de la Cuesta*, ___ U.S. ___, 73 L.ED. 2d 664, 675 (1982). *See also*, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The second situation exists in this proceeding. We have created a new nationwide communications service pursuant to our statutory authority. Because state regulation over the technical standards, entry, and rate regulation could seriously impede the development of this service, we believe such state regulation must give way to the paramount federal interest.

31. This new nationwide paging service is being authorized pursuant to both Title III and Title II of the Communications Act of

[18] These applications will be granted without a formal comparative hearing pursuant to Section 22.32(b) because the applications are not mutually exclusive, nor subject to comparative consideration. The accepted applications will be listed in an informative public notice and will be subject to petitions to deny under Section 22.30 of the rules.

[19] The method and extent of our rate regulation is discussed in an accompanying Further Notice of Proposed Rulemaking. This Notice requests comments on various tariff procedures for both the network organizers and operators.

1934, as amended. Under Title III of the Act, the Commission has broad authority to regulate all communications by radio. That authority includes the power to "classify radio stations," to "prescribe the nature of the service to be provided by each class of licensed stations," to "study new uses for radio," and to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §§ 303(a), (b), and (g). Furthermore, Section 301 of the Act explicitly grants this Commission sole authority to license radio facilities.[20] Under Title II of the Act, the Commission has broad authority to regulate interstate common carriers, whether or not they use radio facilities. Pursuant to Title II, the Commission regulates (1) entry into and exit from interstate service, (2) rates and regulations governing the offering of interstate service, and (3) interconnection between carriers for the provision of joint or "through" interstate service. 47 U.S.C. §§ 201–105, 214. The courts have recognized a broad discretion in the Commission with respect to the manner in which it exercises its Title II powers to achieve statutory objectives.[21] Of course, the Commission's Title II authority over interstate common carriers does not extend so far as to extinguish legitimate state regulation of purely intrastate common carrier communications. 47 U.S.C. § 152(b).[22] The Commission's authority over interstate common carriage, however, is comprehensive and does extend to facilities and services that might be located wholly within a single state if those facilities and services are essential or integral parts of interstate communications.[23]

32. In accordance with this statutory authority, we are certain the subject nationwide paging service. Because paging services have historically been local in nature, the states have traditionally regulated paging common carriers. Network paging, however, will be

[20] In particular, Section 301 provides that "no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license on that behalf granted under the provisions of the Act." 47 U.S.C. § 301.

[21] *E.g.*, AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966); *Cf.* Computer & Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed* (U.S. February 9 and 10, 1983) (Nos. 82–1331 and 82–1352); Telocator Network of America v. FCC, 691 F.2d 525 (D.C. Cir. 1982). Additionally, Section 221(b) reserves to the states jurisdiction over local telephone exchanges which serve single multi-state areas. North Carolina Utilities Commission v. FCC, *supra* at 1045.

[22] *See* National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II) (Opinion of Wilkey, J.).

[23] Computer & Communications Industry Association v. FCC, *supra*; People of California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); Puerto Rico Telephone Co. v. FCC, 553 F.2d 694 (1st Cir. 1977); North Carolina Utility Commission v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (NCUC II). *See also* New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980); General Telephone Co. of the Southwest v. FCC, 449 F.2d 846 (5th Cir. 1971).

predominantly an interstate service, which may also address intrastate demands. In an effort to assure nationwide service, we have imposed two significant requirements upon any entity proposing to offer nationwide service. First, we have initially prohibited local paging on these frequencies. Although network organizers will be permitted to request permission to offer local paging on a secondary basis, such service offerings will not be the ordinary situation and will not be permitted to displace nationwide service. Second, and possibly more important, we are requiring that the three network licensees demonstrate the capability both to serve 15 SMSAs initially and to expand paging service nationwide within two years. Furthermore, in an effort to increase competition in this new market, we are tentatively requiring that the network operators be afforded open and nondiscriminate access to any or all nationwide channels. Regardless of whether that requirement is retained, it is essential to the interstate development of nationwide paging that the network organizer and its operators be afforded access to all cities and states it desires to serve. To achieve the rapid implementation of nationwide service and these policy objectives, we believe our regulation of the service must preempt state regulation with respect to entry, technical standards, and rate regulation for the three network frequencies.[24]

33. Preemption of state entry regulation is necessary for several reasons. Initially, as note above, access for paging operators to every city and state is crucial to our network scheme. If the states restrict entry, implementation of this service will be frustrated. Depending upon how the network is organized, full nationwide coverage might be thwarted if carriers in particular cities are denied entry. State entry regulation also could delay the implementation of this new service as well as increase the carrier's expense of providing it. We realize that because this service has some intrastate characteristics the states may have an interest in how it is provided. The states, like other interested parties, may raise their concerns with this Commission whenever these entities apply for licenses.

34. We are also asserting federal primacy over technical standards for the network paging service. Nationwide operators will be required to comply with the technical parameters specified by the network organizer, including but not limited to the mode of operation, signaling format, network interconnection and method of interference free sharing. The assurance of compatible operation of equipment on an interstate and nationwide basis for the three frequencies is essential to the success of this service. State licensing requirements could add additional and possibly conflicting network technical specifications that would defeat the nationwide plan.

35. Finally, our action cannot coexist with state rate regulation

[24] *See* n. 18 *supra*.

of the three network organizers. The nationwide systems can be used for both interstate and intrastate communication.[25] Although the states generally regulate intrastate communications, they must stand aside when, as here, it is technically and practicably impossible to separate the two types of communications for tariff purposes.[26] Furthermore, we have issued an accompanying Further Notice of Proposed Rulemaking which solicits comments on the extent and method of rate regulation for the network operators. The scope of any preemption vis-a-vis the network operators' rates will be resolved in that proceeding.

36. We note that our preemption of state regulation in this instance is consistent with precedent. The preemptive effect of valid Commission actions over state regulation when it could interfere with interstate communications has consistently been recognized by the Courts. *Orth-Vision*, 69 FCC 2d 657 (1978), *aff'd sub nom. New York State Commission on Cable Television v. FCC & USA*, 669 F. 2d 58 (2d Cir. 1982); *Telerent Leasing Corp.*, 45 FCC 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.) *cert. denied*, 429 U.S. 1027 (1976). Further it is will established that the Commission may assert jurisdiction over facilities that are wholly within a single state if local services cannot be easily and practicably separated from interstate services supplied through the same facilities. *People of State of California v. FCC*, 567 F. 2d 84 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1010 (1978); *North Carolina Utilities Commission v. FCC*, 552 F. 2d 1036 (4th Cir.) *cert. denied*, 434 U.S. 874 (1977).

37. In conclusion, we find that federal preemption in this case is necessary if our policies are to succeed. State regulation could impede the development and provision of this new, innovative, and primarily interstate telecommunications service.

E. *Other Matters*

38. In the *Memorandum Opinion and Order on Reconsideration (Part 1)*, we waived the submissions of Section 22.15(j)(8) topographic maps and Section 22.115 profile graphs, and we added the requirement tht maps on a scale of 1:250,000 be submitted. For the sake of clarity, we have rewritten the applicable rules to reflect these changes. *See* Appendix A.

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[25] For example, a nationwide system can be used to communicate intrastate from San Francisco to Los Angeles, as readily as it can be used interstate from San Francisco to New York.

[26] *See* Computer & Communications Industry Association v. FCC, supra at 215; North Carolina Utility Commission v FCC, 537 F. 2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976); North Carolina Utility Commission v. FCC, 552 F. 2d (4th Cir.), *cert denied*, 434 U.S. 874 (1977).

IV. *Conclusion*

39. This is the first time that common carrier frequencies have been devoted exclusively to nationwide inter-city paging systems. We decided to reject the burdensome and time-consuming extended cut-off procedures and unanimity sharing agreements adopted in the *First Report and Order*. We also reject the complex licensing and coordination problems associated with authorizing separate regional and nationwide networks. One network organizer will be licensed on each frequency. This licensee will have thoroughly devised a method for technical interconnection and interference-free coordination among carriers. Then any local common carrier who wishes to provide network services will be authorized to affiliate with one or more network organizers by adhering to the licensee's proposal. We believe that this two-step regulatory process is workable and will promote the Commission's goals of competition and diversification. We are confident that it will implement nationwide paging in the most efficient and expeditious manner possible.

V. *Ordering Clauses*

40. Accordingly, IT IS ORDERED, that the petitions for reconsideration are granted to the extent set forth herin, and are otherwise denied.

41. IT IS FURTHER ORDERED, That pursuant to the authority found in Section 154(i), 301 and 303(r) of the Communications Act of 1934, as amended, Part 22 of the Commission's Rules and Regulations ARE AMENDED as specified in Appendix A. These amendments shall become EFFECTIVE 30 days after publication of this Memorandum Opinion and Order in the Federal Register.

42. IT IS FURTHER ORDERED, That applications by the applicants desiring to organize a network frequency will be accepted 90 days after this Order is published in the Federal Register.

FEDERAL COMMUNICATION COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

47 CFR Part 22 is revised as follows:

1. 47 C.F.R. § 22.501(p)(1) and (2) is revised to read as follows:

(p)(1) For assignment to base stations of communication common carriers for use exclusively in providing a one-way signaling service. (center frequency of 25 khz band)

931.0125 MHz	931.3625 MHz	931.7125 MHz
931.0375 MHz	931.3875 MHz	931.7375 MHz
931.0625 MHz	931.4125 MHz	931.7625 MHz
931.0875 MHz	931.4375 MHz	931.7875 MHz

931.1125 MHz	931.4625 MHz	931.8125 MHz
931.1375 MHz	931.4875 MHz	931.8375 MHz
931.1625 MHz	931.5125 MHz	931.8625 MHz
931.1875 MHz	931.5375 MHz	931.8875 MHz[1]
931.2125 MHz	931.5625 MHz	931.9125 MHz[1]
931.2375 MHz	931.5875 MHz	931.9375 MHz[1]
931.2625 MHz	931.6125 MHz	931.9625 MHz
931.2875 MHz	931.6375 MHz	931.9875 MHz
931.3125 MHz	931.6625 MHz	
931.3375 MHz	931.6875 MHz	

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[1] Reserved for stations engaged in providing nationwide network paging service; as provided for in § 22.527.

(p)(2) Specification of frequency in application. (a) *Non-network*: An applicant for a new, non-network frequency in the band 929–932 MHz will not specify a frequency in its application. It may specify its non-network frequency preference, but the Commission is not bound by such requests. (b) *Network*: An applicant wishing to organize a network frequency will not specify a frequency preference in its application but must make the showings required by § 22.527. The subsequent applications filed by the affiliating, local common carriers should specify the specific network channel it desires.

2. Part 22 is amended by adding new Section 22.527 to read as follows:

§ 22.527 Channel assignment policies for 900 MHz one-way signaling channels reserved for stations engaged in providing network signaling service.

(a) An applicant wishing to organize a network signaling channel should not specify a particular channel in its application.

(b) The applicant shall submit to the Commission copies of agreements, if any, and system diagrams and plans illustrating how applicant proposes to utilize the desired network signaling channel. Applications filed pursuant to this paragraph must contain at a minimum the following:

(i) Technical standards describing the types of one-way communications to be provided, the signaling format under which individual receivers may be selectively signaled, and the network protocol under which all stations licensed or subsequently licensed on the desired network signaling channel may be connected or interconnected for the purposes of exchanging or delivering signaling messages for transmission by such stations.

(ii) Description of how the proposed system and the technical standards described in paragraph (i) will not discriminate as to access, cost, or otherwise between applicant and the local operators for the desired network paging channel.

(iii) Description of how the proposed network would provide for interference-free operation on the channel in each local area.

(iv) Description of applicant's technical and financial qualifications to construct the proposed system and to develop and implement the technical standards

described in paragraph (i). Such financial qualifications shall satisfy the requirements of § 22.917.

(v) Description of how applicant with others, will provide network signaling service to at least fifteen Standard Metropolitan Statistical Areas initially and to how it will expand network services nationwide within two years.

(vi) a model tariff showing, among other things, how it intends to provide nondiscriminatory access to network operators; and

(vii) Description of how the public interest, convenience and necessity will be served by a grant of the application.

3. 47 C.F.R. § 22.15(j)(8) is revised to read as follows:

(8) Topographic maps (see also Section 22.116) showing the information set forth in Sections (i) and (ii) below are required in all part 22 services except for 900 MHz one-way paging applications, which are governed by Section (iii) below.

(i) exact station location

(ii) location of radials used in determining elevation of average terrain.

(iii) Exact station location should be plotted on a map with a scale of 1:250,000 and the reliable service area should be depicted by a 20 mile radius for each base station.

4. Part 22 is amended by adding new Section 22.15(j)(10) to read as follows:

(j)(10) For 900 MHz one-way applications, the profile graphs referred to in Section 22.116 are not required.

Settlement

Where applicants submitted affidavits showing compliance with Section 311(c)(3)(a) and (b) of the Communications Act verifying that the applications were filed in good faith and in order to obtain a grant, the agreement would be approved.
–Oak Television of Everett, Inc.
BC Docket No. 81–456

FCC 83R-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OAK TELEVISION OF EVERETT, INC. Everett, Washington	BC Docket No. 81–456 File No. BPCT-800409KF
UNITY BROADCASTING COMPANY OF WASHINGTON STATE, INC., Everett, Washington	BC Docket No. 81–457 File No. BPCT-800908KG
GREATER EVERETT TELECASTERS Everett, Washington	BC Docket No. 81–458 File No. BPCT-800908KH
CHANNEL 16, INC. Everett, Washington	BC Docket No. 81–459 File No. BPCT-800908KF
For Construction Permit for a New Television Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 5, 1983; Released: April 7, 1983.)

BY THE REVIEW BOARD: BOARD MEMBER JACOBS ABSENT.

1. The four applicants in this case on February 10, 1983 filed a joint petition for approval of agreement which was supplemented March 29, 1983. We will grant the petition as supplemented because the applicants have complied with the new settlement requirements of Section 311(c)(3) of the Communications Act, 96 Stat. 1087. *See Texas Television, Inc.*, 52 RR 2d 1268 (Rev. Bd. 1982), *review denied*, FCC 83–95, released March 9, 1983.

2. Section 311(c)(3) as amended now provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience, or necessity; and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

In the Initial Decision released November 8, 1982, FCC 82D-72, the Administrative Law Judge concluded that a grant of Unity Broadcasting Company of Washington State, Inc. would serve the public interest. Instead of filing exceptions the four applicants entered into an agreement which on approval would result in the immediate grant of the Unity Broadcasting Company application. They point out that the agreement is in the public interest because it will bring to an end protracted and lengthy proceedings reducing the burden not only on the parties but the Commission as well. They state that the agreement also "presents an unprecedented opportunity for the Commission to realize expeditiously the benefits growing from and achievements inherent in its clearly enunciated minority ownership policy, namely, minority ownership of a UHF television facility in a top fifteen television market. *See Policy Statement on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978)." The Commission and Congress have recognized that settlement agreements such as the one in this case shorten lengthy and expensive proceedings, expedite initiation of new service, and generally serve the public interest. *See Texas Television, Inc., supra. See also Bison City Television 49 Limited Partnership*, FCC 83R-17, released March 16, 1983 (Rev. Bd.).

3. Section 311(c)(3)(b) requires a showing that "no party to the agreement filed its application for the purpose of reaching such agreement." The supplement filed on March 29, 1983 contained affidavits and certification from all applicants verifying that their applications were filed in good faith and to obtain a grant. The record also reveals the applications have been vigorously prosecuted throughout the comparative hearing. Thus, there is no indication that the applications were filed for the purpose of reaching or carrying out the settlement agreement. Since the parties have shown compliance with both Section 311(c)(3)(a) and (b), their joint request is hereby granted.

4. This is the second recent case in which the Board was obliged to withhold action on a settlement agreement which was clearly in the public interest until the pleadings could be supplemented to show compliance with Section 311(c)(3)(b). *Cedar Creek Radio Co.*, FCC 83R-21, released March 17, 1983. In the future such delays can be avoided if the applicants submit the following information:

a. A summary of the history of the negotiations including who initiated the negotiations. 47 CFR 73.3525(a)(2)(3).

b. The reasons why the agreement is in the public interest. Section 311(c)(3)(a), above.

c. A statement demonstrating the applications were not filed for the purpose of entering into the agreement. Section 311(c)(3)(b), above.

5. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed February 23, 1983, by Oak Television of Everett, Inc. IS GRANTED, and the amendment IS ACCEPTED; and that the joint petition for approval of agreement filed February 10, and supplemented March 29, 1983 IS GRANTED; that the application of Unity Broadcasting Company of Washington State, Inc. IS GRANTED; that the applications of Oak Television of Everett, Inc., Greater Everett Telecasters and Channel 16, Inc. ARE DISMISSED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 82D-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OAK TELEVISION OF EVERETT, INC. Everett, Washington	BC Docket No. 81–456 File No. BPCT-800409KF
UNITY BROADCASTING COMPANY OF WASHINGTON STATE, INC. Everett, Washington	BC Docket No. 81–457 File No. BPCT-800908KG
GREATER EVERETT TELECASTERS Everett, Washington	BC Docket No. 81–458 File No. BPCT-800908KH
CHANNEL 16, INC. Everett, Washington	BC Docket No. 81–459 File No. BPCT-800908KF
For Construction Permit for a New Television Station	

Appearances

B. Dwight Perry, Christopher C. Smallwood, Noel Gunther, and *Carolyn A. Wimbly*, on behalf of Oak Television of Everett, Inc.; *Curtis T. White, Edward Hayes, Jr., Michael D. Jones* and *Ellen S. Mandell*, on behalf of Unity Broadcasting Company of Washington State, Inc., *E. William Henry* and *Peter A. Casciato*, on behalf of Greater Everett Telecasters; *Richard F. Kennedy*, on behalf of Channel 16, Inc.; and *Lawrence Bernstein*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

(Issued: November 2, 1982 Released: November 8, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Oak Television of Everett, Inc. (Oak), Unity Broadcasting Company of Washington State, Inc. (Unity), Greater Everett Telecasters (Telecasters), and Channel 16, Inc. (Channel 16), for a construction

permit for a new commercial television station in Everett, Washington. In a *Hearing Designation Order*, 46 Fed. Reg. 38751, published July 29, 1981, the applicants were designated for hearing on the following issues:

(1) To determine with respect to Oak Television:

(a) whether the applicant has $1,089,985 available to construct and operate the proposed station for three months.

(b) whether, pursuant to its Articles of Incorporation, the applicant is empowered to construct and operate a broadcast station in the state of Washington.

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, applicant is qualified to construct and operate as proposed.

(2) To determine with respect to Unity:

(a) the costs of operating the proposed station for three months.

(b) the cost of leasing or purchasing the applicant's proposed transmitter site.

(c) whether the applicant has $2,918,000 available plus the amounts shown to be required in issues (a) and (b) above.

(d) whether, in light of the evidence adduced pursuant to (a), (b) and (c) above the applicant is financially qualified to construct and operate as proposed.

(3) To determine with respect to Greater Everett:

(a) whether the applicant has the $3,155,141 available to construct and operate for 3 months.

(b) whether in light of the evidence adduced pursuant to (a) above the applicant is financially qualified.

(c) whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation, and if so, whether the applicant is technically qualified.

(4) To determine with respect to Channel 16:

(a) whether the applicant has the $1,511,679 available to construct and operate for three months.

(b) whether, in light of the evidence adduced pursuant to (a) above the applicant is financially qualified.

(5) To determine, on a comparative basis, which of the applications would best serve the public interest.

(6) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. The Designation Order further required that, in the event of a grant of the application of Channel 16, the construction permit include a condition that operation not be commenced until the permittee has certified to the Commission that Jon H. and Mary Ann Marple have divested themselves of all interest in, and severed all connections with, Station KRKO(AM) in Everett, Washington. The

Federal Aviation Administration was made a party respondent with respect to Issue 3(c).

3. On August 28, 1981, Oak filed Motions for Summary Decision with respect to Issues 1(a) through 1(c). By *Order*, FCC 81M-4013, released December 18, 1981 (and reflecting rulings made at a prehearing conference on December 16), the Motions were granted and Issues 1(a) through 1(c) were favorably resolved. On August 28 and October 29, 1981, Telecasters filed Motions for Summary Decision concerning Issues 3(a), 3(b) and 3(c), respectively. By *Order*, FCC 81M-4013, *supra*, the Motions were granted. On September 16, 1981, Channel 16 filed a Motion for Summary Decision as to Issues 4(a) and 4(b). By *Order*, FCC 81M-4013, *supra*, the Motions were granted. The sole qualifying issues remaining for hearing were thus Issues 2(a) through 2(d), relating to Unity's financial qualifications.

4. Prehearing conferences were held on October 1 and December 16, 1981. An admission session took place on January 29, 1982, and hearing sessions were conducted on February 2–4 and March 9, 1982. The record was closed by Order released March 23, 1982 (FCC 82M-0936). Proposed findings and conclusions were filed by the applicants and the Bureau on April 23, 1982 and replies to proposed findings were filed by Unity, Telecasters and Channel 16 on May 7, 1982.

Findings of Fact

Unity Financial Issues

5. Issue 2 was specified to determine Unity's construction and operating costs and whether Unity has $2,918,000 available plus any additional amounts required for the then undetermined costs of operating the proposed station for three months and the cost of leasing or purchasing the applicant's proposed transmitter site. However, since designation, Unity has altered both its plan of construction and operation and its means of financing the construction and operation of the proposed station.

6. As revised, Unity will require $1,321,790 to construct and operate for three months (Unity Ex. 12, p. 1). These construction and operational costs are itemized as follows:

Equipment costs	$ 986,790
Operating costs (including site leases)	225,000
interest on loan of Imperial Bank	75,000
Engineering fees	10,000
Legal fees	25,000[1]
	$1,321,790

[1] Legal fees in the amount of $75,000 have already been paid by Unity principal, Carl Washington from his personal funds. Mr. Washington does not expect

7. To meet these construction and operating costs, Unity relies on a $1.5 million commitment from the Imperial Bank of San Francisco, California, and $100,000 in stock subscriptions, on deposit at the Imperial Bank.[2] The Imperial Bank's commitment letters to Unity are in Unity Ex. 12, pp. 4–5. The Bank requires interest only on a quarterly basis for the first year, and interest and principal payable on a monthly basis thereafter. *Id.* The $75,000 in interest calculated into construction and operation costs assumes an interest rate of 20%. The Imperial Bank commitment is also predicated on the personal guarantees of Unity principals. Those guarantees have been furnished (Unity Ex. 12, pp. 6–12). Thus, Unity has shown the availability of funds totalling $1,600,000, to meet projected three-month construction and operation costs of $1,321,790.

Comparative Issue

Oak Television of Everett, Inc.

8. Oak is a Delaware Corporation capitalized with 1000 authorized and issued shares of common stock ($1.00 par value) (Oak Ex. 1, p. 1). Its officers and directors are as follows:

John P. Gwin San Diego, CA	Chairman of the Board of Directors
Werner R. Koester San Diego, CA	President/Director
Eugene M. Keys Poway, CA	Vice-President/Director
Ronald S. Comm Arlington Heights, IL	Treasurer/Director
E. Jeanne Hamm San Diego, CA	Secretary

repayment. He has an oral agreement with respect to repayment which Unity at its option may honor (Unity Ex. 12, p. 1; Tr. 280).

[2] Unity initially proposed at the hearing to prove that it had sufficient funds to construct and operate its proposed facility by means of a $1.5 million commitment letter from the Colonial Overseas Bank, located in the West Indies; stock subscriptions in the amount of $100,000, and a loan from Teleport Oil Company of $300,000. However, the reliability of Colonial Overseas Bank was called into question. See *Memorandum Opinion and Order*, FCC 82M-0303, released January 28, 1982, denying Unity's Motion for Summary Decision. Unity, after attempting to produce a representative from the Bank, called instead Dr. Oscar Murcia, a California businessman who was purportedly willing to lend Unity $1.5 million (Tr. 318, 319). However, Dr. Murcia subsequently testified that, as the management of Unity was presently constituted, he was unwilling to make a loan to Unity (Tr. 430, 432).

None of these individuals holds any ownership interest in Oak (Oak Ex. 1, p. 4).

9. Oak Industries, Inc. (Oak Industries) owns 100% of the outstanding shares of Oak. Its officers and directors are as follows:

Everitt A. Carter San Diego, CA	Chairman of the Board/ Director
Carl J. Bradshaw San Diego, CA	Senior Vice-President/ Director
Frank A. Astrologes San Diego, CA	Executive Vice-President/ Director
John P. Gwin San Diego, CA	Executive Vice-President/ Director
Raymond W. Pierce San Diego, CA	President/Director
Robert J. Hartney San Diego, CA	Vice-President
Michael G. Forys Poway, CA	Vice-President
Robert V. Dumke San Diego, CA	Vice-President
A. Keith Cook San Diego, CA	Vice-President
Jeanne E. Hamm San Diego, CA	Secretary
Thomas C. Runge San Diego, CA	Vice-President/Treasurer
John Yonco Western Springs, IL	Assistant Secretary
Franklin A. Cole Highland Park, IL	Director
Henry A. Correa New York, NY	Director
Vincent T. Gorguze St. Louis, MO	Director
Phillip S. Harper, Jr. Hinsdale, IL	Director
Robert T. McTigue River Forest, IL	Director
Dr. Leo Jedynak San Diego, CA	Senior Vice-President/ Director
Lawrence H. Rogers, II Cincinnati, OH	Director
Gary T. Barbera	Executive Vice-President/

Barrington, IL	Director
Michael R. Maury San Diego, CA	Vice-President/Controller
Eugene N. Meyer San Diego, CA	Vice-President/Staff Operations
Werner R. Koester San Diego, CA	Executive Vice-President
Howard L. McPherson Austin, TX	Vice-President/Manufacturing
Gary J. Goberville Solana Beach, CA	Vice-President/Human Resources

(Oak Ex. 1, pp. 1, 5, 7–9).

10. Oak does not hold or vote any interest in any other communications company, partnership or venture (Oak Ex. 2, pp. 1–4). Oak Industries and its various subsidiaries, however, have extensive other media interests. Oak Industries owns 100% of the licensee and is the STV franchise holder of WKID-TV in Ft. Lauderdale, Florida. *Id.* Through its subsidiary, National Subscription Television of Chicago, Inc., Oak Industries owns a 49% interest in the licensee (a joint venture) of WSNS-TV in Chicago, Illinois. (Oak Industries owns a 24.5 percent share of the joint venture licensee outright; it also owns 49 percent of another entity that owns 50 percent of the joint venture licensee.) *Id.* Oak Industries also owns a 50% interest in the STV franchisee of WSNS-TV. Another Oak Industries subsidiary, Oak Communications, Inc., owns NST Holding Co., Inc., and Oak Television, Inc., which own 49% and 51%, respectively, of the STV franchisee for KBSC-TV in Corona, California. *Id.* Oak Industries has transferred its 50% interest in the licensee of KBSC-TV to a voting trustee. *Id.* An Oak Industries subsidiary has filed a license application for a KBSC-TV translator station to serve three additional communities. *Id* at 2, n. 1. Oak Industries subsidiaries are the license applicants and proposed STV franchisees for three new STV stations in Denver, Colorado; St. Petersburg, Florida; and New Orleans, Louisiana. *Id.* at 3.

11. Oak Industries owns 100% of the STV franchise of Channel 45, Baltimore, Maryland (to decrease to 90% upon commencement of operation); 70% of the STV franchisee of Channel 15, Phoenix, Arizona; 60% of the STV franchisee of Channel 21, Ft. Worth, Texas; and 45% of the STV franchisee of Channel 29, Minneapolis, Minnesota. *Id.* at 3. Oak Industries also owns two cable systems. One system serves Oxnard, Hueneme, and parts of Ventura County, California; the other serves Castro Valley and adjacent communities in California. *Id.*[3]

[3] Oak did not disclose in its direct case or during the hearing the identities and ownership interests of the shareholders, if any, having a one percent or greater

12. Oak does not propose to integrate any of its ownership into the management of the proposed station. Oak's Board of Directors will monitor and control the station's overall performance, with day-to-day management in the hands of a fulltime general manager who will report to the Board. (Oak Ex. 1, pp. 1, 2). None of Oak's officers and/or directors reside in Everett (Oak Ex. 1, Appendix A).

Unity Broadcasting of Washington State, Inc.

13. Unity is a corporation formed under the laws of the State of Washington (Unity Ex. 2, p. 1). There are 100,000 authorized shares of common stock in Unity (Unity Ex. 2, p. 1). There is only one class of stock (Unity Ex. 2, p. 1). Each share carries one vote (Unity Ex. 2, p. 1). The stock has been paid for, but is not yet issued. (Tr. 74).

14. The officers and directors of Unity, and their respective stock ownership interests, are as follows:

Carl D. Washington President and Chairman of the Board of Directors	60,000 shares (60%)
Samuel E. Washington Secretary	15,000 shares (15%)
Calvin E. Burton First Vice President	10,000 shares (10%)
Dr. Thomas Arnold	5,000 shares (5%)
Carl C. Gipson Second Vice President and Treasurer	2,000 shares (2%)
Moyes Lucas	2,000 shares (2%)
Ms. Sharon Silverstone	1,000 Shares (1%)

(Unity Ex. 1, p. 1).[4]

15. Carl D. Washington, Samuel E. Washington, Calvin E. Burton, Dr. Thomas Arnold, Carl C. Gipson and Moyes Lucas are Black Americans. Therefore the corporation is 99% minority owned (Unity Ex. 1, p. 1). The remaining 1% is owned by Ms. Sharon Silverstone, a woman (Unity Ex. 1, p. 1).

16. None of the principals of Unity has any ownership interest in any other radio or television station, cable system, newspaper, or other medium of mass communication (Unity Ex. 3).

17. Unity proposes the integration of three of its stock subscribers into station management. Carl D. Washington, Chairman of the Board, Director, and 60 percent owner of Unity, is the proposed

interest in its parent, Oak Industries, Inc. The record also does not disclose whether any such shareholders own or hold any interest in other communications companies or ventures.

[4] Five percent of the shares of Unity are being held in Treasury. These shares were formerly subscribed to by Clarence Hatch, who has withdrawn from the application (Tr. 253–4).

President and Chief Executive Officer of the station, as well as a member of its Executive Committee. He proposes to devote 30 hours per week to the station (Unity Ex. 4). Samuel E. Washington would be full-time General Manager of the station and would serve as a member of the Executive Committee. He is the Secretary, a Director, and 15 percent owner of Unity (Unity Ex. 4). As General Manager, he will be in charge of the day-to-day operation of the station including the implementation of sales, advertising and programming policies (Tr. 249–50). Calvin E. Burton, First Vice-President, a Director, and 10 percent owner of Unity would serve full-time as the station's Operations Manager and as a member of its Executive Committee (Unity Ex. 4). The commitment of Carl D. Washington, Samuel E. Washington and Calvin Burton to duties at the station would be paramount and would take precedence over any other conflicting time requirements were any to arise (Unity Ex. 4).

18. *Carl D. Washington* was born in Tuscaloosa, Alabama, on August 11, 1943 (Unity Ex. 2, p. 2). Mr. Washington has a Bachelor of Arts degree from Long Beach State University where he majored in Political Science and Speech (Unity Ex. 2, p. 2). From 1968 to 1970, Mr. Washington was a regional marketing *representative* for the Kellogg Corporation. In 1970, he founded Chem-Rex, Inc., a sanitary supply company, for which he served as President until 1974. In 1974, together with his brother Gene, Mr. Washington founded Washington Brothers Distributing Company, a liquor distributor in Northern California, operating until 1978, when the distributorship was sold. In 1979, Mr. Washington founded Teleport Oil Company, a wholesale oil distributorship, of which he remains President (Unity Ex. 2, p. 2). Mr. Washington has no prior broadcasting experience (Unity Ex. 2, p. 2).

19. Mr. Washington presently resides in Oakland, California, with his wife and daughter (Unity Ex. 2, p. 2). He intends to become a resident of the area of license if the construction permit is granted. Mr. Washington is a member of various civic and/or community organizations in the San Francisco/Oakland area (Unity Ex. 2, p. 3). He is also the recipient of the following public service awards: Black Chamber of Commerce Outstanding Business Service Award, 1981, City and County of San Francisco Board of Supervisors Outstanding Public Service Award, Business; and City and County of San Francisco Award of Merit for Outstanding Public Service (Unity Ex. 2, p. 3). However, there is no evidence that Mr. Washington has ever lived or ever been a member or officer of any organization in the Everett area.

20. *Samuel E. Washington* was born on November 24, 1949, in Tuscaloosa, Alabama (Unity Ex. 2, p. 4). Mr. Washington holds a Bachelor of Arts degree from UCLA. Following his graduation in 1971, he worked for the Sanitary Supply Company, Long Beach, California. From 1975 to 1981, he worked in Washington, D.C. as a

sales representative for Levi Strauss & Company (Unity Ex. 2, p. 4). In 1981 Mr. Washington took a medical leave of absence from Levi Strauss due to a back injury and was placed on long-term disability (Tr. 236–38). He is still employed by Levi Strauss pending the final processing on his long-term disability papers (Tr. 241–42). Although Mr. Washington can no longer lift the garment bags that his job at Levi Strauss required, he is able to perform other types of work (Tr. 237–48). Mr. Washington is of the opinion that he is physically capable of performing the tasks of General Manager (Tr. 249–50). No evidence was offered disputing this opinion. Mr. Washington has no prior broadcast experience (Tr. 242).

21. Mr. Washington is temporarily residing in San Francisco, California.[5] His permanent residence is in Washington, D.C. (Unity Ex. 2, p.4; Tr. 236, 244). Assuming grant of Unity's application, he intends to move to Everett or Seattle, Washington (Tr. 244). Washington is a member of the NAACP; the United Negro College Fund, and Kappa Alpha Psi, the National Black Fraternity (Unity Ex. 2, p. 5). However, there is no evidence that Mr. Washington has ever lived or ever been a member or officer of any organization in the Everett area.

22. Calvin E. Burton was born on March 29, 1942, in Anniston, Alabama (Unity Ex. 2, p. 6). Mr. Burton has a Bachelor of Arts degree from Morgan State University in Baltimore, Maryland. He also studied towards a Masters degree at Rutgers University, New Brunswick, New Jersey (Unity Ex. 2, p. 6). Mr. Burton joined the National Broadcasting Company (NBC) in 1968, working for NBC or its affiliate KNBC in various capacities in New York City and Burbank, California, for the next 11 years. From July, 1968, to April, 1970, he was Administrator/Equal Employment Programs, NBC-Corporate Staff. From April, 1970, to March, 1972, he was Administrator, Programs, of KNBC, Burbank, California. From March, 1972, to March, 1975, he was a Staff Producer at KNBC, involved in the development and production of local television programs (Unity Ex. 2, pp. 6–7). Between April, 1970, and about March, 1975, he was also involved in the purchase of several syndicated programs, including "Mouse Factory," the "John McKay Show," and the "Mary Tyler Moore Show." Mr. Burton's responsibility generally entailed identifying the available properties, working out cost details, negotiating contracts with talent and recommending time slots in which to air the programs. In executing these responsibilities, Mr. Burton consulted with KNBC's program manager, to whom he reported directly (Tr. 198–99). From March, 1975, to March, 1976, Mr. Burton was the Producer/Host of "Saturday Show," a public affairs program

[5] During his temporary stay in San Francisco, Mr. Washington has been working with the President of Channel 48 in order to familiarize himself with the operation of a television station (Tr. 242).

on KNBC; in that capacity, he also represented KNBC at various national, state, and local events (Unity Ex. 2, pp. 6–7). In April, 1979, Mr. Burton joined MEDIACOM, in Century City, California, as Director of Production and Programming. In April, 1979, as well, Mr. Burton founded Avandi II, Inc., a television production company in Hollywood, California. He left MEDIACOM in 1981 to devote more time to Avandi II (Unity Ex. 2, p. 7). Mr. Burton is President, Chairman of the Board, and 90 percent shareholder of Avandi II. There is one other shareholder in Avandi II, a senior vice-president of sales and marketing; otherwise, there are five regular employees and 15 free-lance employees (Unity Ex. 2, p. 7; Tr. 192). Mr. Burton relies on Avandi II and certain real estate investments for income (Tr. 202–03). He plans to retain his stock interest in Avandi II and remain its Chairman of the Board (Tr. 192). He currently spends 20 to 30 hours weekly working with Avandi II (Tr. 191, 194). In the event Unity obtains the construction permit, Mr. Burton will remain available for consultation with Avandi II, but only by telephone. Mr. Burton will divest his daily management responsibilities, which, pursuant to a letter of understanding, will be assumed by his brother-in-law, who is presently the Director of Operations and Management Development and Training for CBS records. His paramount commitment will be to the proposed station (Tr. 192–03, 203; Unity Ex. 4).

23. Mr. Burton was nominated for an Emmy Award for "The Jazz Show," "What's Going On," "The Saturday Show," and "Maybe It's All In My Mind." He has been awarded resolutions by the California State Assembly and the Los Angeles City Council for outstanding production of "What's Going On." He has received the National Association of Television Program Executives Award for Excellence in the Production and Broadcast of "Maybe It's All In My Mind" (Unity Ex. 2, pp. 8–9).

24. Mr. Burton presently resides in Los Angeles, California, with his wife and daughter (Unity Ex. 2, p. 6). If the construction permit is granted, he intends to become a resident of Everett (Unity Ex. 2, p. 6). Although his wife is presently employed in California, Mr. Burton testified that she will give up her job to move to Everett, and will look for work in Everett or Seattle (Tr. 213). Mr. Burton is a member of the Board of Directors of the Southern California Counselling Center (Unity Ex. 2, p. 8; Tr. 225–226). He is also an honorary member of the Board of the Directors of the Los Angeles Basin Equal Opportunity League (LABEOC) (Unity Ex. 2, p. 8). Mr. Burton has also been a member of the following organizations: the Black Producers Association,. Media Forum, NAACP, National Catholic Office for Radio and Television, Hollywood Chapter of the National Academy of Television Arts and Sciences, National Urban League, Public Affairs Committee, United Negro College Fund, Radio and Television Committee, the American Management Association, the

American Federation of Television and Radio Artists, and the Screen Actors Guild (Unity Ex. 2, p. 8). A number of these organizations have local chapters serving Everett (Tr. 225–26). However, Unity does not claim that Mr. Burton has ever lived in the Everett area or associated with an Everett or Seattle chapter.

Greater Everett Telecasters

25. Telecasters is a joint venture organized under the laws of the State of Washington (Telecasters Ex. B, p. 1). The names of the joint venturers and their respective ownership interests are as follows: FNI Communications, Inc. (67%); Linda D. Brown (11%); Yoshitada Nakagawa (11%); and Marilyn Joyce Wilkens (11%) (Telecasters Ex. B, P. 1). An oral agreement among the joint venturers, effective December 29, 1980, was reduced to writing and signed on January 13, 1981 (Telecasters Ex. B, p. 2). Samuel Schulman, Chairman of the Board of Directors and 45.2% owner of FNI, Inc., the parent of FMI Communications, Inc., is the Chairman of the Board of New Century Productions, Inc., and owns more than 50% of the stock of that company. He is the general manager and an 0.25% limited partner in SLM, a limited partnership. Both entities are involved in motion picture production (Telecasters Ex. A, p. 2). Leonard Wilkens, husband of Marilyn Joyce Wilkens, is the President, a Director, and a 26% shareholder in W-2, Inc., an applicant for a new FM radio station in Olympia, Washington (Telecasters Ex. A, p. 2). Neither Marilyn Joyce Wilkens, Yoshitada Nakagawa, or Linda D. Brown hold or vote any interest in a television or radio station, CATV system, newspaper, or other communications company, partnership or venture (Telecasters Ex. A, p. 2).

26. Telecasters proposes the integration of two of its owners into the management of the proposed station on a part-time basis. Marilyn Joyce Wilkens, owner of an 11% interest in Telecasters, will serve 20–40 hours per week at the station as Business Manager of Telecasters if its application is granted (Telecasters Ex. B, p. 1; Tr. 88). Linda D. Brown, owner of an 11% interest in Telecasters, will serve 20–40 hours per week as the station's Director of Public Service Broadcasting, assisting the general manager in the development of public affairs and other types of public service programming (Telecasters Ex. B, p. 1; Tr. 90). Anthony R. Tucker has been designated by FNI Communications, Inc., as its representative to carry out its responsibilities as a joint venturer (Telecasters Ex. B, p. 1). He has not proposed to hold a specific position or to work any specified hours at the station. Yoshitada Nakagawa has not agreed to hold a specific position or to work any specified hours at the station.

27. *Marilyn Joyce Wilkens* was born November 25, 1941 in New York City. She is a black woman who resides in Bellevue, Washington (Telecasters Ex. B, p. 1), a community near Everett, with her

husband, Leonard Wilkens, coach of the Seattle Supersonics professional basketball team. They have three children. Ms. Wilkens attended grade school and high school in New York City, going on to study liberal arts for two years in 1960–61 at Bronx Community College and Hunter College in New York. Since moving to the Seattle area in 1969, Ms. Wilkens has been involved in various community affairs. For the past two years she has been a member of the Board of Directors of the Seattle Urban League. Since the summer of 1981, she has been a member of the Boards of Directors of Seattle Community College, University of Washington Dental School, and the local Girls Club of America chapter. Also, Ms. Wilkens now serves as advertising spokesperson for Parkway Plaza, South Center Parkway, near Seattle, Washington. In 1980, she served as District Manager of the Seattle March of Dimes and was active in the Campaign to Pass Medic I (an emergency medical plan) for King County, Washington (Telecasters Ex. D). Ms. Wilkens claims no prior broadcast experience (Telecasters Ex. D).

28. *Linda D. Brown* was born on November 8, 1951 in Ida, Louisiana. Ms. Brown is a black woman who resides in Mercer Island, Washington (Telecasters Ex. B, p. 1), a community near Everett, with her husband, Fred Brown, a member of the Seattle Supersonics professional basketball team. Ms. Brown attended grade school and high school in Kansas City, Missouri. In 1969, she entered the University of Iowa as an undergraduate, studying business administration. After two years of college, Ms. Brown married and moved to the Seattle area where, in 1972, she returned to college, receiving a degree in business administration from Seattle University two years later. From 1977 until 1979, she worked as a sales agent with the real estate firm of Borge M. Meyer and Sons in Mercer Island, Washington. In late 1979, Ms. Brown became sales agent with Lister, Inc., another real estate firm in Mercer Island, Washington. Presently, Ms. Brown retains a real estate license although she is not active as a sales agent. In 1979, Ms. Brown formed the interior decorating firm of Linda D. Brown Interiors. During the past two years, she has been active as a Board Member of the United Way in the Seattle area. Ms. Brown claims no prior broadcast experience (Telecasters Ex. C).

Channel 16, Inc.

29. Channel 16 is a Washington corporation authorized to issue up to 50,000 shares of $1 par value voting common stock. Channel 16's officers and directors and their respective ownership interests are as follows:

Stanley B. McDonald Bellevue, WA	Director/250 shares (25%)
M. Lamont Bean Bellevue, WA	125 shares (12.5%)

Raymond E. Kusler Bellevue, WA	Director/125 shares (12.5%)
Jon H. Marple Everett, WA	President/Director/380 shares (38%)
Mary Ann Marple Everett, WA	Vice-President/Director/100 shares (10%)
Shirley K. Bartholomew Arlington, WA	Secretary/Treasurer/20 shares (2%)

(Channel 16 Ex. 1, p. 1; Tr. 110).

30. Messrs. McDonald, Kusler, and Bean own 40%, 20%, and 20% (non-voting), respectively, of Aurora Chicago Telecasters, Inc. (Aurora) (Channel 16 Ex. 4, p. 2). Aurora holds a 45% interest in HATCO-60, a joint venture and holder of a construction permit, granted by the Commission on November 19, 1981, to broadcast between the hours of 7:00 p.m. and 2:30 a.m. on Channel 60, West Chicago, Illinois (Channel 16 Ex. 4, p. 1). Messrs. McDonald, Kusler, and Bean thus, own, derivatively, through Aurora, interests of 18%, 9%, and 9%, respectively, in HATCO-60. *Id.* at p. 2. Messrs. McDonald and Kusler are also two of the five members of the HATCO-60 executive committee. *Id.* at p. 1. At the time of the hearing, Mr. and Mrs. Marple jointly owned 98% of the shares of stock and were officers and directors of First Pacific Broadcasting, Inc. (First Pacific), licensee of KRKO, an AM radio station in Everett. As noted *supra*, the Designation Order required the Marples to divest themselves of their interest in and sever all connection with KRKO prior to commencement of operation of the proposed station. By *Order* issued October 7, 1982, the Presiding Judge accepted Channel 16's amendment reporting that on September 14, 1982, Mr. and Mrs. Marple had transferred their 98% stock interest in First Pacific to Melvin Squyres and Dexter Taylor. Ms. Bartholomew is a 2% shareholder, officer and director of First Pacific. She has agreed to sell her interest in First Pacific if Channel 16 prevails herein (Channel 16 Ex. 4, p. 1). In this connection, Channel 16's amendment, discussed, *supra*, indicates that she has retained her 2% interest in First Pacific.

31. Channel 16 proposes the integration of two of its stockholders into station management. Jon H. Marple, President, Director, and 38 percent stockholder of Channel 16 is the applicant's proposed full-time General Manager (Channel 16 Ex. 1, p. 6). Mary Ann Marple, Channel 16's Vice President, Director, and 10 percent stockholder, is the applicant's proposed Public Affairs Director. She plans to work at the station full-time during its first year of operation, and part-time (30 hours per week) thereafter. *Id.*

32. Jon H. Marple was born May 5, 1940, in Wheeling, West Virginia. He has a Bachelor of Science degree from Brigham Young University and a Juris Doctor degree from the University of

Washington Law School. He is licensed to practice law in Ohio and the District of Columbia (Channel 16 Ex. 2, p. 1). Mr. Marple taught Constitutional history and business law between 1966 and 1967 at Central State University. In 1967, he became an associate at a Columbus, Ohio, law firm. Thereafter, he briefly worked as a lawyer for a Cincinnati, Ohio corporation, then joined the United States Department of Justice as a senior trial attorney in 1967. Approximately two years later, he joined the General Counsel's office at the Federal Communications Commission, leaving in 1979 to become a member of a Washington, D.C. law firm. In 1976, the Marples purchased the stock of Everett Broadcasting Co., licensee of Station KRKO in Everett, Washington, later changing the company's name to First Pacific Broadcasting, Inc. Mr. Marple has been the day-to-day manager of KRKO since he first purchased the stock (Channel 16 Ex. 2, pp. 1–2).

33. Mr. Marple resides in Everett, Washington with his wife, Mary Ann Marple and their four children. Since moving to Everett in 1976, Mr. Marple has associated with or served on the following civic and community organizations: Greater Everett Chamber of Commerce (Vice President, 1977–1980); General Hospital of Everett (Trustee, 1976–79); Snohomish County Junior Tennis Foundation (Director, 1978–present); Greater Everett Athletic Round Table (Director, 1979–present); Superstar Competition for Special Olympics in Snohomish County (Director, summer 1980) (Channel 16 Ex. 2, p. 1, 3). Mr. Marple has also been a committee member at one time or another over the past five years of the following committees: Mukilteo Boys Club, the Everett Salty Sea Days Celebration, the March of Dimes Committee for Snohomish County, and the Heart Fund (Channel 16 Ex. 2, p.3). Mr. Marple does not know whether he will be associated with the Everett Salty Sea Days Celebration this year; he is not active at present with the Heart Fund (Tr. 538–539). For those community activities requiring public solicitation of funds such as the Heart Fund and the March of Dimes, Mr. Marple testified that his involvement consisted in part of the donation of public service announcements via Station KRKO (Tr. 541–542).

34. Mary Ann Marple was born December 24, 1938 in Pledger, Texas. She has a Bachelor of Arts degree from Western Washington University and has been on leave of absence for three years from the University of Washington in Seattle where she was working towards a Masters degree in Educational Policy Studies (Channel 16 Ex. 3, p. 1). At present, she is 15 credits short of qualifying for that degree (Tr. 455–456). Should she remain on leave of absence for a total of five years, she would have to obtain special permission to re-establish herself as a graduate student without losing any credits towards her degree (Tr. 456, 467, 470). Ms. Marple intends to become a full-time student this summer in connection with her efforts to obtain a Masters degree, but does not know what courses are available or the

deadline for summer applications (Tr. 467–468). However, she has testified that if necessitated by her working schedule at the proposed station, she would defer her efforts to obtain her Masters degree (Tr. 468–469).

35. From 1976 to 1978, Ms. Marple worked as office manager and in public relations at KRKO. Her experience in the area of public affairs is limited to having interviewed community members and leaders in connection with KRKO's license renewal (Channel 16 Ex. 3, p. 1; Tr. 436). Otherwise, there is no record evidence that Ms. Marple has any past broadcast experience. Since the fall of 1978, Ms. Marple has been a teacher in the Snohomish School District, Washington, where she is now employed as a sixth grade teacher. Ms. Marple testified that she has a commitment from her employer that she may obtain a one year's leave of absence should Channel 16 obtain a construction permit (Tr. 439, 443). She has explored with her employer the possibility of taking a second year's leave of absence, but has no commitments in that regard (Tr. 440). It is her present understanding, however, that she will return to her present teaching job full-time after the first year's leave of absence (Tr. 458, 495). Thus, in the proposed station's second year of operations, Ms. Marple intends to work full-time as a teacher, from 8 a.m. until 3:30 p.m., five days per week during a nine-month period, and 30 hours weekly at the station as well (Tr. 458–459, 503).

36. Ms. Marple testified that her duties as the proposed station's Public Affairs Director would consist of "[i]nteracting with community members and leaders as to what their concerns and needs would be, attempt to provide adequate forum of expression for those concerns and needs" (Tr. 437). She stated that Channel 16 has proposed three one-half hour public affairs programs, but that she will have no responsibility for producing, directing, or editing any of these programs (Tr. 437, 463, 487–488). In addition to her information-gathering functions, Ms. Marple testified that she will be involved in the public affairs programming "as an advisor," (Tr. 462), that she would offer advice as to program content, (Tr. 464), and that her chief task would be interacting with the community (Tr. 463). Ms. Marple stated that she would supervise those station employees conducting on-the-air interviews, and would require them to furnish her with their proposed questions beforehand. She would have authority to disapprove of the questions, although she stated, "I don't know as I'd be dictatorial about it" (Tr. 486). However, a station employee could ask a follow-up question without her approval. In this connection, Channel 16's call-in and panel shows will be live (Tr. 487–88). In the event that community members themselves conducted on-the-air interviews, Ms. Marple might supervise only the program's moderator (Tr. 489). In that event, she does not know who else she might supervise (Tr. 490).

37. With respect to the second year of operation, Ms. Marple

testified that her 30 hours weekly commitment would involve working at the station on a daily basis - in the evening, late afternoon and on the weekend (Tr. 461). However, she does not have any "structured time" and it was speculation on her part whether she would be able to fulfill that commitment (Tr. 459). She conceded that she may not be able to work 30 hours (Tr. 459–60). Unlike the first year, Ms. Marple intended to limit her interaction with community leaders to 4:00 p.m. to 5:30 p.m. and at council meetings and fund raising drives, held in the evening (Tr. 463–66). The extent to which she would be working for the station depended on whether there were meetings in the evening which were necessary for her to attend and the availability of community leaders in the time period of 4:00 p.m. to 5:30 p.m. (Tr. 463–64). She conceded the possibility that in some weeks she could be working for less than 30 hours (Tr. 466). If sufficiently important events occurred during the hours she would otherwise be teaching, Ms. Marple suggested she might take leave from her teaching job, although she has only 12 days sick or emergency leave before losing pay (Tr. 490–492). She admitted that such events would in all likelihood occur, and that she would not attempt both to cover those events on a regular basis and teach (Tr. 493–494). She stated that in her second year she would delegate the work she would otherwise have accomplished in the ten hours weekly that she would no longer spend at the station, but she was unclear as to what work that might be (Tr. 484–485), and, in any event, she had not yet set priorities for herself in terms of her projected workload (Tr. 485). She also stated that there was no present intent to hire someone to fill in for her part-time in her second year (Tr. 474–475).

38. Ms. Marple has been a volunteer for the Snohomish County (Washington) Junior Tennis Foundation since 1978. In 1979, she was a volunteer fundraiser for the American Heart and Cancer drive in the Everett, Washington community (Channel 16 Ex. 3, p. 1; Tr. 453–454). From 1976 to the present, she has been a member of several local Parent-Teacher Associations. She has been a member of the Snohomish Education Association, and a member of the Washington Education Association and the National Education Association from 1977 to present. From 1979 to 1980, she worked on curriculm development committees and an advisory committee to the Snohomish School District. She is now a volunteer in the clinical supervision program, designed to improve classroom instruction in the Snohomish School District (Channel 16 Ex. 3, p. 2).

CONCLUSIONS

Unity Financial Issues

39. Unity will require $1,321,790 to construct and operate for three months. To meet these projected costs, Unity relies on a $1.5

million commitment from the Imperial Bank of San Francisco, and $100,000 in stock subscriptions, presently on deposit at the Imperial Bank. Under the terms of the Imperial Bank commitment, Unity would pay interest only for the first year, with principal and interest payable thereafter on a monthly basis. The $75,000 in interest calculated in Unity's cost estimate assumes an interest rate of 20%, substantially higher than the current prime rate. Unity's principals have provided the guarantees required by the Imperial Bank commitment letter. Thus, Unity has established the availability of $1.6 million to meet projected costs of $1,321,790. Oak argues that the bank loan may not be relied on since the interest rate has not been specified, citing *West Central Investment Co., Inc.*, 43 RR 2d 797 (1978). However, Oak has ignored Commission precedent recognizing the validity of an otherwise unconditional loan commitment which leaves terms and conditions to be settled at the time of consummation. For example, see *Connecticut Coast Broadcasting Co.*, 8 RR 2d 1007 (Rev. Bd. 1966), *reconsidered*, 9 RR 2d 839 (Rev. Bd. 1967); *Rose Broadcasting Company*, 43 RR 2d 1317, 1325–26. In addition, unlike the facts in *West Central*, Unity's cost estimate includes an amount for interest payments based on an interest rate of 20%, which, as noted, *supra*, is substantially higher than the current prime rate. In addition, Unity has a cushion of $268,110 in the event that a higher rate must be paid. Under the circumstances, reasonable assurance as to the availability of the bank loan has been demonstrated. It is therefore concluded that Unity has established it is financially qualified and issue 2 is resolved in Unity's favor.

Comparative Issue

40. The comparative issue must be decided in accordance with the Commission's Policy Statement on *Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, i.e. (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

41. Unity's principals do not own any media interests. Samuel Shulman, 45.2% owner of FNI, Inc., the parent of FNI Communications, Inc., one of Telecasters' joint venturers, has interests in entities involved in motion picture production. No evidence has been offered showing that Mr. Shulman's interest in such production companies undermines the objectives underlying the principle of diversification of control of mass media. Therefore, the production companies can not be considered to be communications media for purposes of comparative evaluation. *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723, 724 (Rev. Bd. 1981). Channel 16's principals Mr. and Mrs. Marple have sold their interests in KRKO, Everett, Washing-

ton. Ms. Barthomew has apparently retained her 2% ownership interest in KRKO but has stated her intention to sell the interest if Channel 16 prevails in this proceeding. Three other principals, Messrs. McDonald, Kusler and Bean, own an 80% interest in Aurora Chicago Telecasters, Inc., which holds a 45% interest in Hatco-60, the permittee of a West Chicago television station (Channel 60), which broadcasts between the hours of 7:00 p.m. and 2:30 a.m. Considering the fact that the total ownership interest of the Channel 16 principals in Hatco is not controlling (36%), the distance from Chicago to Everett (over 2,000 miles) and that the West Chicago station operates a limited number of hours on a shared time basis, it is concluded that only a slight comparative demerit is justified. On the other hand, although Oak owns no other media interests, its parent, Oak Industries Inc. and various subsidiaries own extensive media interests throughout the United States. See paragraphs 10–11, *supra*. Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d at 394–5. Since these holdings are not in or close to the community applied for and appear to be geographically diffuse, Oak will receive a moderate, rather than substantial demerit. In summary, Unity and Telecasters will be awarded a slight diversification preference over Channel 16 and a moderate diversification preference over Oak.

Best Practicable Service To the Public

42. In determining which application will insure the best practicable service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395. The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id*. Thus, no integration credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979.

43. Oak does not propose to integrate any of its ownership into the management of the proposed station. Unity proposes the integration of three of its stockholders into station management.

Samuel E. Washington, 15% stockholder, is proposed as full-time general manager and a member of the Executive Committee. Calvin E. Burton, 10% stockholder, is proposed as full-time operations manager and a member of its Executive Committee. Carl D. Washington, 60% owner of Unity, the proposed President, and Chief Executive Officer, as well as a member of the Executive Board, intends to devote 30 hours per week to the station. Thirty hours per week qualifies as substantial but not full-time. *Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981). Unity will receive credit for 25% full-time and 60% substantial integration. Telecasters and Channel 16 challenge Carl Washington's integration proposal, arguing there is serious reason to doubt whether he will actually keep his commitment to work 30 hours a week. They rest their arguments on the fact that he presently serves as the President of Teleport Oil Company, a wholesale oil distributorship which he founded. These arguments are without evidentiary support and are based solely on speculation and surmise. They will be rejected. Mr. Washington has stated unequivocally on the record that performance of his duties at the proposed station will be paramount and will take precedence over any other conflicting time requirements should any arise (Unity Ex. 4, p. 1). Mr. Washington has further stated he intends to move to the license area. No evidence has been introduced which undermines these commitments. It is also urged that Mr. Washington's position in day-to-day management will be of a consultative nature and should not be credited. This contention is similarly grounded on speculation and surmise. The common business usage of the terms "Chief Executive Officer" and "President" reflects high-level, policy-oriented executive positions. Telecasters' reliance on *Grand Broadcasting Co.*, 36 FCC 2d 925 (1964), is inapposite. In setting forth certain job titles which would be accorded "particular weight", the Commission pointed out therein that positions with comparable responsibility but utilizing different titles are equated with those listed. *Id.* at 929. The position to be held by Mr. Washington, President/CEO certainly entails important, policy-level management responsibility. Awarding credit to him is fully consistent with *Grand* and the Commission's *Policy Statement*. No record evidence has been cited indicating that Mr. Washington will not perform in the traditional manner of a President/CEO. On the contrary, his intention to move from Oakland, California to the Everett area provides assurance that he intends to fulfill that role. It is also argued that the quantitative credit for Unity's integration proposal is somewhat lessened because Carl Washington and Samuel Washington have no prior broadcast experience. However, it is a fundamental premise that lack of experience is remediable. *Policy Statement*, *supra*, 1 FCC 2d at 396, footnote 8. There is no basis for questioning an integration proposal merely because it is proffered by a newcomer to broadcasting. Unity will receive credit for 25% full-

time and 60% substantial integration. The qualitative attributes of Unity's integrated owners enhance its proposal. Specifically, Unity is awarded a "plus-factor" for its 25% full-time and 60% substantial minority ownership. In addition, Calvin Burton's employment at NBC and its affiliate KNBC covering a period of 11 years entitles him to credit for prior broadcast experience. Unity's integrated principals have been actively involved in the affairs of the communities in which they reside. Carl D. Washington and Mr. Burton have received awards in recognition of their distinguished service. However, Unity's integrated principals have never lived in or near Everett or been involved in Everett area activities. Consequently, no credit can be accorded for local residence and past participation in civic affairs. Unity's principals have expressed an intention to move to either Everett or the Everett area. Proposed future local residence, is also accorded weight, although to a lesser degree than present local residence. *Policy Statement*, 1 FCC 2d at 396.

44. Telecasters proposes the integration of two of its owners into the management of the proposed station. Marilyn Joyce Wilkens, owner of a 11% interest, proposes to serve 20–40 hours at the station as Business Manager. Linda C. Brown, owner of an 11% interest also proposes to serve 20–40 hours as the station's Director of Public Service Broadcasting. Since their work proposal has been stated in terms of a minimum and maximum amount of time, only the minimum time will be credited. *Midwest, supra*. Telecasters will receive credit for 22% part-time integration of ownership and management. Telecasters' integration proposal is qualitatively enhanced in that Ms. Wilkens and Ms. Brown are Black women. In addition, although neither reside in Everett, both reside within the proposed service area. Telecasters' proposal is further enhanced by Ms. Wilkens' and Ms. Brown's participation in civic affairs within the proposed service area. Although, Ms. Brown's participation in civic affairs is not as extensive as Ms. Wilkens', her involvement during the past two years as a Board member of the United Way in the Seattle area also indicates a knowledge of and interest in the welfare of residents within the proposed service area. Telecasters also contends it is entitled to residual merit based upon the participation of Yoshitada Nakagawa, an Asiatic male and a resident of Mercer Island, Washington. Mr. Nakagawa will not participate in the day-to-day management of the proposed station. Telecasters' request for residual merit rests on the assertion that Mr. Nakagawa together with the other joint venturers will manage the affairs of the joint venture pursuant to the Memorandum of Understanding executed January 13, 1982 (Telecasters Ex. B, p. 2 and Attachment 1). However, Mr. Nakagawa has made no time commitment. In order to receive residual merit an eligible principal must participate to some degree in station affairs, although not enough to receive integration credit. Participation means a specific time commitment.

Midwest, supra. Since Mr. Nakagawa has made no time commitment, residual merit cannot be awarded.

45. Channel 16 will receive credit for the full-time participation as General Manager of Jon H. Marple, President, Director, 38% stockholder. This integration credit is qualitatively enhanced by Mr. Marple's local residence and active participation in local civic activities (see paragraph 33, *supra*), and broadcast experience as manager of FM station KRKO since 1976.

46. Channel 16 also proposes that Mary Ann Marple, Vice President, Director, and 10% owner will be the Public Affairs director full-time during the station's first year, and for 30 hours per week thereafter. Ms. Marple can not receive credit for full-time integration since that integration proposal will not be adhered to on a permanent basis. *Policy Statement*, 1 FCC 2d at 395, footnote 6. Ms. Marple's proposed integration in succeeding years also can not be credited since she has not demonstrated a reasonable likelihood that she will be able to effectuate her proposal to work 30 hours a week. Ms. Marple proposes to combine 30 hours per week at the station with a full-time position as a sixth grade teacher (8:00 a.m. - 3:30 p.m., plus the additional time necessary to prepare for her duties). In addition, she also intends to continue her studies for a Masters degree in Educational Policy Studies. She is currently 15 credits short of qualifying for that degree. In light of Ms. Marple's extensive commitments, her professed intention to devote 30 hours a week to station affairs must be dismissed as inherently incredible. In this regard, Ms. Marple admitted that it was speculation on her part whether she would be able to fulfill her integration proposal. She has conceded that she may not be able to work thirty hours and that in some weeks it was possible she could be working far less than 30 hours. Ms. Marple's integration proposal must also be rejected for another reason. Ms. Marple will have the title "Public Affairs Director." However, Ms. Marple's duties essentially consist of gathering information as to the needs of the proposed community. Ms. Marple's only supervisory responsibilities would consist of reviewing questions before employees conducted on-the-air interviews. Ms. Marple's ability to perform this function while she worked full-time is not subject to question. However, her ability to do so in succeeding years when she would be working only in the late afternoon, evenings, and weekends is subject to great doubt. Moreover, her review of questions appears to be nothing more than an extension of her information-gathering activities, rather than a policy making function. Moreover, Ms. Marple would have no control over follow-up questions or over panel shows conducted by non-employees. Of prime importance, she will have no responsibility for producing, directing, or editing any of Channel 16's proposed public affairs programs. Aside from information-gathering functions, Ms. Marple's only involvement in public affairs programming would be

as an advisor. It is thus apparent that although Ms. Marple will have the title of "Public Affairs Director," in fact, she will not perform any management and policy functions. Integration credit is based on owner participation in management of the station. *Policy Statement*, *supra*, 1 FCC 2d at 396–6. Although Ms. Marple will be active at the station, her role is plainly non-managerial and cannot be credited. See *Bradley, Hand and Triplett*, 51 RR 2d 383, 386 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1095 (Rev. Bd. 1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981). For the reasons noted, Ms. Marple will not be given integration credit. However, she is entitled to an award of slight residual merit for local residence and civic participation since she intends to devote some time to station affairs. See *Midwest*, *supra*. Channel 16 will, therefore, receive 38% full-time participation and slight residual merit for Ms. Marple's proposed participation.

47. *Integration Summary* - Oak does not propose to integrate any of its ownership into the management of the proposed station. Unity has received credit for 25% full-time and 60% substantial (30 hours) integration. Unity's integration proposal is qualitatively enhanced by the participation of 85% minority ownership, previous broadcast experience of Mr. Burton and future residence of the integrated stockholders in or near Everett. Telecasters receives credit for 22% part-time integration. Telecasters' integration proposal is qualitatively enhanced in that Ms. Wilkens and Ms. Brown are Black women, both reside and have participated in civic affairs within the proposed service area. Channel 16 has received credit for 38% full-time integration. Channel 16's integration proposal is qualitatively enhanced by Mr. Marple's local residence, civic participation, and broadcast experience. Channel 16 also receives slight residual merit for Ms. Marple's proposed participation. Unity's proposal deserves a substantial preference over Oak and Telecasters and a slight preference over Channel 16. Oak proposes no integration and Telecasters' proposed 22% part-time integration is far inferior to either Channel 16's or Unity's integration proposals. As between Unity and Channel 16, the 13% differential between Unity's and Channel 16's full-time integration proposal is more than offset by Unity's additional 60% substantial integration. See *Van Buren*, 87 FCC 2d 1021–22.[6] In addition, since Unity, unlike Channel 16, proposes to integrate a majority of its stock ownership (85%), its proposal furthers the Commission goal of maximum ownership

[6] In *New Continental*, *supra*, the Review Board held that an applicant proposing 65% full-time integration warranted a slight preference over an applicant proposing 52.5% full-time / 37.5% part-time integration. This case is distinguishable from *New Continental* since Unity is proposing substantial, rather than part-time integration. In addition, as discussed, *infra*, unlike Channel 16, the winning applicant in *New Continental* proposed integration of a majority of stock ownership into the operation of the station.

participation in station affairs. See *Policy Statement*, *supra*, at 395; *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 587 (Rev. Bd. 1973); *Gilbert Group, Inc.*, 50 RR 2d 81, 92 (Rev. Bd. 1981).

Other Comparative Factors

48. Telecasters and Channel 16 propose to install an auxiliary power generator (Telecasters Ex. E; Channel 16, Ex. 5). Unity and Oak do not propose to provide an auxiliary power supply. However, Telecasters and Channel 16 are not entitled to a preference. In its *Addendum* to the *Policy Statement*, 2 FCC 2d 677 (1967), the Commission stated that it "considers it appropriate to add the acquisition and proposed use of auxiliary power equipment as a factor of decisional significance in comparative AM and FM broadcast proceedings." The Addendum makes no mention of comparative TV proceedings and no cases have been cited where the proposed use of an auxiliary power generator has been credited in a comparative TV proceeding. *Robert M. Zitter*, 59 FCC 2d 274 (Rev. Bd. 1976) and *Enterprise Broadcasting, Inc.*, 56 FCC 2d 352 (Rev. Bd. 1975), cited by Telecasters, were not comparative TV proceedings.

Final Comparative Evaluation

49. Unity has received a slight diversification preference over Channel 16 and a moderate diversification preference over Oak. Unity's integration proposal deserves a substantial preference over Oak and Telecasters and a slight preference over Channel 16. When these preferences are weighed Unity is the winner. It is therefore concluded that a grant of Unity's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Unity Broadcasting Company of Washington State, Inc. IS GRANTED and the applications of Oak Television of Everett, Inc., Greater Everett Telecasters and Channel 16, Inc. ARE DENIED.[7] [8]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN *Administrative Law Judge*

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[8] The Petition For Leave To Supplement Proposed Findings of Fact And Conclusions Of Law filed April 26, 1982 by Unity is granted and the supplement accepted.

Application, Mutually Exclusive
Common Carrier, Mobile Radio
Hearing, Procedure
Land Mobile Service, Private
Lottery
Television, Low Power

Commission establishes rules for selecting initial licensees by lottery in lieu of comparative hearings in certain Mass Media, Private Radio and Common Carrier Services. Where lotteries are used in Mass Media Services, minority and diversity preferences will be given. Preferences are not available, however in the Private Radio and Common Carrier Services.
-Random Selection/Lotteries
Gen. Docket No. 81-768

FCC 83-114

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings	Gen. Docket No. 81-768

SECOND REPORT AND ORDER

(Adopted: March 31, 1983 Released: May 27, 1983)

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES CONCURRING AND ISSUING A STATEMENT; COMMISSIONER DAWSON CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER SHARP CONCURRING IN THE RESULT.

I. *Introduction and Overview*

1. *Introduction.* In this proceeding, the Commission is adopting rules to implement a system of random selection or lotteries to choose licensees from among certain competing applicants. The Commission released a *Second Notice of Proposed Rule Making*

("*Notice*") in this matter on October 7, 1982. 47 Fed. Reg. 45046, (October 13, 1982). Numerous comments and reply comments have been received in response to our proposals.[1] We have carefully analyzed the lottery statute, the accompanying *Conference Report*,[2] the *Notice* and the comments (initial and reply). It is our view that the best interest of the public will be served by adopting regulations to implement a lottery system for issuing licenses in certain enumerated services. The specific framework for implementing the lottery authority is set forth below. Particular emphasis is given to the Low Power Television and Television Translator Service ("LPTV") because of the comp exity involved in using a lottery in that Mass Media service.[3]

2. In the *Notice*, the Commission proposed to use a lottery to select licensees in LPTV, as well as certain private radio an common carrier services. The proposed lottery rules for LPTV differed significantly from the proposals for the other services due to the statutory mandate that "significant preferences" be incorporated into any mass media lottery selection system. In addition to the low power service, a lottery will also be available for use in Private Land Mobile, Operational Fixed Microwave, Aviation and Maritime Services in the Private Radio Bureau and in the Public Land Mobile Service (except cellular) in the Common Carrier Bureau.

3. Lotteries will be used across the board in LPTV and in the public land mobile radio services. In the Private Radio area, however, lotteries will be used on a case-by-case basis. This result is warranted in Private Radio because in some cases expedition does not outweigh consideration of other public interest factors, *e.g.*, public safety and more efficient uses of the spectrum.

4. *LPTV Issues*. The new lottery statute requires that minority and diversity preferences be given to certain mass media applicants. The preference scheme adopted herein is essentially the same as described in the *Conference Report* and the *Notice*. Preferences will be available for:

(a) applicants more than 50% controlled by minorities (a 2:1 preference);

(b) applicants whose owners control no other media of mass communications (a 2:1 preference); and

(c) applicants whose owners control 1, 2 or 3 other media of mass communications (a 1.5:1 preference).

5. The latter two preferences, termed the "diversity" preference,

[1] *See* Appendix A for a list of participants in this proceeding. A brief summary of the comments filed in this proceeding is included in the text; a more thorough comment summary appears in Appendix B.

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982).

[3] All references to "LPTV" or "low power" include television translators except when otherwise stated.

reflect the applicant's other ownership interests in any media of mass communications. Applicants may qualify for both the minority and diversity preference.

6. *LPTV Pre-Hearing Lottery Procedure.* Acceptability for filing and cut-off procedures will basically operate as they do now in LPTV. A strict multiple application rule is adopted that bars the filing of any LPTV application that would be directly mutually exclusive with any pending application filed by the same applicant or by an applicant where there is *any* direct or indirect interest of one per cent or more.

7. A two-track approach for filing Petitions to Deny is adopted for use in LPTV. The first approach will require that Petitions to Deny be filed after a "tentative selectee" is chosen. The second approach requires a two-step process. First, a preliminary notice of Petition to Deny will be filed prior to conducting a specific lottery. Then, after a successful applicant is chosen, those parties that preserved their objections may file formal Petitions to Deny; other parties may participate in the formal post-lottery petition process only if good cause is shown. Conversely, in the Common Carrier and the Private Radio Services, Petitions to Deny, where they properly lie, will be filed prior to the lottery and will be considered post-lottery only with respect to the "tentative selectee."[4]

8. After consideration of any Petitions to Deny and staff examination of the application, the Commission will determine whether a grant can be made or whether a hearing is required.

9. Hearings ordinarily will be conducted on paper before the Commission. In those cases where a paper proceeding cannot resolve certain questions of fact, oral testimony will be heard by an Administrative Law Judge ("ALJ") who will issue an Initial Decision. Exceptions to the Initial Decision may be filed with the Commission. Ordinarily, Bureau counsel will participate only where the Commission refers an issue to an ALJ. Following a paper hearing, the Bureau staff will prepare an Order for Commission approval. In the case of an oral hearing, this action will be taken by the Adjudication Division of the Office of General Counsel. If the "tentative selectee" is found unqualified, a second applicant from the same pool will be selected.

II. *Background and Statutory Authority*

10. For several years, the Commission has considered in different contexts the possibility of using lotteries as a means of allocating licenses to use the electromagnetic spectrum. *Notice of Proposed Rule Making (LPTV)*, BC Docket No. 78–253, 82 FCC 2d 47 (1980); *Notice of Inquiry and Proposed Rule Making*, CC Docket No. 80–116

[4] In many PRB services, Petitions to Deny are not authorized; the Bureau considers oppositions to applications as informal complaints.

45 Fed. Reg. 29335 (May 2, 1980); *Alexander S. Klein, Jr.*, FCC 79–401 (released August 3, 1979). In none of these cases did the Commission make a legal conclusion that it, in fact, possessed adequate legal authority to use lotteries in lieu of a comparative process.

11. The Commission first received explicit statutory authority to use a lottery in Public Law No. 97–35, the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 736–37, which added Section 309(i) to the Communications Act of 1934, 47 U.S.C. § 309(i). On November 17, 1981, we issued a first *Notice of Proposed Rule Making* requesting comments on a proposed implementation plan for the lottery statute. 88 FCC 2d 476 (1981). In our first *Report and Order* in this proceeding we declined to implement our authority to establish a lottery system because of our inability to structure a workable lottery system within the constraints of the statute. 89 FCC 2d 257 (1982). New lottery legislation was subsequently enacted in the second session of the 97th Congress.

12. The revised lottery statute provides:

> (1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.
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> (2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law -
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> (A) adopt procedures for the submission of all or part of the evidence in written form;
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> (B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and
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> (C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).
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> (3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.
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> (3)(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such

preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission, not later than 180 days after the date of the enactment of the Communications Technical Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(4)(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

47 U.S.C. § 309(i).

13. The Commission's new lottery authority contains four significant provisions. First, the Commission is expressly empowered to use a lottery to grant initial construction permits or licenses among competing applicants if the public interest would thereby be served. Next, the Commission's administrative burden in conducting the lottery is reduced because it is only required to determine that the applications are acceptable for filing prior to the lottery. A full qualifications check of *only* the successful applicant need be made *after* the lottery is conducted. Third, when lotteries are used for allocating "mass media" licenses, *i.e.*, those broadcast-type services where the licensee retains editorial control over the medium, the lottery must be weighted with "significant preferences" allocated to minority group applicants and those who own few or no other media of mass communications. In non-mass media services, however, the lottery will be conducted strictly on a random basis. Finally, the Commission is authorized to use lotteries "in any instance," in its discretion, where it is determined appropriate after promulgating rules in a formal rule making proceeding.

III. *Mass Media Comments*

14. In the *Second Notice*, the Commission proposed that as to services within the jurisdiction of the Mass Media Bureau, lotteries be used in contested cases in the low power television and television translator service (hereinafter "LPTV") and in other services on an *ad hoc* basis when the parties' qualifications are such that no material difference between their ability to serve the public interest can be distinguished. The *Notice* proposed a comprehensive scheme

for the conduct of lotteries, including the use of preferences designed to increase minority ownership and enhance ownership ownership diversity generally.

15. Comments received in response to the *Second Notice* cover such matters as whether use of lotteries is consistent with the Commission's public interest obligations, whether the preferences proposed are large enough to be "significant," as the statute requires, and how various ownership interests, such as limited partnerships, will be treated in the preference scheme. A complete summary of the comments is found in Appendix B.

IV. *Mass Media Discussion*

16. *Decisional Criteria for Employing Lotteries.* The *Conference Report* accompanying the new legislation sets forth a number of factors Congress suggests that the Commission consider in determining whether the public interest would be served by utilization of lotteries in particular services or instances. These include:

> [W]hether there is a large number of licenses available in the particular service under consideration; whether there is a large number of mutually exclusive applications for each license, for example, when a new service is initiated; whether there is a significant backlog of applications; whether employing a lottery would significantly speed up the process of getting service to the public; and whether selection of the licensee will significantly improve the level [of] diversity of information available in the community versus the use of the traditional comparative hearing process.

Conference Report at 37.

The *Report* emphasizes that the Commission must, having considered all relevant factors, find that a significant public interest benefit would flow from use of lotteries in the specified circumstances. To do otherwise, the Conferees state, would "disserve the Commission's ultimate statutory goal of obtaining the best practicable information service from diverse sources." *Id.*, at 38. Moreover, the Conferees also state that the factors described above are not to be applied mechanically or without regard to other relevant considerations. *Id.*

17. The *Conference Report* concludes that under the criteria suggested, the Commission would be justified in using, and is in fact encouraged to use, a lottery system in LPTV licensing. LPTV is described by the Conferees as:

> [T]he ideal service for which to use a lottery, given the large number of licenses available, the large number of mutually exclusive applications for each license, the substantial backlog of applications on file with the Commission, the likelihood that use of lottery is essential to expediting the process of getting low power television service to the public, and the likelihood that bringing low power television service to the public quickly, through the use of a lottery, will result in a significant increase in the diversity of information sources available in many communities throughout the country.

Conference Report at 38–39.

18. Thus, it is clear that Congress amended the Communications Act to permit lotteries based on the belief that in certain circumstances the public interest is best served by the rapid commencement of new station operations which a lottery makes possible. Those commenters who claim that any Commission implementation of licensing by lottery would violate our public interest obligations under the Act fail to confront this fact. The Commission concurs in the Conferees' judgment that in the Mass Media services, LPTV is a particularly appropriate candidate for utilization of lotteries in the initial licensing process. Using lotteries is virtually the only method by which the Commission can process expeditiously the 12,000 LPTV applications currently on file, and the thousands more that will be submitted as pending applications are placed on "cut-off" lists. Without lottery processing, initiation of this new broadcast service will be delayed for many years, precluding the expansion of the diversity of broadcast voices that introduction of LPTV can achieve.

19. In the LPTV *Report and Order*, at para. 80, the Commission concluded after a thorough review of the issues that the only traditional comparative criteria to be considered in the LPTV context would be diversity and minority ownership. We found that the other criteria normally considered in full service comparative hearings were not relevant to the intital licensing process in this new, minimally-regulated secondary service. Finally, we viewed use of the comparative process as the "second best" option, to be engaged in only until a system of random selection could be instituted.[5]

20. The factors that the Commission had determined were relevant in comparative considerations in LPTV—diversity and minority ownership—also have been designated by Congress as deserving of special preferences in licensing proceedings conducted by lottery. Commenters Henry Geller and Donna Lampert ("Geller/Lampert") suggest that the public interest would be best served by adoption of a "middle ground" approach to LPTV licensing. Under this approach, the Commission, applying standards similar to traditional comparative criteria, would "take an initial 'hard look'" at mutually exclusive applications and see whether it is possible and desirable to make an immediate public interest judgment on them—for example, to grant one and deny the others, or to exclude from the lottery one or several and then to hold the lottery among the remaining applicants. A similar scheme is suggested by Community Television Network, Inc. ("CTN"). It argues that the Commission should use a paper hearing process adopted in the LPTV *Report and Order* to separate proceedings in which there is a "clear winner" under traditional comparative criteria from those situations in

[5] *Low Power Television Broadcasting*, 47 Fed. Reg. 21468 (May 18, 1982), at paras. 21–22.

which there is "considerable doubt" as to the ultimate winner. We have rejected these alternatives. The minimal public interest benefit that might be obtained from use of the Geller/Lampert approach or the CTN scheme does not outweigh the substantial detriment inherent in use of either option. Both plans involve devoting the resources of the Commission and the parties to consideration of issues that we and the Congress have found to to be largely extraneous to the LPTV licensing process. The result would be additional delay in introduction of service, and additional cost to the parties, without a meaningful public interest gain.

21. Therefore, after full consideration of the analytic factors identified in the *Conference Report*, and having considered the record developed herein, the Commission finds that the public interest would be served by implementation of a random selection system for initial LPTV licensing. However, we acknowledge that at some future time circumstances may have so changed that use of a lottery to process low power applications would no longer be appropriate.

22. *Lotteries as Tiebreakers in Mass Media Comparative Proceedings.* In the *Notice*, the Commission proposed to use lotteries in mass media services other then LPTV "on an *ad hoc* basis in those instances where the qualifications of competing applicants are so close that no material difference between the parties' ability to serve the public interest can be distinguished." Numerous commenters opposed this proposal, contending that inadequate legal authority exists to conduct *ad hoc* lotteries; the *Conference Report* discourages such use; lotteries were intended to be a substitute, not a supplement, for comparative hearings; and sufficient guidance regarding services and standards was not provided. We have analyzed the arguments that have been raised and conclude that the language of both the statute and the *Conference Report* permits the use of *ad hoc* lotteries in "tied" cases. It does appear, however, that the process by which we might identify such instances, and the particulars of the procedure we would utilize in such cases deserve greater consideration than was given in or generated in response to our *Notice* proposal. We have therefore decided not to implement that proposal at this time.

23. *LPTV Applications Subject to Lottery.* Some parties assert that LPTV licensing proceedings cannot be conducted by lottery as to applications already pending because of inadequate notice to applicants as to procedures and preferences. These claims are without merit. We observed in the LPTV *NPRM*, at 78, that we would not process mutually exclusive applications through to grant until comparative criteria and procedures were finally established. *Low Power Television Broadcasting*, 82 FCC 2d 47, 78 (1980). Any grants made during the conduct of that rule making proceeding,

including permits to construct conventional translators, were conditioned on its outcome.[6] Additionally, we proposed in the LPTV *NPRM*, at 75, that if a winning applicant could not be selected through paper hearing on the basis of proposed comparative preferences, "the case would be referred for lottery," with each party to have an equal chance of receiving the authorization. Thus, it has been clear since the commencement of the LPTV rule making proceeding that lotteries might be implemented in LPTV licensing, and that applicants proceeded at their own risk as to the criteria by which their applications might finally be processed.

24. While we did not implement the lottery authority as initially enacted in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, we made clear in the LPTV *Report and Order*, at para. 65, that "it remains our intention to utilize a random selection process when and if that becomes practicable." Applicants were placed on notice that "their applications, if mutually exclusive with other applications, may be subject to revised processing procedures, standards and qualifications in connection with implementation of a system of random selection." *Id.* Because a number of timely-filed petitions for reconsideration of the LPTV *Report and Order* were subsequently submitted, applicants have been on notice that the rules and processes adopted in the *Report and Order* remain subject to modification by the Commission if proper cause is found.

25. In Pub. L. No. 97–259, Congress amended the lottery authority it earlier granted. Subsequently, the Commission issued the *Notice* presently under consideration. Although the diversity and minority preferences adopted by Congress for lottery use will differ somewhat in application from the preferences we had initially contemplated using in LPTV comparative hearings, they reflect similar concerns and are directed to similar objectives. Further, since no cases have been designated for hearing under the procedures initially adopted in the LPTV *Report and Order*, all applicants in contested LPTV cases will be judged by exactly the same standards, regardless of their filing date. In light of all these factors, we do not believe that any LPTV applicant can fairly claim to have been harmed by our determination to apply the lottery scheme adopted herein to pending LPTV applications.

26. *LPTV Processing Framework.* In the *Notice*, we proposed a comprehensive processing blueprint for mass media applications subject to lottery, contemplating that these procedures would initially be applied in LPTV. Under the initial filing procedures, described in para. 16 of the *Notice*, after an application is tendered and found acceptable for filing, it will be listed in a Public Notice

[6] In *Interim Processing Procedures*, 45 Fed. Reg. 62004, (September 17, 1980), we reaffirmed this action.

(the "A" list) inviting competing applications until the specified cut-off date approximately thirty to sixty days later.[7] Applications filed after that date will not be eligible for consideration or grant as part of that particular proceeding.[7A] All competing applications found acceptable for filing will be included in a subsequent Public Notice (the "B" cut-off list), which will also announce the date on which the lottery will be conducted. Additionally, that list will show the preferences for which the applicants have certified that they are eligible, and their selection probabilities. Applicants will be obliged to bring any clerical or mathematical errors in the selection probabilities to the Commission's attention immediately. The lottery will then be conducted and the "tentative selectee" named in a Public Notice providing an opportunity for filing of Petitions to Deny.

27. The proposed use of "A" and "B" cut-off lists described above is similar to present practices in the Mass Media services.[8] This aspect of our proposal was essentially noncontroversial, but for an expression of concern by NLMC that the cut-off period "be long enough to permit a reasonable opportunity for resubmission of applications rejected by FCC staff." The Commission notes that Section 73.3572(c) of the Rules presently sets the time for filing of mutually exclusive applications at a date "not less than 30 days" after release of the "A" list Public Notice. Our experience is that the thirty-day period allows sufficient time for the filing of competing applications.

28. We believe that the system we have described, utilizing "A" and "B" lists, will be a satisfactory method by which to commence processing of applications, and will adopt that procedure, with one minor modification. We observe that our initial proposal did not specify what notice, if any, would be given of changes in selection probabilities necessitated by corrections submitted in response to the "B" list. We conclude that a corrected "B" list should issue, indicating both the changes in selection probabilities and any change in the lottery date.[9] [10]

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[7] Under the procedures being adopted, all pending mutually exclusive applications will be named in the "A" list, and will be served with copies of that list.

[7A] Prior to the adoption of the June 17, 1982, LPTV Rules, engineering judgment was used to prescreen applications for cut-off lists. Since promulgation of the new rules a contour overlap standard has been used in screening applications for such cut-off lists. As a result of using the engineering judgment method, some applicants previously cut-off are mutually exclusive with those that have been assigned later cut-off dates. In order to avoid prejudice to any applicant because of changes in the screening process, all mutually exclusive applications filed prior to the later cut-off date will be considered in a consolidated lottery.

[8] *See* Section 73.3572 of the Commission's Rules.

[9] No lottery will be held less than thirty days following release of a "B" list. This period will permit negotiation of settlement agreements. Additionally, parties who may have erroneously been omitted from the "B" list will have the opportunity to

29. We will also adopt the process we had initially set forth in para. 21 of the *Notice* for actual lottery selection. Applicants will be assigned a portion of the numerical spectrum between .000 and .999 in accordance with their selection probabilities. Although we contemplate that, for ease and consistency of processing, numerical spectrum will normally be allocated in the order in which applications joined in a given lottery group were accepted and given a file number, no applicant has anything in the nature of a "right" to any part of the numerical spectrum. The portion of numerical spectrum allocated to each applicant will be announced at the time the lottery is to be conducted.

30. A random number in the range of .000 to .999 will be generated in a lottery selection session. It is our expectation that mass media lotteries will be conducted on a limited number of specified dates each month. As we proposed in the *Notice*, at para. 22, Public Notice of all drawings will be given no less than seven days in advance. This Notice will normally be given on the "B" list, but may be modified if necessary.[11]

31. *Petitions to Deny.* In the first *Report and Order* in this

so inform the Commission during that period. Later appeals on this issue will not be entertained. Applications which are not mutually exclusive with others will not appear on a "B" list, but only on a proposed grant list which will provide for filing of Petitions to Deny within a fifteen day period.

[10] Placement of the name of an applicant on an "A" list will require the filing by the cut-off date of the applications of those who wish their applications to be considered with that application or with any other application on file by the cut-off date which involves a conflict necessitating being joined in a lottery with that application (or any other application on the list). This is similar to the practice followed in AM and noncommercial FM broadcasting, which are also services in which licensing is done on a noninterference demand basis. *See Kittyhawk Broadcasting Corp.*, 7 FCC 2d 153 (1967), *recon. denied*, 10 FCC 2d 160 (1967), *appeal dismissed, Cook, Inc. v. United States*, 394 F.2d 84 (7th Cir. 1968). *But see*, as to full service television and commercial FM, *Sterling Recreation Organization Co.*, 80 FCC 2d 319 (1980), *recon. denied*, 86 FCC 2d 804 (1981). This process may in some cases require that those interested in securing construction permits for Tier II or Tier III locations file against Tier I applications on "A" lists or against other applications filed in response to or otherwise in conflict with those applications. Those interested in applying for stations in Tiers II or III should be aware that they may be precluded from doing so if they do not stay alert to ongoing processing and submit competing applications within prescribed time periods.

[11] The system for selecting the random numbers will be available for public review and inspection. Additional details regarding the mechanics of the lottery selection process will be included in a "lottery processing manual" which we expect to release prior to the date of the first lottery. In Appendix B of the *Notice*, we proposed in Section 1.1623(a) to compute probabilities to three significant digits. Having reviewed this matter, we now believe that use of three significant digits will be sufficient in lotteries with no more than twenty applicants. However, four significant digits should be used with larger lottery groups in order to provide a sufficient degree of precision with respect to probabilities. To accomodate this procedure, the rule as adopted will require computation to "no less than" three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery. For example, a probability of .2347 in a three digit lottery would be truncated to .234. This approach will not

proceeding, 89 F.C.C. 2d 257 (1982), we observed, at 277–79, that a fundamental difficulty inherent in our Section 309(i) lottery authority as initially enacted was the requirement that the qualifications of all applicants under Section 308(b) and Section 309(a) be determined prior to lottery selection. Our amended lottery authority provides that determinations under Section 308(b) and 309(a) need be made only as to the applicant who has been selected by lottery. The Conferees note that "[i]t is only at this latter, post-lottery stage that Petitions to Deny the application need be considered and that the right to a hearing may arise."

32. We continue to believe that in the LPTV context, where expedition is an overriding public interest factor, the public interest will best be served if we consider Petitions to Deny only against the "tentative selectee". However, we are also sympathetic to the concerns of those commenters who believe that allowing the filing of post-lottery petitions may encourage submission of essentially frivolous pleadings which would not be the case if pre-lottery filing were required. Thus, we are adopting two alternative petition processes. As to any given lottery group, the method to be used will be announced no later than the "B" list release date. Experience should indicate which system will best advance our purposes.

33. One petition approach, as proposed in the *Notice*, will be to invite Petitions to Deny after a "tentative selectee" is chosen by lottery. The second method will require a notice of Petition to Deny to be filed no more than 30 days after publication of the "B" list. Under this second approach, ordinarily only those parties who preserved their rights by filing a notice of Petition to Deny will be allowed to participate in the formal post-lottery Petition to Deny process. Additionally, however, the Commission will consider for good cause shown[12] Petitions to Deny by other parties who did not file the preliminary notice of Petition to Deny. *See* paras. 40–42 *infra*.

34. The law firm of Daly, Joyce and Borsari ("DJB") contends that by allowing petitions to be filed only against the "tentative selectee," the Commission is essentially nullifying the petition rights provided by Section 309(d)(1). That section allows the submission of petitions designed to show that grant of a license or permit to a particular applicant would be inconsistent with the public interest requirements of Section 309(a). However, Section 309(i) states that in a lottery situation those findings only need be made with regard to

substantially disadvantage any applicant and will prevent the occurrence of the problem related to use of a rounding procedure, in which the sum of all applicant probabilities might be greater than 1.000.

[12] "Good cause" includes newly discovered evidence, evidence that could not be discovered before with diligence, and fraud or suppression of evidence by the "tentative selectee." The Commission will adopt a strict standard with regard to "good cause" Petitions to Deny.

the "tentative selectee." Therefore. consideration of petitions against other applicants would have no purpose.

35. It shall be our practice to issue a post-lottery Public Notice identifying the "tentative selectee." A period of fifteen days from issuance of the Public Notice will be provided for the filing of Petitions to Deny. Notice of proposed grant will also be given, and fifteen days provided for filing petitions, with regard to those uncontested applications not subject to lottery.[13] If no petitions are filed against the "tentative selectee," the staff will review the application to determine whether the applicant is fully qualified. If so, a construction permit will be granted. If not, a hearing designation order will issue.

36. We believe it appropriate to provide the "tentative selectee" fifteen days from the date on which petitions are due for the filing of an opposition. Replies by petitioners will not be allowed. Although we had initially proposed twenty day periods for oppositions and replies, the limited number and scope of issues involved indicate that shorter periods will provide adequate time for preparation and submission of the relevant pleadings and that replies are unnecessary.

37. *Two Step Petition to Deny Process.* There will be a two-page limit on the notice of Petition to Deny. The Notice will be filed with the Commission and served upon the applicant against which it is directed within 30 days after publication of the "B" list. Responses to the notice will not be entertained. The notice will make specific allegations that concisely state and explain with particularity the reasons why the applicant lacks qualifications or why a grant of the application would *prima facie* be inconsistent with the public interest. *See, e.g.*, Fed. R. Civ. P. 8. The purpose of the notice is to inform applicants and the Commission of petitioner's contentions; subsequent post-lottery procedures will allow full ventilation of the issues.

38. It is expected that only legitimate and truthful issues will be raised in the notice of Petition process. The notice will be subscribed to and certified by the petitioner and signed by his representative, if any.[14] Moreover, untruthful statements or intentional misrepresen-

[13] We reject the proposal of the National Latino Media Coalition ("NLMC") that the "tentative selectee" be required to publish local notice of its status. We believe that the notice that an application has been filed, which is required, is sufficient to inform interested persons in the community of the applicant's activities before the Commission. This is the same process that is followed with regard to regular broadcast applications. We see no need to impose heavier burdens on applicants in this secondary service.

[14] A suggested certification form follows:

STATE OF . . . . . .

COUNTY OF . . . . . .

tations in one proceeding could be the subject of inquiry in other proceedings as well.[15]

39. In the two-step approach, the formal Petition to Deny process will begin after a "tentative selectee" is chosen by lottery. When the Public Notice announcing the "tentative selectee" is issued, petitioners will have the opportunity to detail their objections to the apparent winner's qualifications in a formal Petition to Deny. Only those parties that preserved their right to object by filing a notice of Petition to Deny may participate in the post lottery proceedings, absent a good cause showing. *See* n. 10, *supra*. The formal Petition to Deny will be limited strictly to only those issues raised in the initial notice of Petition to Deny. Petitioners will have fifteen days after the Public Notice announcing the "tentative selectee" to present their case in chief. The "tentative selectee" will have fifteen days to respond.

40. In providing alternative approaches for handling Petitions to Deny in low power television lottery proceedings, we are taking a different approach than that to be applied to similar filings in the Common Carrier and Private Radio Services that will be subject to lotteries. As explained in paras. 103–105 and 126 *infra*, in the latter services Petitions to Deny and other objections must be filed before the actual lottery. Pre-lottery filing of Petitions to Deny in these services will result in the most efficient conduct of these proceedings. With regard to the low power television lotteries, however, other considerations not material to the non-mass media lotteries recommend the advisability of the alternative two-step Petition to Deny process. Specifically, the sheer number of applications involved as well as the nature of the issues that could be raised in low power proceedings, including those arising from the preference system, suggests that it would economize the efforts of interested parties to

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Jane Z. Doe hereby certifies and states that she resides at _____; that she is the petitioner herein; and that she has read the foregoing petition and knows the contents thereof and that the same are true of her personal knowledge.

/s/

Jane Z. Doe

[15] Frivolous, fraudulent or false allegations will be viewed with extreme disfavor. Intentional and material misstatements could lead to prosecution by the Justice Department under 18 U.S.C. § 1001 which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, or fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

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defer the preparation and filing of full Petitions to Deny until after the lottery. In this regard, we are particularly aware that participation by individuals, informal citizens' groups, and nonprofit organizations is likely to be much more common in low power lottery proceedings than in Common Carrier or Private Radio proceedings. Deferred filing of full Petitions to Deny will enable such individuals and groups to utilize their limited resources more efficiently and effectively. We will, of course, closely monitor the workings of the mass media and non-mass media Petition to Deny procedures. Should it become apparent that the public interest would be better served by revisiting any of the procedures adopted herein, we will not hesitate to make the necessary changes.

41. *Qualifications of "Tentative Selectee."* We note that we will only consider the merits of petitions that concern the qualifications of the "tentative selectee." We have considered the comments of such parties as Spanish International Network ("SIN") and CTN arguing that challenges to the preference claims of all applicants must be considered before a lottery is conducted. We have determined that we will not consider such issues pre-lottery, and that they will generally only be in order against the "tentative selectee" post-lottery. To consider all such claims against applicants other than the "tentative selectee" potentially could mire lotteries in pleadings equal in volume and complexity of disposition to those associated with traditional comparative hearings, with no corollary public interest benefit. In most instances, improper preference claims would affect the selection probabilities of all other applicants proportionately.

42. However, we have determined that in cases in which the provision of the Rules (Section 1.1623) requiring computation of a minimum forty per cent diversity preference is used, all other applicants are not equally disadvantaged by an improper diversity claim. Therefore, to make certain that all applicants are treated equitably, we will entertain post-lottery challenges to the diversity status of applicants benefiting from the minimum diversity preference provision. We will announce, at the time of release of a "B" list, whether the minimum diversity preference was applied. The post-lottery filing deadlines for "objections to diversity claim", and objections thereto, will be the same as those adopted for Petitions to Deny. No other claims regarding preferences will be considered as to any applicant other than the "tentative selectee."[16]

[16] Due to the early difficulties experienced by the Commission in establishing its LPTV recordkeeping system, we are concerned that some Petitions and informal objections previously submitted may not have been associated with the correct applications file. Additionally, many of the matters raised in pending Petitions have been rendered moot by actions taken in this *Report and Order* and in the *LPTV Reconsideration Order*, FCC 83-129, also adopted this date. Therefore, we have determined that in order to provide equitable and expeditious treatment to all parties, all Petitions to Deny and informal objections now on file against

43. All applicants should be aware that improper preference claims violate Federal law. 18 U.S.C. § 1001. Additionally, evidence of such claims could place in jeopardy all Commission authorizations then held by the wrongdoer, as well as adversely affecting the grant of any further authorizations.

44. *Hearing Procedures: Paper and Oral.* As observed in the *Notice*, we believe that we may be able to abbreviate the time consumed by the administrative process through the use of a modified paper proceeding directly administered by the Commission. In paper proceedings, the Commission *en banc* or one or more Commissioners will receive the evidence and issue the decision awarding construction permits to applicants.[16A] The Mass Media Bureau will serve as advisor to the Commission in the paper proceeding process.[17] As such, the Bureau will be responsible for reviewing and analyzing pleadings, and preparing a draft of the decision.[18]

45. The Commission will issue a *Memorandum Opinion and Order* disposing of any allegations presented in Petitions to Deny which do not raise substantial and material questions of fact. This document will also specify any remaining issues for either a paper or oral hearing. If Petitions to Deny do not raise new or novel issues, action upon them may be taken by delegated authority, and similiarly, Designation Orders may be issued by delegated authority. The Designation Order will specify the procedures for a paper hearing, set forth the pleading schedule to be followed by the parties, specify the party with the burden of proceeding and order any petitioner who directly raises an issue specified in the order to participate as a party.

46. In the case of a paper hearing, the Designation Order will direct the applicant or the party with the burden of proceeding to submit its direct case in writing on or before the date set in the

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LPTV applicants will be considered dismissed. Parties may wish to refile Petitions and file notices in accordance with the procedures outlined herein.

[16A] The flexibility for an individual Commissioner or panels of Commissioners to rule on such matters is provided in Section 5(d)(1) of the Communications Act and Section 566(b) of the Administrative Procedure Act. We will in future actions determine the circumstances under which such decisionmaking will be delegated.

[17] In the event that the Mass Media Bureau may be required to perform any investigative or prosecutorial functions prior to designation in a particular proceeding, such tasks shall be conducted by separated Bureau personnel who will not include or be subject to the direct supervision of the Bureau personnel who advise the Commission in the adjudication of proceedings. *See* 5 U.S.C. § 554. In addition, Bureau personnel who authorize, directly supervise or direct investigative or prosecutorial functions will not participate or advise in the Commission's adjudicative decisions. The taking of oral evidence will not be delegated to Commission employees other than Administrative Law Judges.

[18] Of course, the Bureau personnel who participate as a party through a separated trial staff will not advise the Commission regarding any aspect of that case.

Order. This will be approximately 30 days from the date of the Order. The direct written case must set forth all the facts and circumstances related to the issues in the Designation Order. Documentary evidence upon which the applicant or the party relies must be attached in exhibit form. Each exhibit must be numbered, paginated and accompanied by a certification by a person or persons with personal knowledge of the facts therein. The Designation Order will also specify that the other parties may submit a written rebuttal case within twenty days after the direct case is due. As with the direct case, documentary evidence submitted with the rebuttal case must be placed in a numbered exhibit and accompanied by an appropriate certification by a person or persons with personal knowledge of the facts recited therein.

47. Within ten days after the rebuttal case is due, any party to a paper proceeding also may submit a request for oral hearings and cross examination, stating the subject matter of the desired oral presentation or cross-examination and the basis for it. Included therein shall be the evidence to be presented, the reason why the evidence is material to the outcome of the proceeding, the reason why an oral presentation or cross-examination is necessary to bring out this evidence, and the evidence in the record which would be contradicted by the cross-examination or oral presentation. In sum, the moving party must demonstrate that an oral hearing is required for a full and true disclosure of the facts in issue. Finally, the Designation Order will specify a date for the submission of proposed findings of fact and conclusions of law that conform with Section 1.264 of our Rules, requests for the admission of facts and genuineness of documents in accordance with Section 1.246, written objections to the admission of proffered evidence and requests for deposition allowed by Section 409(h) of the Communications Act. In paper proceedings, the Commission *en banc* or one or more Commissioners will issue subpoenas, rule upon questions of evidence, require the filing of memoranda of law upon any issue which the Commission is required to rule upon during the course of the hearing, dispose of routine procedural requests, act on motions to enlarge or modify issues, and take actions and enter procedural orders in conformance with the Administrative Procedure Act.

48. The Commission intends to dispose of as many post-lottery hearings as possible pursuant to the paper procedures described above. When reviewing each case, the Commission also will consider any requests for oral hearings.[19] However, as we had determined in the LPTV *Report and Order*, *supra*, at para. 71, we will order oral hearings only in limited circumstances, *i.e.*, where it is shown that the party will be prejudiced by a paper proceeding without oral

[19] However, as we have noted in Paragraph 45, the Commission may in the first instance on its own motion designate a matter for oral rather than paper hearing.

testimony, where a substantial and material question of fact which would affect the outcome cannot be resolved without oral testimony or where oral testimony would otherwise be required by the public interest. If the Commission makes a decision on the basis of the written affirmative and rebuttal cases and any other authorized pleadings, the request for oral testimony will be deemed denied, but reasons for the action will be articulated.[20]

49. *Disposition of Competing Applications.* Due to the virtually simultaneous filing of thousands of LPTV applications, we are in some cases faced with the need to process "daisy chains" consisting of numerous applications interconnected by their mutual exclusivity. We will not take further action on other applications in the chain until the status of the "tentative selectee" is finalized. Thus, a Petition to Deny the grant to the "tentative selectee" would freeze the status of all other applications in that lottery group. If the "tentative selectee" is found qualified, remaining applications will be processed as appropriate. That is, those applications which are no longer mutually exclusive with others will be placed on a proposed grant list allowing for filing of Petitions to Deny, groups of mutually exclusive applicants will be designated for lottery, and applications which are not grantable due to their mutual exclusivity with the selectee will be dismissed. If the "tentative selectee" is found unqualified, all remaining applicants will participate in a lottery, unless the elimination of the application of the "tentative selectee" has broken the mutual exclusivity of the applicants. In that case, the applications shall be broken into groups, and the lotteries conducted. In either situation, the process will be repeated until all applications have been disposed of.

50. *Acceptability Standard for LPTV Applications.* We reaffirm our decision in the LPTV *Report and Order*, at para. 51, that an

[20] If the Commission concludes that an oral proceeding is necessary, it will issue a Designation Order or an interlocutory order referring the proceeding to the Chief Administrative Law Judge for hearing on the unresolved issue or issues. The Chief Administrative Law Judge will assign an Administrative Law Judge to preside over the hearing and set a prehearing conference to establish a discovery and trial schedule. The Mass Media Bureau will be made a party to the proceeding. The Presiding Judge may request proposed findings of fact and conclusions of law to be filed within thirty days after the record is closed. The Presiding Judge shall conduct the hearing, make all evidentiary rulings, and issue an Initial Decision. *See* Sections 1.201 *et seq.* and, particularly, Section 1.243. All appeals, taken by exceptions to the Initial Decision, will go directly to the Commission. The Adjudication Division of the General Counsel's Office will serve as an advisor to the Commission in such appeals. Our action herein constitutes the determination required under Section 0.365 of the Rules that Initial Decisions will not be appealed to the Review Board. The Commission, after consideration of a written appeal, and oral argument if necessary, shall determine whether the "tentative selectee" is qualified. If so, a grant shall issue. If not, another lottery shall be held from among the remaining applicants in the initial lottery group. If the Initial Decision is not appealed, either a grant will issue or a new lottery will be held subsequent to this action.

LPTV application must be "complete and sufficient" in order to be acceptable for filing. The Conference Report calls for use of the "substantially complete" acceptance standard set forth in *James River Broadcasting Corp. v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), unless another standard has been established by rule. The LPTV standard has been so established. It differs from the "substantially complete" requirement in that applications which are incomplete or have blatant defects are summarily returned.[21]

51. *LPTV Application Form.* The preference system being adopted in this *Report and Order* requires the submission of additional information on ownership characteristics and various other certifications by those who have already filed LPTV applications. Form 346, the application for LPTV construction permits, is being amended to reflect the new information requirements. *See* Appendix D. When an application now on file is placed on an "A" cut-off list, the applicant will be permitted to amend to provide only the newly required information, as requested on the new Form 346, until the "A" cut-off date.[22] New mutually exclusive applications filed in response to the "A" list will be required to comply with all rules and policies in effect, as reflected in the new form.[23] In those instances where an "A" list has already been issued, mutually exclusive applications have been filed in response, and the cut-off date has passed prior to the effective date of this *Report and Order*, the Commission will release a "B" list, allow all applicants on that list thirty days to amend with the additional information, and then issue a corrected "B" list indicating preferences to be applied and setting a lottery date.

52. The Commission's application forms currently require the submission of information that, in the ordinary case, is sufficient for the Commission to be able to determine that an applicant is qualified under Section 308(b). The Commission previously has found that it is in the public interest to acquire much of this type of information by certification.[24] The Commission staff has had, and retains, the ability to inquire of applicants if additional information is necessary to resolve matters at issue. To require that all applicants submit the

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[21] Applications which are later refiled will be treated in accordance with the practices described in the *LPTV Report and Order*, para. 51.

[22] Applications which are not amended with the requisite information will be dismissed. In the future, we will further revise the format of Form 346 to facilitate computerized processing.

[23] In some situations, the filing of new applications against the "A" list will cause additional pending applications to be joined in mutually exclusive status. The Commission will notify those applicants of this occurrence and they will be given thirty days to amend with the newly required information, prior to release of the "B" list for their lottery group.

[24] *See, e.g., Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 R.R. 2d 381 (1981).

specific factual information underlying their certifications, as proposed by such parties as Youth News, would impose a mammoth paperwork burden upon applicants and the Commission, without balancing public interest benefit. Applicants who submit false information will, as we have indicated above with regard to preference claims, be subject to substantial penalties.

53. *Multiple Applications.* We concur in the views of such parties as Local Power Television, Inc. ("LPTI") and International Broadcasting Network ("IBN") regarding the need for Commission clarification of the manner in which multiple applications for the same facilities by applicants with some common interests will be treated. It appears that some applicants have filed identical or substantially identical multiple applications, perhaps for the purpose of improving the chances of winning in a specific lottery. Permitting such "stuffing of the ballot box" would seriously jeopardize the integrity of the Commission's processes. Additionally, allowing such actions might effectively nullify the program of diversity and minority preferences mandated by Congress.

54. We are therefore adopting a strict multiple application rule, that bars the filing of any application for a new station, or for major changes in an existing station, that would be "directly mutually exclusive" with any pending application filed by the same applicant or by any applicant in which any party common to both applications is an officer, director, or has any interest, direct or indirect.[25] The phrase "directly mutually exclusive" takes into account the possibilities inherent in a "daisy chain," a long or otherwise complex series of applications that are connected by their mutual exclusivity for a particular lottery or lotteries. For example, an applicant may file several applications specifying the same channel but different, non-overlapping, though geographically nearby, coverage areas. While these applications may be involved in the same lottery because each is mutually exclusive with other applications that link them together, they would not be "directly mutually exclusive" because the facilities that each specifies do not conflict with one another. Theoretically, each could be granted. Conversely, those applications filed by the same applicant specifying facilities which, by themselves, would be mutually exclusive with each other, are barred.[26]

[25] However, the proposed 1% benchmark for cognizable ownership interests will apply.

[26] Two low power television or television translator construction permit applications will be considered mutually exclusive whenever the facilities associated with one of the applications would cause interference within the protected signal contour of the other as defined in the low power television rules (47 C.F.R. § 74.707). Applicants that are unsuccessful in the lottery and whose facilities would not cause interference to those of other co-pending applications, including those of the lottery winner, may also receive a construction permit. Such permits will be accompanied by a notification that the permittee may expect to receive

Those who have filed applications that violate this rule should withdraw such applications no later than thirty days following the effective date of this *Report and Order*.[27] Our revised LPTV construction permit application includes a certification of compliance with this requirement. Existing applicants will be obliged to make this certification at the time relevant applications are covered by an "A" cut off list or when they are otherwise notified of the need to amend.

55. *Real Party in Interest Certification*. In the *Notice*, at para. 30, the Commission proposed (consistent with the *Conference Report*, at 45–46), that all applicants in the Mass Media services certify, as part of their application for any service in which random selection may be used, "that the applicant is the real party in interest and that no agreement, either explicit or implicit, has been made to transfer or assign the license at a later date to any other party."[28] We suggested that this certification be added to Form 346 for LPTV applicants, and that it be appended to applications in other relevant services. At this time, we shall adopt this noncontroversial proposal for the LPTV service only. As to existing LPTV applicants, we shall require that they complete this certification at the time they are covered by an "A" cut off list or otherwise notified of the need to amend.

56. *License Holding Period*. NLMC asserts that the certification only will be sufficient to inhibit abuse of the minority and diversity preferences in LPTV if the recently-abolished three year anti-trafficking rule is applied to LPTV proceedings. However, we continue to be of the view, as we observed in para. 31 of the *Notice*, that application of a one year holding period, as adopted in the LPTV *Report and Order*, will be sufficient to preclude the "rapid re-assignment or transfer of stations, construction permits, or licenses granted by lottery" that the Conferees believe would undermine the intent of the preference scheme. In the *Report and Order* deleting the "three-year rule" and the underlying "trafficking" policy, we adopted a one year holding period in situations in which the permit

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interference from the facilities of the lottery winners. If permittees deem such interference intolerable, the construction permit shall be surrendered to the Commission within 30 days of the grant date.

[27] Should such applications not be withdrawn, it is the Commission's intent, in the course of processing, to retain the application filed first in time and dismiss all other applications conflicting with this rule.

[28] Although the *Conference Report*, at 46, mandates that this certification only be required from the new permit grantee, we proposed that it be included in all applications and completed when filed. No comments contrary to this approach appear to have been received. We believe that both to safeguard the Commission's processes, and to facilitate applications processing, it would be appropriate to adopt the proposal as made.

to construct a new facility resulted from a hearing grant made on the basis of comparative criteria.[29] Both the holding period adopted in the *LPTV Report and Order* and the period established in our proceeding eliminating the "three-year rule" apply only in cases where the construction permit was awarded by virtue of a comparative preference. We believe that continuing this procedure in the lottery context is consistent with the intent of Congress that a holding period be imposed to protect the integrity of the lottery preference scheme. Thus, the one year post-lottery holding period will apply only when the permit holder was the beneficiary of a diversity or minority preference. The one year period begins with initiation of on-air operation. The rules will be amended to reflect this decision.

57. *Changes in Preference Eligibility.* We also shall adopt the proposal in para. 32 of the *Notice* requiring that an applicant inform the Commission of changes in preference status within seven days of the completion of any such changes, up until publication of a "B" list on which the applicant appears, or, as to unopposed applications, the proposed grant list. Changes in diversity status for subsequent lotteries would be reported after the construction permit is granted. This treatment in some cases may result in an applicant receiving an extra diversity preference in a lottery held subsequent to a tentative selection which has not been processed through to grant. However, we are of the view that it is a reasonable method by which to modify the status of LPTV applicants while limiting the delay entailed by such a requirement.

58. Thus, if an applicant is a "tentative selectee" and a petition has been filed against the grant of the application, the "tentative selectee" status will not affect the diversity preference to which that applicant may be entitled in a subsequent proceeding. However, any subsequent grant will be conditioned on the outcome of the first proceeding. Further, the grant in the second proceeding, and all further grants, will be included for purposes of adjusting the diversity preference in subsequent proceedings. We believe this process represents an equitable compromise. While applicants remain under a continuing obligation to make certain that the information on file is correct, amendments will not improve the preference standing of any applicant once that applicant appears on the "B" cut-off list.

59. *Preference Framework for Mass Media Services.* As we have indicated, substantial attention was drawn to the preference scheme that the Commission proposed at paras. 35–44 of the *Notice*, and the related rule proposals set forth as Sections 1.1621–1.1623 in Appen-

[29] *Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control)*, 47 Fed. Reg. 55924 (December 14, 1982).

dix B of the *Notice*. The proposals made track the *Conference Report* accompanying the amendatory language of the statute. Having fully considered all of the comments submitted regarding the various aspects of the preference scheme, we adopt the preferences generally as proposed, but with a number of clarifying and perfecting modifications.

60. Initially, we find that the minority preferences enacted by Congress are constitutional under the holdings of the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). As we observed in the first *Notice* in this proceeding, 88 F.C.C. 2d at 491, those cases make clear that the award of special preference to remedy the effects of past discrimination does not offend the equal protection component or the due process clause of the Fifth Amendment.[30] We noted that although a remedial preference scheme "may result in grants of licenses of minority applicants which might otherwise have gone to others," under *Fullilove* that result is an appropriate consequence of the remedial preference. We remarked that the medical school admissions program overturned in *Bakke* set aside a specific number of places for minorities, utilized a different admissions standard for minorities than for whites, and did not involve any finding of past discrimination by an appropriate governmental body.

61. The program adopted herein does not share the attributes of the scheme rejected in *Bakke*, and comports with the teachings of *Fullilove*. The Conferees have, at 43–44 of the *Report*, found that past discrimination has resulted in severe underrepresentation of minorities in media ownership. They have therefore established a program in which race is one of two factors to be awarded fixed relative preferences.[31] As SIN correctly points out, a 2:1 fixed relative preference does not guarantee that minorities will receive double the number of licenses as would non-minority applicants. Further, the Conferees have instructed that we report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate. All of these factors lead to the conclusion that the preference system as adopted passes constitutional muster.[32]

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[30] The process of analysis under the equal protection component of the due process clause of the Fifth Amendment, applicable to the Federal government, is essentially the same as that conducted under the equal protection clause of the Fourteenth Amendment.

[31] In fact, the diversity preference has an intermediate "floor" for each lottery that is not applied to the minority preference.

[32] This conclusion is buttressed by the recent judicial action rejecting a challenge of Commission use of minority ownership status as one of the acceptance criteria for applications to use frequencies made available by our clear channel rule making

62. The proposed rules contained in Appendix B of the *Notice* represent the preference scheme described in the *Conference Report*. The Conferees stated, at 44, that the minority ownership preference "must be no less than a fixed relative preference of 2:1." Members of different minority groups are to "be allowed to aggregate their ownership interests to achieve a majority interest in any given application." The contention of a number of parties that a 2:1 fixed relative preference is not "significant" within the meaning of the statute is contradicted by the findings of the Conferees that such a preference fulfills the "significance" test. Further, the alternative preferences proposed by Frontier Broadcasting Companies ("Frontier") and others are so exclusionary in nature as to be constitutionally suspect. If the "dilution effect" complained of by some parties appears with experience to be detrimental to achieving the result intended, the Congress or the Commission may wish to revisit this area. We believe, however, that the minority preference designated in the *Conference Report* should first be applied for a reasonable period.

63. The diversity preferences in the proposed rules of the *Notice's* Appendix "B" reflect the *Conference Report's* multilevel approach to the diversity issue. There is proposed a 2:1 fixed relative preference for those with no other mass media ownership interests, a 1.5:1 preference for those holding interests in one, two or three properties, no preference for those with more than three interests, and no preference for those with media properties that essentially would be co-located with the proposed new station. A number of commenters object to this scheme because it does not take account of the details of media ownership, failing, for example, to distinguish between a major market VHF station and a low power station. Upon review of the *Conference Report* and the comments of the parties, we have determined to reject the modifications suggested by the commenting parties.

64. In taking this action, we agree with the view expressed by SIN that "should the Commission have to expend substantial resources to investigate and resolve such subjective issues . . .it might as well hold a traditional comparative hearing." SIN correctly notes that the premise of the lottery proposal is that in the secondary, basically unregulated LPTV service, "most distinctions between applicants are not significant enough to warrant detailed Commission inquiry."[33]

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proceeding. *Bunkfeldt Broadcasting Corporation v. FCC*, No. 82-1212 (D.C. Cir. January 6, 1983). Our action resolving the clear channel proceeding was affirmed in *Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

[33] Given the absence of any local programming obligations, we do not find Press' proposal for an "underserved communities" preference to be in the public interest. Further, it appears that utilizing preferences other than those specified in the statute and *Conference Report* would be contrary to law. Press' proposal that "Tier III" applications for such communities be processed at an early date

65. An important aspect of the preference system is the manner in which various ownership interests are defined. The *Conference Report* states, at 45, that with respect to both the diversity and minority preferences, "the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary."

66. In light of our further review of the *Conference Report*, and having reflected upon the comments of the parties, we will adopt our initial proposal that both general and limited partnership interests be considered in determining the ownership of a partnership. We believe that the *Conference Report's* focus on "individuals who are participants in a . . .partnership," at 44, coupled with its intention that we consider "the partners," commends this result. Additionally, the emphasis on beneficial ownership interests in other entities suggests the similar inclusion of limited partners.

67. There is no doubt of the Conferees' intent that "a majority interest" be held in order for a minority preference to be awarded. Including limited partnership interests in this computation should increase the frequency with which such ownership can be achieved.[34] We believe that profit shares should be determinant of ownership of partnership interests. Thus, a five percent share of annual profits will be viewed as a five percent partnership interest. Use of this single measure will facilitate our ability to process applications with ease, and is consistent with the Conferees' emphasis on beneficial ownership. We will adopt the apparently noncontroversial proposal in para. 38 of the *Notice*, that in computing diversity preference eligibility the media holdings of the partnership itself be considered together with the combined cognizable holdings of the partners. In considering ownership interests, we will utilize the proposed 1% benchmark for cognizable ownership interests. This action will eliminate any *de minimis* ownership interests from consideration while remaining true to the intent of the Conferees.[35]

68. In the *Notice*, we proposed that non-stock corporations and unincorporated associations be treated "in a manner similar to

might have an unfair impact upon other applicants, and would, due to the interrelated mutually exclusive status of many applications, also require us to process numerous applications that do not have "underrepresented" status out of normal order. We do not believe this proposal should be adopted.

[34] Conversely, however, considering the ownership interests of limited partners may have a negative impact on the ability of minority entrepeneurs to benefit from the diversity preference.

[35] The rule tracks, but is not identical to, the Commission's current "attribution" rules. Its function is to exclude minor interests from consideration in calculating eligibility for lottery diversity preferences. Revision of this rule may be undertaken consistent with the outcome of our determinations in MM Docket No. 83-46, *Corporate Ownership Reporting and Disclosure by Broadcasting Licensees*, 48 Fed. Reg. 10082 (March 10, 1983).

partnerships in which each member holds an equal share." We agree with IBN and the Corporation for Public Broadcasting ("CPB") that nonstock corporations, as well as licensees operated by commissions, boards, or other governmental bodies should be judged as to minority status on the basis of the composition of the board. We believe this treatment also should apply, for diversity purposes, to the holdings of board members. The same treatment should be afforded both nonprofit and for-profit nonstock corporations. We do not concur, however, with CPB's opposition to our consideration of the membership of nonprofit corporations or unincorporated associations when such entities are membership organizations. Action consistent with the thrust of the *Conference Report* suggests consideration of the composition of the membership as to minority and diversity preferences. In order to minimize costs, we will authorize appropriate recognized sampling methods to be used in organizations with more than fifty members.

69. Upon further consideration of our *Notice* proposal, at paras. 39–40, regarding treatment of trusts, we believe that as to the minority ownership preference, the percentage each beneficiary derives as a portion of the whole should be considered, with more than fifty percent total minority share being required in order for preference to be awarded. This is consistent with the qualitative manner in which partnership interests are being treated, and appears more appropriate than our initial proposal to base this computation on mere numbers of minority beneficiaries. We will adopt as proposed our plan for the treatment of trusts for diversity purposes. Thus, if either the trust or its beneficiaries, or the trust and beneficiaries combined hold more than fifty percent of any medium of mass communications, these interests will be attributed to the trust applicant. An exclusion of interests of beneficiaries receiving less than 1% of trust income will be applied.

70. We also will adopt the *Notice* proposals regarding treatment of corporate ownership interests, as presented at paras. 41–42 of that document. The corporate applicant, by its officers, will be required to certify both as to the minority status of the holders of beneficial interest in a majority of the corporation's voting stock, if claiming such a preference, and as to any diversity preference claims. To derive this data, corporations with more than fifty shareholders will be permitted to use appropriate sampling procedures, if necessary. Such sampling methods are presently used in ascertaining alien ownership interests. A one per cent attribution benchmark will be applied in the diversity context, as proposed.[36]

[36] As to spousal ownership interests, we will, in computing the lottery diversity preference, treat such holdings in the same fashion as other family relationships. That is, spousal relationship, standing alone, will not be presumed to create common control over a mass media entity in which one spouse has an interest. Thus, we will, in the lottery context, look for diversity purposes to the general

71. *Definition of Mass Media.* In the *Notice*, we proposed to include daily newspapers in the definition of "media of mass communications" for calculating the diversity preference. American Newspaper Publishers Association ("ANPA") asserts in its comments, however, that it would be erroneous to consider newspapers as media in the lottery context since print media is not mentioned in the statutory definition. Although newspapers are not included in the open-ended statutory definition, the Conference Report, at 43, indicates that newspapers should be so included.[37] Moreover, we believe that newspapers should be included in the definition to further the Commission's long-recognized public interest goal of promoting diversity of viewpoints. *See, e.g., FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

72. By including daily newspapers[38] in the statutory definition of mass media, we are not precluding newspapers from applying for LPTV licenses. The effect of our action, which is meant to increase the diversity of voices, is to make a newspaper owner applicant ineligible for an LPTV diversity preference in the community in which it publishes. Thus, all other things being equal, it is more likely that a non-media owning applicant will be more successful in a LPTV lottery than an applicant who owns no other print or electronic media.

73. We concur in Microband's view that Congress did not intend MDS to be considered as a mass communications medium so long as it is regulated as a Common Carrier Service in which the MDS licensee lacks direct editorial control over the programming. The statutory language includes in the "media of mass communications" MDS "and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee." The *Conference Report* adds clarity to this definition by observing that in services such as MDS, "which may be neither clearly common carrier nor broadcast entities," preferences need be used in lotteries when licensees have the ability to exercise direct editorial

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view of family relationships found in such cases as *KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605, 607 (1974), and not to the presumption regarding spousal ownership interests stated in cases such as *Lady Sarah McKinney-Smith*, 59 FCC 2d 398, 401–402 (1976), and *Alexander S. Klein*, 86 FCC 2d 423, 426 (1981). The action taken here is consistent with the *Conference Report's* view, at 45, that women, which it states to be "significantly underrepresented" in telecommunications ownership, should "substantially benefit" from the lottery preference scheme.

[37] A statutory definition that specifies "include" is a term of enlargement and not of limitation. *Highway & City Freight Drivers v. Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978).

[38] A daily newspaper is one that is published four or more days per week in the English language and is circulated generally in the community of publication. A college newspaper is not considered as being generally circulated.

control over a substantial proportion of the programming or information services offered. It appears appropriate to treat MDS ownership in the same manner when MDS permittees or licensees participate in lotteries in other services, such as LPTV. Thus, present MDS licensees will be eligible for diversity preferences in LPTV without regard to their MDS holdings. However, this matter will be revisited if MDS is at some future time treated as a broadcast type service.

74. *Translators as Mass Media.* We do not agree with comments to the effect that translators should not be considered mass communications media. Under Section 74.732(e) of the Commission's Rules, an existing translator station immediately may commence low power operation upon notification to the Commission. It would raise serious questions regarding the legitimacy of the Commission's processes were we to award diversity preferences to translator operators who subsequently could convert their operations to LPTV status by letter.

75. *Local Ownership and the Diversity Preference.* The *Conference Report* states, at 43, that "the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process." The Conferees observe that when a lottery applicant for a mass media license or permit has more than 50 percent interest "in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote the public interest to give such applicant a preferred status relative to other applicants." Thus, in any mass media lottery, no diversity preference will be awarded to an applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications in the community for which the grant is sought. The *Conference Report* states that the Commission should require certification as to whether an applicant holds such an interest "a prerequisite for an acceptable application."

76. In the *Notice*, at para. 44, the Commission proposed to "make ineligible for a diversity preference, those applicants the owners of which essentially own more than 50% of a local medium of mass communications." We further proposed to require applicants to certify that they did not hold a controlling interest in media of mass communications serving "the community wherein the license or permit is sought." It is clear that the essence of the concerns evidenced in the *Conference Report* and reflected in our *Notice*, is that no diversity preference be provided those applicants who already control a medium of mass communications in the same locality in which the new facility is sought. Difficulty in implementation arises, however, when attempting to equate "locality" with the term of art "community of license." The notion of a "community of

license" is not particularly relevant in this context, because LPTV licensees are not required to serve a given "community" as such.[39] Therefore, in order to implement the proposed restriction with appropriate regard to concerns about local media concentration, we will, in LPTV, adopt contour encompassment standards modeled on our "one to a market" restrictions. Diversity preferences will not be awarded to applicants whose owners, when aggregated, have a controlling interest in stations whose stated contours wholly encompass or are encompassed by the protected predicted contour of the LPTV station for which the license or permit is sought. Similar restrictions will be applied to co-located cable television systems and daily newspapers. Certification as to this status will be included in the revised LPTV application. Existing applicants must complete the certification at the time their applications appear on an "A" cut off list or when they are otherwise notified of the need to amend.[40]

77. *Ex Parte Rules.* Low power television proceedings will

[39] *See* LPTV *Report and Order, supra,* at paras. 14–15, 62. However, in order to effectuate the Conferees' intent that no diversity preference be given to those owning other media of mass communications in the same locality, it will be necessary to take cognizance of those service areas known as the cable television system's "franchise area" and the daily newspaper's "community of publication," and to utilize these as the areas to which the contour of the proposed LPTV station is related.

[40] The standards to be applied in LPTV will provide that no diversity preference be granted to any applicant whose owners, when aggregated, have a controlling interest in the following media of mass communications, if the service areas of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with Section 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(a) AM broadcast station—predicted or measured 2 mV/m groundwave contour, computed in accordance with Sections 73.183 or 73.186;

(b) FM broadcast station—predicted 1 mV/m contour, computed in accordance with Section 73.313;

(c) TV broadcast station—Grade A contour, computed in accordance with Section 73.684;

(d) Low power TV or TV translator station— protected predicted contour, computed in accordance with Section 74.707(a);

(e) Cable television system franchise area;

(f) Daily newspaper community of publication.

Additionally, the diversity preference will not be available to applicants whose proposed transmitter site is located within the franchise area of a cable system owned by the applicant and/or its owners or the community of publication of a daily newspaper owned by the applicant and/or its owners. Failure to consider the location of the transmitter site in the community of publication or the franchise area could easily lead to the diversity preference being awarded to existing media owners in a manner contrary to the Conferees' intent. Given this focus on localism, it is clear that the Conferees did not intend that we consider direct broadcast satellite ("DBS")

become "restricted" for *ex parte* purposes from the time that a "B" list is published. Under the current *ex parte* rules, adjudicative proceedings generally become restricted at the time that a hearing designation order is issued. Adjudicative proceedings can become restricted, however, prior to issuance of the hearing designation order, for example, where public notice is given or actual notice is obtained that mutually exclusive applications have been filed. *See* 47 CFR § 1.1203(b)(2). However, this rule goes beyond the requirements of the Administrative Procedure Act, which requires the imposition of *ex parte* restrictions no later than "the time at which a proceeding is noticed (*i.e.*, designated) for hearing" unless actual notice is acquired beforehand. 5 U.S.C. § 557(d)(1)(E). Thus, to comply with our *ex parte* rules, LPTV proceedings will become restricted when the "B" cut off list is published or actual knowledge of mutual exclusivity is acquired, whichever occurs first. This result is justified due to the unusual circumstances of LPTV, *viz.*, the voluminous number of applications and the fact that it is practically impossible to determine, with precision, which applications are mutually exclusive prior to issuance of the "B" list.

78. *Major Changes.* A subsidiary area raised in the *Second Notice* was the treatment of "major change" applications under a lottery system. We are persuaded that the proposal to subject "major change" applications in the traditional broadcast services to processing by lottery should not be adopted now. No basis has been established in this proceeding upon which to apply lottery processing to traditional service "major change" applications separate and apart from the treatment of all other applications in those services.

79. As to "major change" requests in LPTV, we continue to believe that the processing of such applications as initial filings is justified. "Major change" status does not, as CTN erroneously contends, open up the underlying authorization of an existing licensee to competitive challenge. However, the modifications that are treated as "major changes" are considered to be so significant that it would be inequitable to confer any protected status upon them. In our *LPTV Reconsideration Order*, FCC 83–129, adopted separately this date, we are adopting a proposal that modifications of facilities that would not increase the signal range of the station in any horizontal direction be treated as "minor." We believe this will facilitate maintenance-type facilities changes without creating new interference or preclusion. For the reasons stated in the LPTV document, additional adjustment in the handling of major technical changes does not appear appropriate at this time.

80. Pending applications for new facilities and for "major changes" in existing facilities are assigned a new file number when

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operators as owners of "local" media for purposes of this restriction. See *Conference Report*, at 43.

they are amended in such manner that the amendments themselves constitute a "major change." When "major change" amendments are filed after the initial application appears on a cut off list, the application is no longer considered a part of that cut off group, and loses the protection the cut-off list affords. We do not concur in SIN's view that amendments reflecting site changes and similar matters should be treated as "minor," whether or not that would otherwise be the case, prior to issuance of a "B" cut-off list.[41] We observe that the standard for acceptance of LPTV applications is that they be "complete and sufficient." Additionally, under Section 1.65 of the Commission's Rules, applicants are under a continuing obligation to inform the Commission of significant changes in the information they have provided. Thus, all the information on file with the Commission should be current and complete. Allowing amendment of applications as is requested by SIN would add a substantial burden to the already Herculean processing task that the Commission faces in LPTV. It is the responsibility of the applicant to keep the necessary information on file with the Commission so that its rights are not jeopardized.[42]

81. *Channels 70–83 Issue.* We have also determined not to grant KIRO's request that translators wishing to move from channels 70 through 83 be exempt from consideration as "major change" applicants subject to lottery. Channels 70 through 83 were reallocated from broadcast to land mobile use in 1970.[43] Shortly thereafter, we concluded that translators operating on those channels would be afforded protection from the land mobile services only for the balance of their existing license terms, "after which renewals would be granted only on a secondary basis." We noted that while licensees on those channels were not being required to move, "they should be aware of the secondary nature of their authorizations and the possibility of changes to lower channels becoming necessary."[44] More than 800 television translators were in operation on channels 70 through 83 at the time of reallocation. Roughly 600 stations remain in operation on those frequencies today.[45] Applications from such

[41] As we have noted above, under our newly revised definition of "major change," a site change is in fact treated as "minor" so long as there is no corresponding change in coverage area.

[42] Applicants should note that in the LPTV *Reconsideration*, we are revising our procedures and will henceforth treat LPTV transfers of control as "major changes" in the same circumstances in which this would ordinarily be the case in the broadcast services. Individuals interested in the LPTV applications process should read the *Reconsideration* document.

[43] *Spectrum Space for Land Mobile Services*, 19 RR 2d 1663 (1970).

[44] *Amendment of Part 74, Subpart G (Television Broadcast Translator Stations)*, 23 RR 2d 1504, 1509 (1971). Our policy regarding the secondary status of low power stations on channels 70–83 currently is codified as Section 74.702(a)(3) of the rules.

[45] *Improvements to UHF Television Reception*, 90 FCC 2d 1121, 1127 (1982). We

licensees seeking a channel change are exempt from the LPTV applications freeze.[46] However, it may well be that in a number of cases, such applications will be mutually exclusive with others and will not be granted.[47] We believe the Commission's proper concern in such situations is that service is provided to the public. The nature of this service should be responsive to market demands. It is not the Commission's role to maintain an existing service in perpetuity. Thus, while we will not protect channel 70–83 operators from other applicants for lower channels, we will grant special temporary authority (STA) to such licensees, if a lower channel is available and a move is immediately required by land mobile interference problems.[48] However, these licensees must compete equally with all other applicants for regular low power or translator service on that lower channel and they will be required to cease their STA operation if another party is assigned the channel and is prepared to commence operation. This resolution will maintain the level of service to a community, while removing the Commission from considerations regarding the content of that service. For similar reasons, we will grant STA to translators forced to move by the start of operations of full service stations.

V. *Private Radio Comment Summary*

82. Most of those commenting on our proposals to use lotteries in the Private Radio Services addressed the appropriateness of lotteries in the Private Land Mobile Radio Services ("PLMRS"). Only a few commenters addressed the use of lotteries in the Aviation, Maritime and Private Operational-Fixed Services.

83. Many commenters maintained that lotteries would be inappropriate in any Private Land Mobile Service because the qualifications of competing applicants could always differ. Some commenters recognized, however, that lotteries could expedite the licensing process and be beneficial in certain cases, particularly when the licenses would be used strictly for entrepreneurial commerical purposes.

84. Some commenters were concerned that the use of lotteries in the PLMRS might jeopardize the frequency coordination process.

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determined in the UHF proceeding that new television sets no longer need be equipped to receive channels 70–83. This will make it possible to manufacture sets which perform better on the remaining UHF channels. Manufacturers are not, however, precluded from producing sets which receive channels 70–83.

[46] *LPTV Report and Order, supra*, Appendix E, para. 3.

[47] Only approximately 40 channel change applications are now pending. We expect this level to increase in the near future, as Cellular Land Mobile Communications Systems are licensed to operate on the spectrum in question.

[48] Section 309(f) of the Communications Act requires a party to have pending an application for authorization of service before the Commission is permitted to grant STA. Thus, a translator licensee seeking STA must first apply for regular authority to broadcast on the channel in question.

Another argument advanced by several commenters was that the use of lotteries in the Private Land Mobile Services would be contrary to the spectrum management principles set forth in revised Section 331(a) of the Act. 47 U.S.C. § 331(a). Finally, others raised concerns about public safety, spectrum "trafficking" and the need for expert licensees.

VI. *Private Radio Services Discussion*

85. *Proposals*. In the *Notice*, we recognized that licensees do not receive exclusive use of frequencies in most of the Private Radio Services. Indeed, most frequencies are shared, and the need for comparative hearings or lotteries usually does not arise. The *Notice* did, however, set forth several proposals for implementing lotteries in certain Private Radio Services. In summary, we proposed to use lotteries in the Aviation, Maritime, Private Land Mobile and Private Operational-Fixed Microwave Radio Services. In essence, we proposed to have the option of utilizing the random selection technique in any Private Radio Service where mutually exclusive applications could be filed or where more applications for initial licenses might be received than could be accommodated on available frequencies. Additionally, we requested comments on whether selection by lottery should apply to applications in all the different classes of Private Land Mobile Services.

86. We explained that our overriding concern in making these proposals was to ensure that the public received the benefits of private radio service in the most expeditious manner possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Our proposals were based on the premise that in any particular private radio lottery the qualifications of competing applicants to serve the public interest would be without substantial material differences. Under these circumstances, comparative hearings would serve no useful purpose and in large part would result in artificial distinctions without significant differences in licensees' qualifications to serve the public.

87. In the *Notice*, we recognized that under the Communications Act and our Rules, Petitions to Deny may not be filed against applications for Private Land Mobile licenses. We noted, therefore, that formal filings involving oppositions and replies would not be entertained in these services. In the other Private Radio Services where we proposed to select licensees by lottery (e.g. Aviation, Maritime, and Operational-Fixed Services), Petitions to Deny could be filed under our proposed rules in accordance with statutory requirements. 47 U.S.C. § 309. We proposed to streamline the lottery in these services, however, by requiring that Petitions to Deny be filed against applicants before the lottery and only those that were filed against the tentative selectees would be reviewed after the lottery. We noted that this would enable us to eliminate the

necessity of a second time-consuming Public Notice inviting Petitions to Deny. Also, because the Private Radio Services do not currently involve "media of mass communications," we proposed to conduct all Private Radio Bureau lotteries without awarding significant preferences to any applicants. We believed that these proposals would ensure that lotteries were "extremely simple" in the Private Radio Services, as Congress had prescribed. *Conference Report* at 46.

88. *Lotteries in Private Land Mobile Radio Services.* Many of those commenting in response to the *Notice* took issue with these proposals. In particular, they questioned our proposal to use lotteries to select licensees in the Private Land Mobile Radio Services (Part 90). Some commenters referred to Section 120 of the Communications Amendments Act of 1982, the same legislation that authorizes the Commission to use lotteries to select licensees. That section establishes guidelines for the Commission's management of the Private Land Mobile spectrum. It directs the Commission to consider certain principles such as public safety, spectrum efficiency, competitive markets and interservice sharing. 47 U.S.C. § 331.

89. Some commenters argued that our proposed use of lotteries in these services was inconsistent with these new statutory guidelines, particularly those relating to public safety. They stated that there are significant differences in the abilities of many applicants to serve the public interest. They pointed to the legislative history of the new private land mobile legislation, which stresses the Commission's obligation to promote the private land mobile spectrum needs of police departments and other public agencies using the spectrum to protect the American public. This concern was also expressed by some of those commenting in regard to the use of lotteries in the Operational Fixed Microwave Service (Part 94), where eligibility is based on Part 90 of the Rules (Private Land Mobile Services).

90. Many of these commenters were concerned about the use of lotteries in particular cases. For instance, the American Association of State Highway and Transportation Officials (AASHTO) opposed the use of lotteries in the Highway Maintenance Radio Service. Forest Industries Telecommunications (FIT) opposed lotteries in the Forest Products Radio Service. The Association of Public Safety Communications Officers, Inc. (APCO) and the Los Angeles County Sheriff's Department were against lotteries for public safety frequencies. UTC, the Utilities Communications Council, opposed the use of lotteries in the Power Radio Service and Operational Fixed Service. In essence, these parties and others argued that the Commission should rely on comparative hearing procedures to select the "better qualified" licensee. They also emphasized the importance of frequency coordination in accommodating the maximum number of licensees in a limited amount of spectrum.

91. We are convinced, however, that the new statutory guidelines for managing the Private Land Mobile spectrum—promoting

safety, improving spectrum efficiency, reducing regulatory burdens, encouraging competition, providing services to large numbers of users, and increasing interservice sharing opportunities—are consistent with our proposal to use lotteries in the Private Land Mobile Services. The *Conference Report* makes it clear that these guiding principles, all of which were recognized as important goals, were *not* intended to be exclusive and that the Commission may consider any other relevant factors in the public interest. Moreover, not all of these guidelines need be considered by the Commission in each individual case. *Conference Report* at 52.

92. The *Conference Report*, we believe, encourages us to use lotteries in these services if it is done in a manner consistent with these new statutory guidelines. The *Conference Report* discourages the use of "auctions or similar economic methods" to assign this portion of the spectrum, but does state that this should *"not be construed to limit the ability of the Commission to use lottery procedures for purposes of granting private land mobile licenses . . . ."* *Conference Report* at 53, (emphasis added). This makes it apparent that Congress did not exclude private land mobile applications from the range of possible candidates for a lottery.

93. In certain areas of the country, we expect lotteries to be absolutely essential in some Private Land Mobile Radio Services. In particular, as some of the commenters noted, applications for base station licenses in the Commercial or SMRS pool of frequencies at 800 MHz are prime condidates for selection by lottery.[49] As a result of our recent decision in Docket No. 79–191, 250 new private land mobile channels in the 800 MHz band were released, with eighty channels earmarked for the SMRS pool. *Amendment of Part 90*, 90 FCC 2d 1281, 1299 (1982). Unlike the other pools, SMRS base station licensees were authorized to provide a communications service to eligibles for profit. We have already received far more applications for SMRS frequencies in some geographic areas than can be accommodated in the available spectrum. *See* FCC Public Notice, 2459, February 17, 1983. For instance, in the SMRS pool in the Los Angeles area alone, we have received approximately 250 applications requesting 1200 frequencies. Only 80 frequencies are available for assignment in that pool and in all likelihood only 16 applications will be granted. A comparative hearing of this scope, even a "paper" proceeding, would be unworkable for all practical purposes unless coupled with a lottery. We believe that traditional comparative hearings in these circumstances would undoubtedly delay service to the public and would not result in the selection of significantly more qualified licensees. This would clearly be inconsistent with our public interest responsibilities and the new statutory guidelines.

[49] FIT, SIRSA, and AAR suggested that lotteries would be appropriate for SMRS licenses.

Other major urban areas are faced with similar demand for these frequencies.

94. This is precisely the type of situation described in the *Conference Report* as appropriate for selection by lottery. There are large numbers of licenses available; there are large numbers of applications because new frequencies have been made available; there would be a significant backlog of applications without a lottery; and a lottery would speed up the process of getting service to the public. *Conference Report* at 37.

95. *Case-by-Case Use of Lotteries.* We interpret the *Conference Report* as encouraging the Commission to utilize lotteries in the Private Land Mobile Services, where necessary, on a case-by-case basis consistent with the new statutory guidelines for managing these services. In the *Conference Report*, Congress made it clear that the lottery authority was discretionary in nature and that a service should not be subject to a lottery if the traditional comparative process would provide a superior means of diversifying media ownership in particular instances. *Id.* at 37–38. It is apparent that Congress' main concern in preserving comparative hearings in these circumstances and in developing a significant preference scheme in the lottery procedure was to ensure diversification in the Mass Media Services. These concerns are not relevant at this time in the Private Radio Services, where licensees do not engage in mass media programming or the distribution of video entertainment to the public.[50]

96. We do not intend to apply the lottery selection process automatically or mechanically in these services. As some commenters suggested, expedited hearing proceedings may be used initially to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to random selection. This will ensure that in any particular Private Land Mobile lottery there will be no substantial material differences in the applicants' abilities to serve the public interest.[51] Lotteries will not be utilized if the proposed uses of the spectrum would serve the public in materially differently ways. We would not, for example, utilize the same lottery to select between applicants proposing the use the spectrum for public safety purposes and those proposing non-

[50] Parallel Communications Corp., the AAR and SIRSA recommended that lotteries be used to select from among competing applicants in the Private Operational Fixed Microwave Service who filed for the use of multi-directional systems as a result of Docket No. 19671, *First Report and Order*, 86 FCC 2d 299 (1981), *reconsideration pending*. As stated in the *Notice*, we will grant appropriate significant preferences if any applications involving mass distribution of video entertainment are processed in the future by lottery.

[51] The comparative criteria to be applied to particular groups of applications to determine if they should be subject to a lottery will be established in subsequent service-specific proceedings. *See, e.g., Amendment of Part 90*, 90 FCC 2d 1281 (1982).

public safety use. We expect this to minimize the concerns expressed by APCO, UTC, the Los Angeles County Sheriff's Department and others about the use of lotteries to select from among competing applicants proposing significantly different uses of the spectrum.

97. Some commenters have expressed their concerns that the use of a lottery will somehow adversely affect the frequency coordination process used so effectively in these services. They reference the new legislation, which specifically authorizes the Commission to accept the services of non-Federal Government advisory committees in coordinating the assignment of these frequencies.[52] They are concerned that lotteries will prevent the coordinators from using good engineering practices to arrive at solutions to difficult assignment problems.

98. We do not expect any lottery in these services to affect the coordinators adversely. We have not proposed in this proceeding any changes in the rules regarding frequency recommendations by coordinators, nor have we intended to create the impression that assignments will not be based upon good engineering practices. We will continue to utilize the services of the coordinating committees, as authorized in the new legislation, and we will continue to follow the guidelines delineated in the new legislation for managing these services, including efficient spectrum utilization and good engineering practices.

99. Questions have also been raised concerning the applicability of the Commission's "anti-trafficking" rules to lotteries in the Private Land Mobile Services in light of current loading and construction requirements. *See, e.g.*, 47 C.F.R. §§ 90.358, 90.609. We wish to make it clear that we have not altered the transfer and assignment rules in these services, nor have we seen any reason in the record of this proceeding to change the loading and construction requirements in any way as a result of a lottery.

100. *Aviation, Maritime and OFS Services.* We received few comments on our proposals to use lotteries in the Aviation Services (Part 87), the Maritime Services (Part 81) and the Operational-Fixed Microwave Radio Service (Part 94). Some commenters claimed that lotteries were inappropriate in these services because some types of these stations are expensive to construct and the qualifications of competing applicants could differ greatly. Others argued that lotteries would be beneficial in these services.

101. In light of these comments, we will use comparative hearing procedures in these services when it appears upon initial analysis that there are significant differences in the abilities of competing applicants to serve the public. On the other hand, when it appears upon initial analysis that there are no substantial material differences in the qualifications of competing applicants, we will select

[52] 47 U.S.C. § 331(b).

licensees by lottery. In this way, lotteries will be used to resolve "tied cases" when comparative hearings would serve no useful purpose. In making this public interest determination whether applications in these services should be subject to a comparative hearing or lottery, we may consider such factors as public safety, service coverage area, operator experience and spectrum efficiency. Other relevant factors may also be taken into account. Our reasons for using lotteries or comparative hearings will be specified in public documents in each individual case. By using lotteries selectively in these services, we expect to expedite service to the public in appropriate cases while ensuring that licensees always remain fully qualified. This is one of the four factors specifically referenced in the *Conference Report* for our consideration in determining whether to utilize our lottery authority. In any instance where we select licensees by lottery in these services, we will make the affirmative finding, required by the Conferees, that the public interest will be significantly benefited. *Id.* at 37–38.

102. In the Private Radio Services, therefore, we are adopting the rules essentially as proposed. We will utilize lotteries only when it appears that there are no substantial and material differences in the qualifications of competing applicants to serve the public interest. Prior to the lottery, applications will be reviewed to determine that they are acceptable for filing and comparative criteria may be applied. This will ensure that lotteries will occur in these services only when comparative hearings would serve no useful purpose. Only qualified applicants will receive license grants. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a qualified applicant is selected. It will not be necessary to conduct a separate second lottery in the Private Radio Services.[53] The selective use of lotteries will allow us to address the concerns of the commenters on a case-by-case basis and, we feel, will result in significant public interest benefits. It will enable us to ensure that the public receives private radio service in the quickest way possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. Based on our review of the *Conference Report*, we are convinced that Congress expected us to maintain the option of utilizing lotteries under these circumstances.

103. We are persuaded, in light of the comments favoring the use of comparative criteria in the Private Land Mobile Radio Services (Part 90), that licensees should be selected by lottery in these services only after expedited paper proceedings have shown that the

[53] The *Conference Report* indicates that a second lottery is necessary only after an initial tentative selectee has been determined to be unqualified in the mass media services, because selection probabilities in those cases will have to be recomputed. *Conference Report* at 39–40.

qualifications of the competing applicants are without substantial and material differences. As a procedural matter, Petitions to Deny are not authorized in these services (47 U.S.C. § 309; 47 C.F.R. § 1.962). Prior to the lottery, therefore, we will review informal complaints against applicants and will use "paper" hearing procedures to apply comparative criteria developed in separate proceedings (*e.g.*, Docket 79–191, *supra*). After the paper proceeding, and in light of the number of frequencies available for assignment, those applications that are clearly superior will be granted. Those that are clearly inferior will be denied. Those that are without substantial and material differences will be designated for random selection if frequencies remain available for assignment.

104. After the random selection, having already determined through the paper proceeding that the applicants are qualified to become licensees, any new allegations that the applicants are not qualified to be licensees will be handled through the Petition for Reconsideration process or through license revocation proceedings under 47 U.S.C. § 312.

105. In the other Private Radio Services where licensees may be selected by lottery (Maritime, Aviation and Operational Fixed Microwave Radio Services; Parts 81, 87, and 94), Petitions to Deny may be filed against applicants. The paper proceeding, if any is necessary, will therefore occur after the lottery selection process has been completed. It will be based upon the Petitions to Deny that were filed against the tentative selectee prior to the lottery.

106. In short, the paper proceedings in the Private Land Mobile Services will occur before the lottery and will be used to ensure that only those applications without substantial and material differences are designated for lottery selection. On the other hand, in those Private Radio Services where Petitions to Deny are authorized, we will require that the Petitions be filed before the lottery and only those that have been filed against the tentative selectee will be reviewed after the lottery is conducted. Paper proceedings, if necessary in light of the Petitions to Deny, will be held at that point. In both situations, only qualified applicants will receive license grants. In the Private Land Mobile Services, this will be determined by paper proceedings held before the lottery. In the other Private Radio Services, it will be guaranteed by the Petition to Deny process.

107. Any paper proceeding in the Private Radio Services will be administered by the Commission. The Commission will receive the evidence and issue the final decision awarding licenses to applicants and/or designating applications for random selection. The Private Radio Bureau will serve as advisor to the Commission and will be responsible for reviewing pleadings and preparing a draft of the final decision. The Bureau will not appear as a party unless the Commission orders it to do so in a particular case. If the Bureau participates as a party, it will do so through separated counsel.

108. A public notice will start the paper proceedings. The notice will identify the applications involved and will include the hearing designation order, the issues, and the pleading schedule and procedures to be followed by the parties in the paper proceedings. Because of the Private Radio Bureau's role as advisor to the Commission regarding these applications, the Chief, Private Radio Bureau and his staff will be considered to be decision-making Commission personnel for purposes of *ex parte* contacts regarding any hearing conducted pursuant to these procedures. However, should any of his staff be designated as separated counsel for the purpose of participation as a party in any hearing, they will be non-decision-making personnel.

109. If the Commission concludes that an oral proceeding is necessary, it will issue an interlocutory order directing an Administrative Law Judge to hear a particular issue or issues. The order will specify the issue or issues and will establish the procedures to be followed.

110. At the conclusion of the paper proceedings for Private Land Mobile licenses, applications will be granted, denied or designated for random selection. In the other Private Radio Services, at the conclusion of the paper proceeding tentative selectee will receive license grants or will be determined to be unqualified. If it is determined that a tentative selectee in any of the Private Radio Services is unqualified after a lottery has been conducted, the license will be awarded to the next tentative selectee selected from the same lottery.

111. As stated in the *Conference Report* at 46, we expect the lottery procedures for these non-media services to be "extremely simple." Public Notices will specify the date, time, location of, and additional procedures for lotteries in the Private Radio Services.

VII. *Common Carrier Comments*

112. All of the comments addressing the issue of lotteries in the Cellular Radio Service supported the exclusion of cellular service from lottery procedures. Many parties opposed using lotteries in the rural radio and offshore radio services. Some parties also suggested that some or all of the public land mobile services be excluded, particularly in cases where an applicant proposes to expand an existing system, either by adding a frequency or by proposing a wide-area system. Some parties questioned whether a lottery would expedite application processing and suggested higher threshold financial and technical standards. Concerns were raised by some commenters regarding trafficking and spectrum warehousing. One party requested that preferences be awarded for local ownership and non-profit cooperatives. Finally, one party opposed lotteries on the grounds that they may be inconsistent with State certification procedures.

VIII. *Common Carrier Services Discussion*

113. *Lotteries in the Public Mobile Service.* In the *Notice*, we proposed to conduct lotteries for mutually exclusive applications in all of the public mobile land services except for the Cellular Radio Service.[54] In our discussion, we referred to new allocations for 35 MHz paging (CC Docket No. 80–189) and 900 MHz paging (Gen. Docket No. 80–183) and to the extremely large number of applications which were expected for these new frequencies. Thus far we have received nearly 6,500 applications for the frequencies. A substantial number of these applications involve mutually exclusive ("MX") situations. We also expressed our skepticism that existing criteria will provide a meaningful mechanism for selecting among MX applicants and cited the overwhelming administrative burden of comparative proceedings for all the anticipated MX applications.

114. Some of the comments suggest that a lottery is inappropriate in the public land mobile services and that, in making its common carrier proposal, the Commission failed to consider the four factors listed in the *Conference Report*. We discuss these factors and findings related to them at this point. First, there is a large number of licenses available (including licenses for systems operating on previously allocated frequencies). Second, there is a potentially large number of mutually exclusive applications.[55] Third, there is a significant back-log which a lottery will reduce. The fourth criterion, diversity of information sources, does not apply to these services. Our decision to apply a lottery to the public land mobile services is based instead on the strong applicability of the other three tests.[56] We conclude, therefore, that a lottery is appropriate for the public land mobile service.

115. Some of the comments (Telocator's, for example), while not objecting to the use of a lottery in these services, oppose its application to all frequency bands. The comments suggest that the Commission distinguish between the newly allocated frequencies (for which, in limited cases, they support a lottery) and the rest of the land mobile frequencies (for which the comments oppose a lottery). The parties refer to the following language in the *Conference Report*: "Relevant factors for the Commission's consideration. . . include . . . whether there is a large number of mutually exclusive applications

[54] The public mobile services include paging, two-way land mobile telephone service, two-way air-ground service, offshore telecommunications service, rural radio service, and cellular radio service. The cellular radio service is not included in this proposal for implementing lottery rules.

[55] The precise number of mutually exclusive applications will not be determined until the 900 MHz applications are loaded into the automated data base and analyzed.

[56] See below, however, our discussion of the rural radio and offshore services.

for each license, for example, *when a new service is initiated.*" *Conference Report* at 37, (emphasis added).

116. In our view, the above position is based on a confusion of the term "newly allocated frequency band" and the term "new service". While the *Conference Report* uses "new service," it did so only as an example of a situation where a back-log of applications might occur. The pertinent legislation was written in the context of, but was not confined to, the initiation of low-power television, which clearly is a new service. The allocation of additional frequencies for public land mobile service is not, strictly speaking, the initiation of a new service. Therefore, in implementing a lottery, we seek not simply to expedite low band and 900 MHz applications, but all public land mobile applications. While the bulk of our back-log of applications will be for newly allocated frequencies, all applications are processed similarly and are of equal priority. All land mobile applications will therefore be expedited by a lottery, not just those for newly allocated frequencies.

117. *New and Existing Systems.* Telocator further opposes the use of a lottery in cases where an applicant requests an additional frequency to develop a wide-area system or to relieve congestion on a trunked mobile telephone system. Initially, we note that paging systems do not use trunking, so the argument as to congestion relief is of limited applicability to this discussion. The newly-allocated frequencies are for paging. The bulk of the anticipated back-log is related to these new frequencies, and not to situations where existing licensees seek additional two-way frequencies to relieve congestion on mobile telephone systems. The Commission is nevertheless mindful of the competing interests of new applicants seeking a first channel and established carriers who seek to enhance their existing systems. In our view, the solution to this problem is to make additional frequencies available, so that all parties, whether new entrants or established carriers, may have access to frequencies. Our recent allocation for cellular radio has responded to this problem, as have the low-band and 900 MHz allocations for paging. The lottery, on the other hand, is not designed to relieve frequency shortages but rather to expedite the licensing process, so that all applicants, whether new entrants or existing carriers seeking another frequency, may have their applications expedited. We also note that, even under the present rules, established carriers receive no preference over new entrants in a comparative proceeding, so a lottery does not place established carriers in a less advantageous position *vis a vis* new entrants.

118. The Commission is also aware of the desire of carriers to obtain additional frequencies to provide wide-area service. In the 900 MHz allocation, we recognized the need for wide-area public mobile service and specified frequencies for network and regional paging systems. *First Report and Order*, 89 FCC 2d 1337 (1982). In describing

how these applications would be processed, the Commission stressed that its purpose was to employ the most expeditious way to equitably process applications and make assignments. *Id.* at para. 49. To accommodate these applicants interested in establishing wide-area systems, we would apply a liberal assignment and transfer policy when licensees wish to trade their 900 MHz frequencies. For example, applicant "A" wishes to construct a wide-area system operating on frequency "1". If in one site, however, applicant "B" obtains frequency "1", and "A" proposes to purchase the constructed facilities from "B" in order to provide service on frequency "1" throughout the entire area, the Commission would give liberal consideration to the assignment application. We propose a similar approach in the case of the lottery procedure, thereby remaining consistent with the Commission's goal of expediting the licensing process while also taking into account the interests of those carriers providing wide-area service.[57]

119. *State Certification and Other Concerns.* In its comments NARUC opposes the lottery on the ground that it may undermine the state certification process for radio common carriers. We reject this view, however, since Section 22.13 will remain in effect, requiring all licensees to comply with all applicable state certification requirements. 47 C.F.R. § 22.13.

120. TDS expresses the concern that lottery winners will engage in trafficking and thus frustrate the lottery's purpose of expediting service to the public. TDS requests that a two-year anti-trafficking provision be applied to lottery winners in the public mobile services. We reject this suggestion. The language discussing the trafficking issue in the *Conference Report* (pp. 45–46) is confined to the mass communications media service and is clearly related to the Conferees' concerns as to preferences awarded in lotteries and the diversity of ownership in those services. No preferences are awarded in the public mobile services and diversity of ownership is not at issue in lotteries involving these carriers. The trafficking issue as it affects the public mobile services is discussed in detail in CC Docket No. 80–57, 47 Fed. Reg. 43842, and goes beyond the scope of the lottery proceeding.

121. TDS requests that proposed rule Section 22.32(g) be amended to explicitly state that no preferences will be awarded in lotteries involving these services. This request is consistent with the intent of

[57] The Commission's 900 MHz proceeding makes provision for nationwide paging systems, a technological advance with which the Commission has not had previous experience. Although in this *Second Report and Order* we implement lottery proceedings for 900 MHz applications in general, we reserve the option to decide in the 900 MHz proceeding whether lotteries are appropriate for applicants proposing network paging systems. *See First Report and Order*, Gen. Docket No. 80–183, 89 FCC 2d 1337 (1982).

the Act (*see Conference Report*, p. 41), and we will revise the rule accordingly.

122. *Offshore and Rural Radio Services.* In the *Notice*, the Commission proposed to include the offshore telecommunications service and the rural radio service in the common carrier lottery. This proposal was widely opposed in the comments, basically on the ground that, using the four factors listed in the *Conference Report*, neither service is appropriate for a lottery. Upon consideration of the four factors, the language in the statute, and the comments, we have concluded that these two services should not presently be included in the lottery proceeding. Neither service involves a large number of licensees or mutually exclusive applications, and neither service has a significant back-log. Moreover, we can perceive no other "salient consideration" that would compel us to use lotteries in these services. *See Conference Report* at 38. We reserve, however, the option of reexaming the applicability of a lottery to either of these services if, in the future, any of the above factors should significantly change. We note in particular that the Commission has recently proposed to allocate additional frequencies in the Offshore telecommunications service. *See Notice of Proposed Rule Making*, Gen. Docket No. 83–45, FCC 83–35, released February 22, 1983. If in the future, the number of mutually exclusive applications in this service should increase substantially, we may at that point propose to implement a lottery to more expeditiously process the applications.

123. *Telephone Cooperatives.* The Bledsoe Telephone Cooperative, Inc. ("Bledsoe") opposes a lottery in common carrier services on the grounds that the procedure would be counterproductive to the provision of quality service needed in rural areas. Bledsoe suggests that preferences be awarded for local ownership and non-profit cooperatives. The Commission is cognizant of the high quality of service provided by non-profit cooperatives, particularly in rural areas where high quality service may not otherwise be available. We have decided above not to use lotteries in the Rural Radio Service; accordingly, our decision implementing lotteries is not likely to affect telephone cooperatives at all.

124. *Pre-Lottery Screening.* Tymnet, Inc., urges the Commission to screen applicants carefully prior to the lottery. We will not engage in such comparative consideration at the pre-lottery stage, nor will we attempt to distinguish between superior and marginally qualified applicants in these common carrier services, as Tymnet suggests. In our many years of regulating these services, we have found the overwhelming majority of carriers to be fully qualified in all respects. Even when a marginal operator is licensed, there is little potential for harm to the public interest because there are many operators in most markets from which customers may choose. Furthermore, most states regulate the market entry or rates, or both, of the radio common carriers and telephone companies

providing mobile services. This serves as an additional, important check on their qualifications. Accordingly, we will not adopt the Tymnet proposal because it would impose time and resource burdens on Bureau staff without achieving significant public interest benefits in the common carrier area.

125. *Common Carrier Procedures.* The Appendix includes rules in Part I and Part 22 outlining procedures to be used for lotteries in the Common Carrier Bureau in general and in the Public Land Mobile Service in particular. Other common carrier services which may in the future use lotteries will be added to the list, after appropriate proceedings, in Section 1.821 ("Scope").[58]

126. Under the common carrier lottery, the same procedures currently set forth in our rules will be followed as to application filing, acceptance or dismissal, public notice, and as to filing of petitions to deny.[59] Where it is determined that properly filed applications are mutually exclusive, a lottery will be held under the direction of the Bureau Chief. No preference will be awarded to common carrier lottery participants, consistent with the language in the Conference Report (p. 41). Pleadings filed against mutually exclusive applications will not be reviewed prior to conducting the lottery. The Commission will hold the lottery and then will review only the pleadings filed against the tentative selectee. This approach conserves staff time ordinarily spent reviewing pleadings filed against non-selected mutually exclusive applications. We believe the filing of Petitions to Deny pre-lottery, although at variance with that to be applied to low power television applications, best suits the individual demands of the common carrier processing function. Compare our discussion at para. 31 *et seq., supra.*

127. The staff will review the selectee's application and related pleadings. If the applicant is qualified, the staff will grant the application. If, however, a substantial and material question of fact remains, the application will be designated for hearing. We retain the option of sending the case to an Administrative Law Judge or to the Commission *en banc* or one or more Commissioners, and our rules reflect that option. Whether the proceedings are conducted by the ALJs or the Commission, they will be based primarily on written submissions. We intend to reduce the expense and delay associated with unlimited discovery, extensive cross-examination and motions to enlarge, and we will specify how those limitations are to apply in each designation order. In those cases referred to ALJs, all appeals

[58] As we noted above, we have reserved the option of deciding in the 900 MHz proceeding (Gen. Docket No. 80–183), whether to include network paging applications in the lottery proceeding.

[59] In general, our rules for conducting a common carrier lottery are inserted in the Part I and other applicable rules parts. General rules for processing applications have been retained and will apply to all situations except those in which a lottery is conducted.

taken by exception to the Initial Decision will go directly to the Commission and will not be subject to intermediate review by the Review Board. *See* note 20, *supra*. If the selectee's application is denied, the Commission will proceed to review the application of, and any pleadings filed against, a second selectee. In the public mobile radio services, the lottery will not only identify a tentative selectee but will also rank the applicants so that, if the first selectee is ultimately disqualified, the second (and third, and so on) selectee will have already been identified.

VIII. *Conclusion.*

128. We believe that the actions we have taken in this proceeding represent a prudent exercise of our administrative discretion. We have attempted to implement the lottery statute in a manner that best serves the public interest. This is the Commission's first experience with lotteries; we plan to use our random selection authority cautiously.

129. Lottery processing may be used in those services enumerated above where the lead application was filed on or after August 14, 1981 (the effective date of the first lottery statute). In addition, all pending applications in the low power television and television translator service will be subject to a lottery, including those filed prior to August 14, 1981. *See* paras. 23–25 *supra*.

130. Some of the rules as initially proposed in the *Notice* have been modified after careful consideration of the statute, legislative history and numerous comments. Further rule makings may be necessary to fully develop the Commission's lottery program.

131. Although this Commission is always chary of imposing new regulations on the communications industry, we believe in this case that the benefits of the lottery regulations far outweigh their costs. Lotteries will help speed provision of service to the public by eliminating the costly and time consuming comparative hearings while still maintaining some relative advantage for minorities and others underrepresented in the ownership of mass media facilities. The Commission holds great hope for lotteries, particularly in implementing new services such as LPTV and 800 MHz.

132. *Paperwork Reduction Act.* In accordance with 44 U.S.C. § 3501 *et seq.* and Executive Order No. 12291, the Commission submitted a copy of the *Notice* to OMB for review and comment. OMB's comments were necessary because the NPRM postulated that the rule making could result in additional paper work requirements on applicants for communications licenses. OMB expressed general support for the lottery proposal and made no specific objection to the proposal for applicant certification of preference eligibility. OMB did, however, request the Commission to submit for review any additional information requirements such as new or revised forms

that may result from this proceeding. In accordance with that request, we will seek OMB comment on revised FCC Form 346.

X. *Regulatory Flexibility Act - Final Analysis.*

133. *Need for and Purpose of Rules.* The Commission proposed the subject lottery rules to implement its recently amended random selection authority. The use of lotteries to select licensees from among competing applicants, it is expected, will serve the public interest by significantly decreasing the cost and delay of traditional comparative hearings. Moreover, safeguards are built into the random selection system so that only fully-qualified applicants receive licenses through the lottery process.

134. *Comments.* Apparently, no comments were received that directly addressed the initial regulatory flexibility analysis.

135. *Alternatives Considered.* As noted in our initial flexibility analysis, there are two alternatives to the lottery proposal. One is to retain traditional comparative hearings; the other is to employ auction techniques. In view of the Congressional direction to implement a licensing lottery, we concluded that there was no practical alternative to establishing lottery procedures.

XI. *Other Matters.*

136. In view of the foregoing and pursuant to Sections 1, 3, 4(i) and (j), 303, 309 and 403 of the Communications Act of 1934, as amended (47 U.S.C. §§ 151–609), it is HEREBY ORDERED that the action taken herein is effective July 5, 1983.

137. It is FURTHER ORDERED that revised FCC Form 346 is amended, as set forth in Appendix D, effective upon receipt of approval from the Office of Management and Budget.

138. It is FURTHER ORDERED that all Petitions to Deny and informal objections pending against any application in the low power television and television translator service are hereby dismissed.

139. It is FURTHER ORDERED, that all applicants who have filed multiple applications inconsistent with Section 73.3521, adopted herein, shall withdraw such applications as are necessary to remedy the conflict no later than thirty days following the effective date of the action taken herein.

140. For general information regarding this proceeding contact Randy Thomas, Office of General Counsel (202) 632–6990. For specific information relating to the use of lotteries in the Common Carrier Service contact Michael Menius (202) 632–6450; Mass Media Service contact Barbara Kreisman (202) 632–3894; or Private Radio Service contact John Richards (202) 634–2443.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendixes B and D -may be seen in FCC Dockets Branch.

APPENDIX A

Comments

American Association of State Highway and Transportation Officials, Special Committee on Communications

American Legal Foundation

American Newspaper Publishers Association

American Telephone and Telegraph Company

Associated Public-Safety Communications Officers, Inc.

Association of American Railroads

Bledsoe Telephone Cooperative, Inc.

CBS, Inc.

Center City Broadcasting, Inc.

Corporation for Public Broadcasting

Cox Communications, Inc.

Daly, Joyce & Borsari

Forest Industries Telecommunications

Frontier Broadcasting Companies

Geller, Henry and Donna Lampert

GTE Service Corporation

International Broadcasting Network

KIRO, Inc.

Local Power Television, Inc.

MCI Airsignal, Inc.

Microband Corporation of America

Mobile Marine Radio, Inc.

Motorola, Inc.

National Association of Broadcasters

National Association of Business and Educational Radio, Inc.

National Association of Regulatory Utility Commissioners

National Conference of Black Lawyers

National Latino Media Coalition (NLMC *et al.*)/Black Citizens for a Fair Media/Telecommunications Research and Action Center/National Association for Better Broadcasting and League of United Latin American Citizens

Offshore Telephone Company

Paul, Hastings, Janofsky & Walker

Pierce, Mark

Press Broadcasting Company

Pride, Pamela

Radio and Television Commission of the Southern Baptist Convention/American Christian Television System, Inc.

Shreveport Metro Communications/Roanoke Media/Horizon Communications

Spanish International Network (and Affiliated Low Power Television Applicants)

Special Industrial Radio Service Association, Inc.

Telephone and Data Systems, Inc.

The Television Center, Inc.

Telocator Network of America

TRT Telecommunications Corporation

Tymnet, Inc.

United Church of Christ, Office of Communication

Utilities Telecommunications Council

Waterway Communications System, Inc.

Youth News (Comments submitted by Media Access Project on behalf of Youth News)

Late-Filed Comments

Community Television Network

County of Los Angeles

Los Angeles' County Sheriff's Department

Informal (Late) Comments

Office of Management and Budget

Palomar Communications

Parallel Communications Corporation

Reply Comments

American Telephone & Telegraph Company

Association of American Railroads

Forest Industries Telecommunications

MCI Airsignal, Inc.

National Black Media Coalition

National Latino Media Coalition, *et al.*

Spanish International Network

Appendix C - New Rules

Part 1 - Practice and Procedure

Subpart A - General Rules of Practice and Procedure

1. § 1.65 is amended to read as follows:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except where paragraph (b) applies, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Except where paragraph (b) applies, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

(b) Changes in information relating to § 1.1622, lottery preferences, must be furnished to the Commission no more than 7 days after the changes occurs until (1) in the case of a non-mutually exclusive application, the Commission releases the Public Notice proposing the application for grant; or (2) in the case of a mutually exclusive application, the Commission releases the final Public Notice announcing the acceptance of the last-filed mutually exclusive application.

2. § 1.227(a)(2) is amended to read as follows:

§ 1.227 Consolidations.

* * * * *

(2) Any applications which present conflicting claims, except where a random selection process is used.

* * * * *

3. In § 1.227, Subparagraph (b)(1) is amended to read as follows:

(b)(1) In broadcast cases, except as provided in subparagraph (5) of this paragraph, and except as otherwise provided in § 1.1601, *et seq.*, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended so as to require a new file number, is substantially complete and tendered for filing by the close of business on the day preceding the day designated by Public Notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

4. § 1.227, subparagraph (b)(3) is amended to read as follow:

(3) Common carrier cases

(i) General rule

Where an application is-mutually exclusive with a previously filed application, the second application will be entitled to comparative consideration with the first or entitled to be included in a random selection process, only if the second has been properly filed at least one day before the Commission takes action on the first application. Specifically, the later filed application must have been received by the Commission, in a condition acceptable for filing, before the close of business on the day prior to the grant date or designation date of the earlier filed application.

(ii) Domestic public fixed and public mobile

See Rule sections 21.31 and 22.31 for the requirements as to mutually exclusive applications. See also rule Sections 21.23 and 22.23 for the requirements as to amendments of applications.

(iii) Public coast stations (Maritime mobile service) See subparagraph (b)(4) of this section.

5. In § 1.227, subparagraph (b)(4) is amended to read as follows:

(4) In cases of applications filed in the Private Radio Services, except as otherwise provided in § 1.972, any application that is mutually exclusive with another application or applications will be consolidated for hearing with such other application or applications only if the later application in question is substantially complete and tendered for filing by whichever date is earlier: (i) Not later than the close of business 1 business day before the Commission adopted an order which first designated for hearing the prior application or applications with which such application is in conflict; or (ii) within 60 days after the date of public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing. An application which is substantially amended by a major change (*i.e.*, substantial change as defined by § 1.962(c)) will, for the purpose of this section, be considered to be a newly filed application.

6. In Part 1, § 1.821 is added to read as follows:

§ 1.821 Scope.

Where action on applications is permitted by the Chief, Common Carrier Bureau, under delegated authority, the provisions of this section, including provisions incorporated by reference, shall apply to applications for initial licenses for stations in the Public Land Mobile Service (See Subpart G, Part 22).

7. In Part 1, § 1.822 is added to read as follows:

§ 1.822 Grants by random selection.

(a) Applications in the common carrier services specified in § 1.821 ("Scope") shall be filed, accepted or dismissed, placed on public notice, and subject to Petitions to Deny according to the rules established for the specific service.

(b) If there are mutually exclusive applications for an initial license, the Commission may use a random selection process. Each such random selection shall be conducted under the direction of the Chief of the Common Carrier Bureau. The random selection shall pick a tentative selectee and then repeat the random *selection process* with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked *in* order as alternative selectees. Pleadings filed against these applications will not be reviewed prior to conducting the random selection. No preferences shall be awarded to participants. Following the random selection, the Commission shall

announce the tentative selectee and determine whether this applicant is qualified to receive the license. Petitions to Deny and other pleadings properly filed against the selectee's application will be reviewed. If the Commission determines that the tentative selectee is qualified, it shall grant the application. Parties shall not file petitions for reconsideration, motions to stay or applications for review at the time that a tentative selectee is announced. Instead, such pleadings may be submitted at the time when the Commission grants or denies the application. The filing periods specified in the rules shall apply for such pleadings.

8. In Part 1, § 1.823 is added to read as follows:

§ 1.823 Post-selection hearings.

(a) If, after reviewing the selectee's application and pleadings properly filed against it, the Commission determines that a substantial and material question of fact exists, it shall designate the qualifying issue(s) for an expedited hearing.

(b) Expedited hearing procedures.

(i) Hearings may be conducted by the Commission or an Administrative Law Judge. In the case of a question which requires oral testimony for its resolution, the hearing will be conducted by an Administrative Law Judge.

(ii) Parties have ten (10) days from publication in the Federal Register of the hearing designation order to file notices of appearance.

(iii) When the Commission, under § 1.221, issues an order stating the time, place, and nature of the hearing, this order shall instruct the applicant to submit its direct case in writing within thirty (30) days from the order's release date, or as otherwise specified in the order. The direct written case must set forth all those facts and circumstances related to the issues in the designation order. Documentary evidence upon which the applicant relies must be attached. Each exhibit must be numbered and must be accompanied by an affidavit from someone who has personal knowledge of the facts in the submission and who attests to the truth of the submission.

(iv) The order will also specify those petitioners that directly raised an issue which was designated and will inform these parties of their opportunity to submit a written rebuttal case within twenty (20) days after the direct case is due. The procedures in paragraph (iii) will apply as to documentary evidence, exhibits, and affidavits.

(v) Appeal of initial decisions rendered by an Administrative Law Judge shall lie with the Commission.

Subpart F - Private Radio Services Applications and Proceedings

9. In § 1.918, a new paragraph (d) is added and paragraph (d) is redesignated as (e), to read as follows:

§ 1.918 Amendment of applications.

* * * * *

(e) A request to amend an application after it has been designated for random selection pursuant to § 1.972 will be considered only upon written petition addressed to the Chief, Private Radio Bureau and will be granted only for good cause shown. A petition which requests a substantial change in the application or which affects the lottery probabilities of other applicants must be accompanied by a signed statement of a person with knowledge of the relevant facts and must specify with particularity why such change is necessary and whether or not consideration has been promised to or received by the petitioner, directly or

indirectly, in connection with the filing of such petition for amendment. If consideration has been promised or received, the statement shall set forth all the relevant facts with sufficient detail to enable the Chief, Private Radio Bureau to determine whether and to what extent, if any, the consideration represents only the reasonable costs of prosecuting the petitioner's application. Redesignate paragraph (d) as (e).

10. In § 1.953, paragraph (a) is amended to read as follows:

§ 1.953 How applications are processed.

(a) Applications are processed in sequence according to date of filing, or pursuant to the system of random selection prescribed in § 1.972 of this part. Applications which are in accordance with the provisions of this chapter and established policies of the Commission may be processed to completion in accordance with the applicable delegations of authority as set forth in Part O of this chapter.

• • • • •

11. A new § 1.972 is added to read as follows:

§ 1.972 Grants by random selection.

(a) The provisions of this section, including provisions incorporated by reference, may apply to applications for initial licenses:

(i) for stations in the following Private Radio Services: Part 81 - Stations on Land in the Maritime Services Part 87 - Aviation Services

Part 90 - Private Land Mobile Services

Part 94 - Private Operational-Fixed Microwave Service

(ii) In any other proceedings in the Private Radio Services in which the Commission determines that there is no material difference in competing applicants' abilities to serve the public interest.

(b) Applications in the services specified above shall be tendered, filed, accepted or dismissed, publicly noted, and subject to Petitions to Deny in accordance with Section 1.962 and the rules and policies established for each respective service.

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 81 or Part 87, or if there are more applications for initial licenses in Part 90 or Part 94 than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Expedited hearing proceedings may be used to apply comparative criteria in specified radio services to determine which applications will be granted, denied or subject to the random selection. Each such random selection shall be conducted under the direction of the Chief of the Private Radio Bureau. The selection percentages, preferences, and probability calculations prescribed in Section 1.1621 *et seq.* of this part shall not be applicable to any system of random selection conducted in the Private Radio Bureau. Following the random selection, the Commission shall announce the tentative selectee and determine whether the tentative selectee is qualified to receive the license under the rules applicable to the respective service. Where authorized under Section 1.962, Petitions to Deny which have been filed against the tentative selectee before the random selection will be reviewed and processed prior to grant, in accordance with Section 1.962 and those rules applicable to each respective service. If the Commission determines that the tentative selectee has satisfied all requirements, it shall grant the application. If it is determined that an initial tentative selectee is not qualified to receive the license grant, another tentative selectee chosen from among the same applicant pool during the same random selection will be designated until a

qualified applicant is selected. If the Commission determines that a substantial and material question of fact exists, it shall designate the question for hearing. Hearings may be conducted by the Commission or the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge.

* * * * *

12. Section 1.973 is amended to read as follows:

§ 1.973 Designation for hearing.

(a) If the Commission is unable to make the findings prescribed in § 1.971(a) and does not utilize the system of random selection prescribed in § 1.972 of this part, it will formally designate the application for hearing on the grounds or reasons then obtaining and will notify the applicant and all other known parties in interest of such action.

(b) Orders designating applications for hearing will specify with particularity the matters in issue.

(c) Parties in interest, if any, who are not notified by the Commission of its action in designating a particular application for hearing may acquire the status of a party to the proceeding by filing a petition for intervention showing the basis of their interest not more than 30 days after publication in the Federal Register of the hearing issues or any substantial amendment thereto.

(d) The applicant and all other parties in interest shall be permitted to participate in any hearing subsequently held upon such applications. Hearings may be conducted by the Commission or by the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge. The burden of proceeding with the introduction of evidence and burden of proof shall be upon the applicant, except that with respect to any issue presented by a Petition to Deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission or the Chief of the Private Radio Bureau.

* * * * *

13. Subpart L is added to 47 CFR Part 1 to read as follows:

Subpart L - Random Selection Procedures for Mass Media Services

General Procedures

§ 1.1601 Scope.

The provisions of this subpart, including provisions incorporated by reference, shall apply to applications for initial licenses or construction permits or for major changes in the facilities of authorized stations in the following services:

(a) Low Power Television and Television Translator Broadcasting

§ 1.1602 Designation for random selection.

(a) Applications in the services specified in Section 1.1601 shall be tendered, accepted or dismissed, filed, publicly noted and subject to random selection and hearing in accordance with any relevant rules. Competing applications for an initial license or construction permit shall be designated for random selection and hearing in accordance with the procedures set forth below.

§ 1.1603 Conduct of random selection.

(a) Each random selection shall be conducted under the direction of the Chief of the Mass Media Bureau, or his designee.

(b) The random selection probabilities will be calculated in accordance with the formula set out in rules 1.1621–1.1623.

§ 1.1604 Post-selection hearings.

(a) Following the random selection, the Commission shall announce the "tentative selectee" and, where permitted by Section 73.3584 invite Petitions to Deny its application. Following the responsive pleadings thereto, the Commission shall:

(1) in the case of low power television stations, take action pursuant to either rule 73.3591, 73.3592 or 73.3593,

(b) If, after such hearing as may be necessary, the Commission determines that the "tentative selectee" has met the requirements of rule 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question for hearing. Hearings may be conducted by the Commission or, in the case of a matter which requires oral testimony for its resolution, an Administrative Law Judge.

§ 1.1621 Definitions.

(a) Medium of mass communications means

(1) A daily newspaper; and a license or construction permit for

(2) a television (including low power TV or TV translator) station,

(3) a standard (AM) radio station,

(4) an FM radio station,

(5) a direct broadcast satellite transponder under the editorial control of the licensee, and

(6) a cable television system.

(b) Minority group means

(1) Blacks,

(2) Hispanics,

(3) American Indians,

(4) Alaska Natives,

(5) Asians, and

(6) Pacific Islanders.

(c) Owner means the applicant and any individual, partnership, trust, unincorporated association, or corporation which

(1) if the applicant is a proprietorship, is the proprietor,

(2) if the applicant is a partnership, holds any partnership interest,

(3) if the applicant is a trust, is the beneficiary thereof,

(4) if the applicant is an unincorporated association or non-stock corporation, is a member, or, in the case of a nonmembership association or corporation, a director,

(5) if the applicant is a stock corporation, is the beneficial owner of voting shares.

NOTE 1: For purposes of applying the diversity preference to such entities only the other ownership interests of those with a 1% or more beneficial interest in the entity will be cognizable.

NOTE 2: For the purposes of this section, a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

NOTE 3: For the purposes of applying the diversity preference, the ownership interests of the spouse of an applicant's principal will not presumptively be attributed to the applicant.

§ 1.1622 Preferences.

(a) Any applicant desiring a preference in the random selection shall so indicate as part of its application. Such an applicant shall list any owner who owns all or part of a medium of mass communications or who is a member of a minority group, together with a precise identification of the ownership interest held in such medium of mass communications or name of the minority group, respectively. Such an applicant shall also state whether more than 50% of the ownership interests in it are held by members of minority groups and the number of media of mass communications more than 50% of whose ownership interests are held by the applicant and/or its owners.

(b) Preference factors as incorporated in the percentage calculations in Section 1.1623, shall be granted as follows:

(1) Applicants, more than 50% of whose ownership interests are held by members of minority groups - 2:1.

(2) Applicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications - 2:1.

(3) Applicants whose owners in the aggregate hold more than 50% of the ownership interest in one, two or three other media of mass communications - 1.5:1.

(c) Applicants may receive preferences pursuant to § 1.1622(b)(1) and either § 1.1622(b)(2) or (b)(3).

(d) Preferences will be determined on the basis of ownership interests as of the date of release of the latest Public Notice announcing the acceptance of the last-filed mutually exclusive application.

(e) No preferences pursuant to § 1.1622(b)(2) or (b)(3) shall be granted to any LPTV applicant whose owners, when aggregated, have an ownership interest of more than 50 per cent in the following media of mass communications, if the service areas of those media as described herein wholly encompass or are encompassed by the protected predicted contour, computed in accordance with Section 74.707(a), of the low power TV or TV translator station for which the license or permit is sought:

(1) AM broadcast station — predicted or measured 2 mV/m groundwave contour, computed in accordance with Sections 73.183 or 73.186;

(2) FM broadcast station — predicted 1 mV/m contour, computed in accordance with Section 73.313;

(3) TV broadcast station — Grade A contour, computed in accordance with Section 73.684;

(4) Low power TV or TV translator station — protected predicted contour, computed in accordance with Section 74.707(a);

(5) Cable television system franchise area, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the franchise area of a cable system in which its owners in the aggregate, have an ownership interest of more than 50 percent.

(6) Daily newspaper community of publication, nor will the diversity preference be available to applicants whose proposed transmitter site is located within the community of publication of a daily newspaper in which its owners, in the aggregate have an ownership interest of more than 50 percent.

§ 1.1623 Probability calculation.

(a) All calculations shall be computed to no less than three significant digits. Probabilities will be truncated to the number of significant digits used in a particular lottery.

(b) Divide the total number of applicants into 1.00 to determine pre-preference probabilities.

(c) Multiply each applicant's pre-preference probability by the applicable preference from Sections 1.1622(b)(2) or (b)(3).

(d) Divide each applicant's probability pursuant to (c) by the sum of such probabilities to determine intermediate probabilities.

(e) Add the intermediate probabilities of all applicants who received a preference pursuant to Sections 1.1622(b)(2) or (b)(3).

(f)(1) If the sum pursuant to (e) is .40 or greater, proceed to subparagraph (g).

(2) If the sum pursuant to (e) is less than .40, then multiply each such intermediate probability by the ratio of .40 to such sum. Divide .60 by the number of applicants who did not receive a preference pursuant to Sections 1.1622(b)(2) or (b)(3) to determine their new intermediate probabilities.

(g) Multiply each applicant's probability pursuant to (f) by the applicable preference ratio from rule 1.1622(b)(1).

(h) Divide each applicant's probability pursuant to (g) by the sum of such probabilities to determine the final selection percentage.

PART 22 - PUBLIC MOBILE RADIO SERVICES

Subpart B - Applications and Licenses

Common Carrier Mobile Service Rules

14. In § 22.23, paragraph (a) is amended to read as follows:

§ 22.23 Amendment of applications.

(a) *Amendments as of right.* A pending application may be amended as a matter of right within 90 days from the filing date of the application, provided that:

(1) Amendments shall comply with § 22.29, as applicable; and

(2) No amendment to an application will be permitted after a Petition to Deny has

been filed unless the amendment responds to all objections raised in all petitions such that any petitions may be dismissed.

15. In § 22.23, paragraph (b) is amended to read as follows:

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or selected under the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

16. In § 22.28, paragraph (a) is amended to read as follows:

§ 22.28 Dismissal and return of applications.

(a) Except as provided under § 22.29, any application may be dismissed withut prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of § 22.29 as appropriate.

17. In § 22.28, paragraph (b) is amended to read as follows:

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of § 22.29 (whenever applicable) and demonstrates good cause.

18. In § 22.28, paragraph (c) is amended to read as follows:

The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to selection under the random selection process, but dismissal may be made with prejudice for unsatisfactory compliance with § 22.29 or after designation for hearing or after selection under the random selection process.

19. In § 22.31, paragraph (b) is amended to read as follows:

(b) An application will be entitled to comparative consideration with one or more conflicting applications (and, in specified services in this Rules Part, included in a random selection process) only if:

* * * * *

20. In § 22.31, paragraph (c) is amended to read as follows:

(c) Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. (For example, applications A, B and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be considered comparatively with B (or, where applicable, included in the random selection process), C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.)

21. In § 22.31, subparagraph (e)(1) is amended to read as follows:

(1) The application has been designated for hearing under the random selection process, or for comparative hearing, or for comparative evaluation pursuant to § 22.35, and the Commission or the presiding officer accepts the amendment pursuant to § 22.23(b);

* * * * *

22. In § 22.31, subparagraph (e)(4) is amended to read as follows:

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 22.29 whereby two or more applicants entitled to participate in a random selection process join in one or more of the existing applications and request dismissal of their other application(s) to avoid the random selection process.

23. In § 22.32, paragraph (b) is amended to read as follows:

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to a post-random selection hearing or to comparative consideration pursuant to § 22.31 with another application(s), except where the competing applicants have chosen the comparative evaluation procedure of § 22.35 and a grant may be made under that procedure;

* * * * *

24. In § 22.32, paragraph (e) is amended to read as follows:

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented;

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements.

25. In § 22.32, paragraph (f) is amended to read as follows:

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this chapter.

26. In § 22.32, paragraph (g) is amended to read as follows:

(g) Whenever the public interest would be served, the Commission may grant one or more mutually exclusive applications expressly conditioned upon final action on the applications, and then either conduct a random selection process (in specified services under this Rules Part), or designate all mutually exclusive applications for a formal evidentiary hearing or (whenever so requested) follow the comparative evaluation procedures of § 22.35, as appropriate, if it appears:

* * * * *

27. In § 22.35, paragraph (a) is amended to read as follows:

§ 22.35 Comparative evaluation of mutually exclusive applications.

(a) In order to expedite action on mutually exclusive applications, in services under this Rules Part where the random selection process does not apply, the applicants may request the Commission to consider their applications without a formal hearing in accordance with the summary procedure outlined in paragraph (b) of this section, if:

* * * * *

28. In Part 22, § 22.525 is added to read as follows:

§ 22.525 Grants by random selection.

(a) If a properly filed application for an initial license in the Public Land Mobile Service is mutually exclusive with another such application, the applicants shall be included in the random selection process set forth in Part I, §§ 1.821 *et seq.* No preferences shall be awarded. Renewal applications shall not be included in a random selection process.

Part 73 *RADIO BROADCAST SERVICES*

Subpart H - *Rules Applicable in Common to Broadcast Stations*

29. Part 73 is amended by adding a new § 73.3521 to read as follows:

§ 73.3521 Mutually exclusive applications for low power television and television translator stations. When there is a pending application for a new low power television or television translator station, or for major changes in an existing station, no other application which would be directly mutually exclusive with the pending application may be filed by the same applicant or by any applicant in which any individual in common with the pending application has any interest, direct or indirect, except that interests of less than 1% will not be considered.

30. In § 73.3522, paragraph (a) is amended to read as follows:

§ 73.3522 Amendment of applications.

(a) Predesignation amendment.

(1) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573 and 73.3580, and except as provided in (2) of this paragraph, any application, other than an application for a low power TV or TV translator station, may be amended as a matter of right prior to the adoption date of an order designating such applications for hearing, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 73.3513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner.

(2) Subject to the provisions of §§ 73.3525, 73.3571, 73.3572, 73.3573, and 73.3580, and except for applications for low power TV or TV translator stations, mutually exclusive broadcast applications may be amended as a matter of right by the date specified (not less than 90 days after publication) in FCC's public notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent applications prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(3) Subject to the provisions of Sections 73.3525, 73.3572 and 73.3580, and except as provided in (4) of this paragraph, any application for low power TV and TV translators may be amended at any time.

(4) No applicant for a low power TV and TV translator station which is mutually exclusive can improve its status with respect to Section 1.1622 by amendment of its application subsequent to the release of the initial Public Notice announcing the public lottery that will resolve the applicant's mutually exclusivity pursuant to Sections 1.1601 *et seq.*, notwithstanding the requirements of Section 1.65.

(5) Subsection (b) and (c) of this paragraph are not applicable to applications for low power TV and TV translator stations.

* * * * *

31. In § 73.3564, paragraph (c) is revised to read as follows:

§ 73.3564 Acceptance of applications.

* * * * *

(c) At regular intervals the FCC will issue a Public Notice listing all applications and major amendments thereto which have been accepted for filing. Pursuant to § 73.3571(c), 73.3572(c), and 73.3573(d), such notice shall establish a cut-off date (not less than 30 days from the date of issuance) for the filing of mutually exclusive applications and, except in the case of low power TV and TV translator applications, Petitions to Deny. However, no application will be accepted for filing until a statement establishing compliance with the local notice requirements of § 73.3580 has been received by the FCC.

32. In § 73.3572, paragraphs (c), (d) and (e) are revised and a new (f) is added to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, and TV translator station applications.

* * * * *

(c) Applications for TV stations, other than low power TV and TV translator stations, will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

(d) Except for applications for low power TV and TV translator stations, regardless of the number of applications filed for channels in a city or the number of assignments available in that city, those applications which are mutually exclusive, *i.e.*, which request the same channel, will be designated for hearing. All other applications for channels will, if the applicants are duly qualified, receive grants. For example, if Channels 6, 13, 47, and 53 have been assigned to City X and there are pending two applications for Channel 6 and one application for each of the remaining channels, the latter three applications will be considered grants without hearing and the two mutually exclusive applications requesting Channel 6 will be designated for hearing. If there are two pending applications for Channel 6 and two applications for Channel 13, separate hearings will be held.

(e) Where applications, other than applications for low power TV and TV translators stations, are mutually exclusive because the distance between the respective proposed transmitter sites is contrary to the station separation requirements set forth in § 73.610, such applications will be processed and

designated for hearing at the time the application with the lower file number is reached for processing. In order to be considered mutually exclusive with a lower file number application, the higher file number application must have been accepted for filing at least one day before the lower file number application has been acted upon by the FCC.

(f) Processing of applications for low power TV and TV translator stations.

(1) Applications for low power TV and TV translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications must be filed.

(2) Subsequently, the FCC will release a Public Notice: (i) establishing a date, time, and place for a public lottery; (ii) accepting for filing previously unaccepted applications which are mutually exclusive with those applications accepted on the previous Public Notice; (iii) designating the listed mutually exclusive applications for public lottery pursuant to the procedures set forth in Sections 1.1601 *et seq.*; and (iv) describing each applicant's certified preferences and selection probabilities and assigning to each applicant a number block. (It will be the applicant's responsibility to notify the Commission, within 30 days of the release of the Public Notice, of any omissions of applications or clerical or mathematical errors in preferences or probabilities. The Commission will not entertain appeals involving these matters if timely notification to the Commission has not been made.) If necessary, the FCC will release subsequent (not less than 30 days after the release of the Public Notice initially announcing the lottery) Public Notices correcting any clerical or mathematical errors and including any previously omitted mutually exclusive applications. The public lottery pursuant to the procedures set forth in Section 1.1601 *et seq.*, will be held no less than 30 days subsequent to the last released Public Notice, whether initial or corrected, announcing the lottery. Subsequent to the lottery, the FCC will release a Public Notice announcing the selection of a tentative selectee resulting from the lottery and providing an opportunity for the filing of Petitions to Deny pursuant to the requirements of Section 73.3584(c). If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of a tentative selectee's application, the same will be granted. Those applications which, due to the lottery, are no longer mutually exclusive with other applications will be announced in a Public Notice proposing the grant of those applications and providing an opportunity for the filing of Petitions to Deny pursuant to Section 73.3584(c). Groups of mutually exclusive applicants remaining after a lottery will be designated for lottery. Applications which are not grantable due to mutually exclusivity with the permittee selected by lottery will be dismissed.

(3) If, upon examination, the FCC is unable to find that the public interest, convenience and necessity will be served by the granting of a lottery tentative selectee's application, and it appears that a hearing may be required, the procedure set forth in Section 73.3593 will be followed. No further action will be taken with reference to the other applications in the lottery group from which the tentative selectee was selected until the tentative selectee's qualifications to be a permittee are resolved. If the tentative selectee is ultimately found to be unqualified to be a permittee, the procedure set forth in subparagraph (f)(2) above will be followed.

(4) The FCC will periodically release a Public Notice proposing for grant those applications which have previously appeared on a Public Notice, but which are not mutually exclusive with any other application, and providing an opportunity for the filing of Petitions to Deny pursuant to Section 73.3584.

NOTE 1: Notwithstanding subparagraph (f)(1) and § 73.3522(a)(3), applications for low power TV and TV translator stations will be processed within the tiered processing framework as set forth in *Notice on Interim Processing*, 45 Fed. Reg. 62004 (published September 17, 1980), *Order Imposing Freeze*, 46 Fed. Reg. 26062 (published May 11, 1981) and *Report and Order in the Matter of Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 47 Fed. Reg. 21468 (published May 18, 1982).

NOTE 2: Pursuant to Section 73.3584(c), the Commission may announce, by the Public Notice designating the applications for public lottery, that a Notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

33. Section 73.3584 is revised to read as follows:

§ 73.3584 Petitions to Deny.

(a) Except in the case of applications for new low power TV or TV translator stations or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to §§ 73.3571(j), 73.3572(b), 73.3573(b), 73.3574(b) or 73.3578) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed prior to the day such applications are granted or designated for hearing; but where the FCC issues a public notice pursuant to the provisions of §§ 73.3571(c), 73.3572(c) or § 73.3573(d), establishing a "cut-off" date, such petitions must be filed by the date specified. In the case of applications for transfers and assignments of construction permits or station licenses, Petitions to Deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the application. In the case of applications for renewal of license, Petitions to Deny may be filed at any time up to the last day for filing mutually exclusive applications under § 73.3516(e). Requests for extension of time to file Petitions to Deny applications for new broadcast stations or major change in the facilities of existing stations or applications for renewal of license will not be granted unless all parties concerned, including the applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible and the granting of an extension warranted.

(b) Except in the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, the applicant may file an opposition to any Petition to Deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 except that as to a Petition to Deny an application for renewal of license, an opposition thereto may be filed within 30 days after the Petition to Deny is filed, and the party that filed the Petition to Deny may reply to the opposition within 20 days after the opposition is due or within 20 days after opposition is filed, whichever is longer. The failure to file an opposition or a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

(c) In the case of applications for new low power TV or TV translator stations, or for major changes in the existing facilities of such stations, any party in interest may file with the Commission a Petition to Deny any application (whether as originally filed or if amended so as to require a new file number pursuant to

Section 73.3572(b)) for which local notice pursuant to Section 73.3580 is required, provided such petitions are filed within 15 days of the FCC Public Notice proposing the application for grant (applicants may file oppositions within 15 days after the Petition to Deny is filed); but where the Commission selects a tentative permittee pursuant to § 1.1601 *et seq.*, Petitions to Deny shall be accepted only if directed against the tentative selectee and filed after issuance of and within 15 days of FCC Public Notice announcing the tentative selectee. The applicant may file an opposition within 15 days after the Petition to Deny is filed. In cases in which the minimum diversity preference provided for in Section 1.1623(f)(1) has been applied, an "objection to diversity claim," and oppositions thereto, may be filed against any applicant receiving a diversity preference, within the same time period provided herein for Petitions and oppositions. In all pleadings, allegations of fact or denials thereof shall be supported by appropriate certification. However, the Commission may announce, by the Public Notice announcing the acceptance of the last-filed mutually exclusive application, that a notice of Petition to Deny will be required to be filed no later than 30 days after issuance of the Public Notice.

(1) If so announced, a Petition to Deny filed against an applicant will not be accepted if filed by a party which failed to timely file a notice of petition, and make service of the notice of petition pursuant to Section 1.47, unless good cause is shown for the failure to file the notice. Good cause includes allegations based on facts that could not previously be discovered with diligence, and fraud or suppression of evidence by the tentative selectee.

(2) The notice of Petition to Deny shall be limited to two pages. The notice shall include specific allegations that concisely state the reasons why the applicant lacks the qualifications to be a licensee or why a grant of the application would be inconsistent with the public interest. The notice shall be supported by certification made by a person or persons having personal knowledge thereof.

(d) Untimely Petitions to Deny, as well as other pleadings in the nature of a Petition to Deny, and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

34. In § 73.3591, paragraph (b) is revised to read as follows:

§ 73.3591 Action on applications.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete, or, in the case of low power TV and TV translator stations, complete and sufficient, and tendered for filing by:

(1) the close of business on the day preceding the day designated by Public Notice as the day the listed application is to be available and ready for processing; or

(2) the date prescribed in § 73.3516(e) in the case of applications which are mutually exclusive with applications for renewal of license of broadcast stations.

* * * * *

35. In § 73.3597, paragraphs (a)(1) and (a)(2), (b)(1) and (c)(1) are revised to read as follows:

§ 73.3597 Procedures on transfer and assignment applications.

(a) * * * * *

(1) The permit or license was not authorized after a comparative hearing or, in the case of low power TV and TV translator stations, the permit or license was not authorized after a lottery in which the permittee or licensee benefited from minority or diversity preferences;

(2) The application involves an FM translator station or FM booster station only;

* * * * *

(b)(1) The commencement date of the one-year period set forth in paragraph (a) of this section shall be the date on which the station initiated program tests in accordance with § 73.1620 or § 74.14.

* * * * *

(c)(1) As used in paragraphs (c) and (d) of this section:

(i) "Unbuilt station" refers to an AM, FM, or TV broadcast station or a low power TV or TV translator station for which a construction permit is outstanding, and, regardless of the stage of physical completion, as to which program tests have not commenced or, if required, been authorized.

* * * * *

PART 81 *STATIONS ON LAND IN THE MARITIME SERVICES*

36. In Part 81, a new § 81.51 is added to read as follows:

§ 81.51 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

PART 87 *AVIATION SERVICES*

37. In Part 87, a new Section 87.48 is added to read as follows:

§ 87.48 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

* * * * *

PART 90 *PRIVATE LAND MOBILE RADIO SERVICES*

38. Section 90.143 is amended to read as follows:

§ 90.143 Grants of applications.

(b) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

Redesignate paragraph (b) as (c).

* * * * *

PART 94 *PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICES*

39. In § 94.37, a new paragraph (c) is added to read as follows:

§ 94.37 Grant of application without hearing.

. . . . .

(c) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter.

. . . . .

SEPARATE STATEMENT OF CHAIRMAN MARK S. FOWLER Re: Lottery Procedures March 31, 1983

I applaud the effort of Congress to empower the Commission to employ a lottery to alleviate the Commission's processing and adjudication burdens and the accompanying delay that selecting among many competing applicants for broadcast or other licenses engenders. A lottery method of selection can assist in the inauguration of new telecommunications services that might otherwise be subject to interminable delay. I would have desired, however, that the lottery system authorized by Congress have offered all qualified license applicants an equal opportunity for success. A nondiscriminatory lottery is not only vastly easier to administer than the skewed lottery architected by Congress, but also reflects a paramount aspiration of this Nation: equal justice or opportunity for all persons under the law. I unequivocally oppose relying on the color of a person's skin to determine whether special preferences should be awarded in seeking communications licenses through a lottery system. The tragic history of race relations in the United States naturally elicits enormous sympathy for those who in the past have suffered grievously on account of race. But this sympathy should not blind us to the constitutional questions raised by the minority preference system and to the unhappy policy implications of enshrining racial preferences into law.

The decisions in *University of California Regents* v. *Bakke* [1] and *Fullilove* v. *Klutznick* [2] established standards by which to test the constitutional validity of a lottery that prefers minority applicants. First, findings must have been made that discrimination existed in a particular industry. Second, a remedial program must be narrowly

[1] 438 U.S. 265 (1978).
[2] 448 U.S. 448 (1980).

tailored to remedy the effects of that past discrimination without excluding other innocent groups from the opportunity to participate in the relevant field. Third, the program must be subject to continuing oversight to assure that it will cause the least possible harm to innocent third parties.

Bakke established the proposition that preferences for minorities may be used only where there have been "judicial, legislative, or administrative findings" of specific instances of discrimination in the field in issue.[3] "Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another,"[4] for there could be no showing of a compelling justification for inflicting competitive disadvantages on innocent individuals.

In *Fullilove*, the Court approved a preferential program for public works contracting but only because Congress had made findings on the basis of "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities . . . ."[5] The absence of any similar findings with respect to the broadcast industry is arguably fatal to the Commission's preferential program. It is clear from the *Bakke* decision that evidence of past discrimination in society at large is insufficient to justify the imposition of an affirmative action program.[6]

There have been no Congressional findings of illegal discrimination in the communications field. In the Conference Report accompanying the Communications Amendment Act of 1982, the Conference Committee made findings that minority goups were "significantly underrepresented in the ownership of telecommunications facilities."[7] Congress, however, omitted any findings that attributed this underrpresentation to illegal discrimination by either governmental or private parties. Underrepresentation in an industry or profession, *simpliciter*, cannot justify racial preferences. *See Bakke* at p. 302.

Even if there had been findings that illegal discrimination in the communications industry had handicapped some minorities in competing for broadcast licenses, the remedy created by the Congress would still be of questionable legitimacy. Central to the Court's holding in *Fullilove* was the doctrine that the preference accorded to minorities must be equivalent to the extent of the past discrimination. Congress, however, has awarded minorities a 2. to 1 lottery preference without findings that this degree of preference accurately reflects the amount of the handicap that might be attributed to putative past discrimination. The preferences awarded

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[3] *Bakke, supra*, at p. 307.
[4] *Ibid*, at p. 309.
[5] *Fullilove, supra*, at p. 477.
[6] *Ibid*, at p. 307.
[7] H. Rep. No. 97-765, 97th Cong. 2nd Sess. (1982) ("Conference Report") at p.45.

extend to all minority applicants, whether or not the applicant has substantial resources or enjoyed the same or better educational or other opportunities compared to a non-preferred applicant.

An affirmative action remedy must be tailored to correspond to the extent of injury traceable to past illegal discrimination, and must be subject to continuing oversight to ensure that it will do the least possible harm to innocent persons disadvantaged thereby.[8] The statute upheld in *Fullilove*, for example, set a goal of devoting 10% of each public works grant to minority businesses, but provided that bids from minorities above ordinary competitive levels need only be entertained to the extent they reflect "costs inflated by the present effects of prior disadvantage and discrimination."[9] With regard to the "continuing oversight requirements," the Communications Amendments Act of 1982 is silent.[10] The program challenged in *Fullilove* was a one-time program, and there was consequently no need for continuing oversight. The lottery preferences, in contrast, can be employed indefinitely, and some type of meaningful oversight would seem to be required to justify a racial classification.

Because the preferential program adopted today impinges on the civil rights of innocent individuals on account of race, I believe it to be constitutionally unsound. I believe that whenever the courts, Congress, or this Commission diverge from a norm of color-blindness, there must be a compelling reason, for, as Justice Stevens has noted, "classifications based on race are potentially so harmful to the entire body politic."[11] No compelling reason animated Congress to etch racial preferences into the lottery system.[12] Too often in our history, policymakers and the courts have caused adverse social repercussions by making ill-advised decisions in matters of race.[13] Indeed, as Justice Stevens further observed, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals."[14]

The victims of the minority preference system are innocent non-preferred persons who are denied equal opportunity to compete for a Commission license. It seems to me that history has demonstrated that when race, class or caste are officially sanctioned as reasons for

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[8] *Bakke*, *supra*, at pp. 308–309.

[9] *Fullilove*, *supra*, at p. 481.

[10] A statement in the Conference Report directs the Commission to furnish annual reports on the effect of § 309(i)(3) (Conference Report at p. 45). The minority preferences, however, do not terminate even if underrepresentation by minorities in broadcasting is overcome.

[11] *Fullilove*, *supra*, at p. 534 (Stevens, J. dissent).

[12] Congress seemingly assumed that diversity of broadcast programming would be advanced by increasing broadcast ownership by minorities. There is not a scintilla of evidence based on experience or otherwise to support this assumption.

[13] *See Dred Scott* v. *Sanford*, 60 U.S. (19 How) 393 (1857); the *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[14] *Fullilove*, *supra*, at p. 534 n. 4 (Stevens, J. dissent).

denying equal opportunity, then a principle has been established that threatens to deny equal opportunity for everyone. As Justice Jackson so eloquently put it in *Korematsu* v. *U.S.*,[15] the principle lies around like a loaded weapon ready to be used by persons who claim an urgent need.

To diverge from a norm of color blindness is to foster racial antagonism[16] and to denigrate individual liberty. While some commentors have suggested that to get beyond racism, the country must employ racist means,[17] I believe that viewpoint is utterly irreconciliable with American ideals of equal civil rights. Four score and seven years ago, Justice Harlan urged a constitutional norm of color-blindness that history has applauded: "In respect to civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved."[18] Events at home and abroad since Justice Harlan delivered his memorable words substantiate their ageless wisdom.

I wish to make it clear that these views should not be interpreted as a weakening of my commitment to increasing the participation of minorities in broadcasting through nondiscriminatory means.[19]

I also disagree with another aspect of the lottery order: namely, the Commission's determination to bar newspapers from eligibility for a diversity preference. The statutory provision relating to lotteries requires that certain preferences be accorded when a lottery is used to grant licenses for any medium of mass communication. One of the preferences to be awarded is a diversity preference, meant to encourage divergent sources of programming and information. The preference applies to applicants who control less than four other media of mass communications. The statute provides that the "term 'media of mass communication' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, *the licensed facilities of which* may be substantially devoted toward providing programming . . ."[20] Because newspapers are not licensed, it is clear that the Congress did not intend that they be deemed a medium of mass communications. In addition, the other media listed differ in type from newspapers in that they utilize the electromagnetic spectrum.

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[15] 323 U.S. 214, 246 (1944) (Jackson, J. dissent).

[16] *Anderson* v. *Martin*, 375 U.S. 399 (1964).

[17] *Bakke*, *supra*, at p. 407 (Blackmun, J. dissent).

[18] *Plessy v. Ferguson*, 163 U.S. 537, 554 (Harlan, J. dissent) (1896).

[19] I also believe it is my duty to administer faithfully the lottery statute enacted by Congress despite my doubts as to its constitutionality.

[20] 47 U.S.C. § 309(l)(3)(c)(i) (emphasis supplied).

My fellow commissioners rely on language in the Conference Report[21] to support their view that newspapers are to be included within the definition of mass media. The fact that the Conference Report mentions newspapers when the statute is silent with respect to them argues in favor of a contrary conclusion, for it makes clear that consideration went into the question of whether newspapers should be included within the definition of mass media, and that Congress did not vote affirmatively in favor of inclusion. The use of a Conference Report to supercede the meaning of an unambiguous statute is inappropriate[22], for it is a fundamental canon in matters of statutory construction that "legislative purpose is expressed by the ordinary meaning of the words used."[23]

As a matter of policy, I also believe it to be unsound to prevent newspapers from obtaining a diversity preference in obtaining an LPTV license. Newspapers can be an invaluable source of equity capital and management talent, as was demonstrated in the early history of radio and television stations, where newspapers played a substantial role in underwriting local television stations. It is also in the national interest to allow newspapers to diversify their financial investments. Congress acknowledged the importance of preserving newspapers as viable means of communication in the Newspaper Preservation Act[24] and to prejudice their ability to communicate through the medium of LPTV is antithetical to the motives that spurred the passage of that Act.

The argument advanced in support of the Commission's position - that diversity in mass media will be furthered by the Commission's yolking newspapers within the ambit of mass media - is twice flawed. First, it means that the diversity demerit would be imposed on a newspaper in San Francisco if it applied for an LPTV station in Omaha. Such a combination would clearly not impair diversity, because San Francisco newspapers do not penetrate the Omaha market, and an Omaha LPTV station would not compete in the San Francisco market. Secondly, th diversity of views championed by the First Amendment and public interest considerations has both a quantitative and qualitative aspect. A reasonable number of varying views are required to stimulate edifying political or other discourse. But such discourse will be impoverished without concern for the

[21] Conference Report at p. 41.

[22] *Caminetti* v. *U.S.*, 242 U.S. 470, 490 (1917).

[23] *Richards* v. *U.S.*, 369 U.S. 1, 9 (1962).

The Representatives and Senators who voted on the lottery statute were entitled to rely on the text of the statute and not the Conference Report in determining how to vote. Similarly, when the President deliberated as to whether to sign the bill, he could assume that the unambiguous statutory language controlled.

[24] 15 U.S.C. § 1801.

quality of viewpoints expressed. As Alexander Meiklejohn observed[25], it is more important that everything worth saying shall be said than that everyone shall speak. To allow newspapers to own LPTV stations would increase the quality and richness of views received by the audience and thereby further diversity concerns. A rigid insistence on maximizing the gross number of different viewpoints at the expense of all other First Amendment values is contrary to the public interest.

March 31, 1983

CONCURRING STATEMENT OF COMMISSIONER ANNE P. JONES

In Re: Second Report and Order in General Docket No. 81-768: Use of Lotteries to Select Certain Initial Radio Licensees

Since the rules and procedures established by this Report and Order are intended to speed authorization of service and may have that effect, I concur. I do so, however, with substantial reservations of which I will mention only a few.

First, it seems to me these rules and procedures could and should be simpler, shorter, and better designed for their intended purpose. For example, I believe Commissioner Rivera is correct that the preference scheme adopted out of deference to the Conference Report may not in all circumstances result in the "significant preferences" for under-represented persons and groups mandated by the statute. If experience demonstrates that a different scheme is needed to achieve the statutory purpose, I hope the Commission will adopt it on the premise that the statute and not the Conference Report is the law of the land.

Second, I believe the flood of applications being received in the cellular mobile radio service is demonstrating that the Commission may have erred in excluding that service from this proceeding. If we are to avoid a licensing debacle in cellular comparable to that which already exists in low power television, we should promptly move toward use of the lottery mechanism to choose from among competing qualified cellular applicants.

Third, I am distressed that the Commission did not give serious consideration in this proceeding to the possibility of granting "significant preferences" to women. On this point, I note that the evidence cited by Commissioner Dawson clearly indicates that women are "applicants . . . the grant to which of [a mass media] license or permit would increase the diversification of ownership of the media of mass communications." Hence they should be granted a preference and may well also qualify for the "additional significant

[25] Meiklejohn: Political Freedom, 26 (1948), quoted in *CBS* v. *Democratic Nat'l. Committee* 412 U.S. 94, 122 (1973).

preference" which under the statute "shall be granted to any applicant controlled by a member or members of a minority group."

With these reservations and some others, I concur in issuance of this Report and Order in the hope that it will be only the first step in establishment of a fair, efficient, and simple mechanism for speeding authorization of needed telecommunications service by choosing by random from among competing qualified applicants for radio licenses. I look forward to the next step.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

To the extent preferences have been enacted into law and to the extent those preferences appear to be based on underrepresentation in broadcast ownership, I believe that a preference for female ownership should also be given in cases involving lotteries.

First, it seems clear that the preferences awarded by the lottery statute are based on traditional underrepresentation in broadcast ownership. As the legislative history of the lottery statute says, preferences are awarded because the

> Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

Conference Report at 43.

In addition, it seems obvious that women are seriously underrepresented in the ownership of broadcast stations. A May 1982 study prepared for the Commission by ELRA Group, Inc. estimates that only 2.8 per cent of television stations, 8.6 per cent of AM stations and 9 per cent of FM stations are owned[1] by women. And 50 per cent of the female owners of AM stations, 43 per cent for FM stations and 27 per cent for TV stations are the wives of other owners. Since women comprise more than 51 per cent of the population, it is clear that they are significantly underrepresented in the ownership of broadcast stations, and, in fact, the legislative history of the lottery statute notes that women are "significantly underrepresented in the ownership of telecommunications facilities." *Conference Report* at 44–45.[2]

I understand that the statute and its legislative history are not entirely clear on the inclusion of women in the preference scheme.

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[1] The study uses majority ownership (i.e., 50 per cent or more) as the bench mark for "ownership."

[2] In apparent recognition of this the Commission has begun to include in comparative cases some preference, if not a well-defined one, for female ownership. *E.g.*, Waters Broadcasting Corp., 91 F.C.C.2d 1260, 52 Rad. Reg.2d (P&F) 1063, 1069 (1982) ("substantial enhancement for minority and female ownership").

For example, the statute itself states that the minorities for whom preferences are designed "include" certain enumerated groups. *See Conference Report* at 10. Thus, the language does not appear to preclude additions to the enumerated groups.[3] Moreover, the legislative history states that underrepresented groups such as women

> would, of course, be eligible for both media ownership and minority ownership preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lottery preference scheme, and, consequently, the American public will benefit by having access to a wider diversity of information sources.

Conference Report at 45. To me, this suggests that the Commission could include a preference for female ownership if it chose to to do.

However, because of the apparent confusion in the statute and its legislative history, I welcome the notice seeking comment on the Commission's authority to extend the minority preference to include women as well as the letter to Congress noting this confusion. I will look forward to the early issuance of these documents as well as the documents in the notice proceeding.

STATEMENT OF
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Use of Lotteries to Select Certain Initial Licensees

I dissent from the majority's decision to grant a diversity preference to those who own a full power television station (and no more than three media outlets) in all cases except when the LPTV station applied for is encompassed by or encompasses the Grade A contour of the full service station.[1] That approach defies Congress' intent to foreclose applicants who own a medium of mass communications in the same market as the facility being applied for from obtaining a diversity preference. Congress' wishes on this point are strong and quite specific:

> The Conferees strongly believe that the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in

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[3] For example, the United States Court of Appeals for the Eighth Circuit has construed similar language in a bankruptcy statute. There, the court found that the statute at issue used

> the word "includes" when setting out the types of organizations that come within the definition rather than the word "means." When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity (in this case labor unions) does not imply that the entity falls outside of the definition.

Highway & City Freight Drivers v. Gordon Transports, Inc., 567 F.2d 1285, 1289 (8th Cir. 1978) (footnote ommitted).

[1] *See Second Report and Order* para. 77 n. 34.

the licensing process. Where an applicant for a license or permit has controlling interest (over 50 percent) in any other medium of mass communications which would be co-located with the licensed facility sought, it would not promote diversity to give such an applicant a preferred status relative to other applicants.[2]

Congress precluded local media owners from obtaining a diversity preference to promote the spirit of our existing duopoly, one-to-a-market and other crossownership rules; while not limiting a media owner's right to apply for, or obtain, a low power television license in its community of license, it is quite clear that Congress did intend to prevent such applicants from being preferred in any lottery.

The majority quite simply ignored this congressional purpose by adopting a Grade A encompassment standard for full power television stations. Under this standard, the owner of an urban full power television station seeking an LPTV station in its suburban service area will now be eligible for a diversity preference (so long as that owner does not own more than three media outlets). And, under the congressionally imposed multiplier scheme, such an applicant's chances of winning can be further increased if the forty percent collective minimum diversity advantage has not been achieved. The net effect of the Grade A encompassment standard adopted will be to undermine, not promote, the goal of local diversification, directly contrary to congressional intent. The majority should have used the Grade B contour duopoly standard now embodied in the rules[3] to govern the preference eligibility of television station owners applying for nearby LPTV stations.

Apart from this issue, I would also note two problems I hope the Congress will remedy during its first annual review of this legislation.

I am extremely troubled by the fact that the preference scheme we have adopted, while faithful to the narrow directives of the legislative history of Section 309(i) as amended, will not in practical effect accord with the statutory mandate to award a "significant preference" to applications that are minority-owned or controlled. The procedures we have fashioned here give new meaning to the word "significant" as far as preferences for minority ownership are concerned. Unlike the diversity preference, the statistical advantage given for minority ownership is a relative one. Thus, the larger the pool of applicants in a given lottery, the smaller the preference to minority eligibles. Indeed, because of the hugh number of applications that will be involved in most LPTV lotteries, *de minimus* "preferences" will be the rule rather than the exception as far as

[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982).
[3] See 47 C.F.R. § 73.636(a)(1).

minority ownership is concerned. This situation not only flies in the face of the *Report and Order* authorizing LPTV,[4] which set advancement of minority ownership as a primary goal, but the plain language of Section 309(i)(3)(A) as well. Congressional review of this condition is, therefore, imperative.

I also hope that Congress sees fit to alter its standard governing limited partnerships, which is at variance with FCC treatment of limited partnerships in the tax certificate context.[5] Both the tax certificate policy and the lottery legislation are designed to promote minority ownership of telecommunications facilities; I can think of no reason standards applicable to limited partnerships should differ between the two programs.

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[4] *See Report and Order Authorizing Low Power Television Service*, 47 Fed. Reg. 21468 (released May 18, 1982).

[5] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, FCC 82-523 (released December 13, 1982).

Appeal, Denied
Application, Amendment of, Engineering Change
Review by Review Board
Site Availability

Review Board denied appeal and affirmed ALJ's denial of a comparative broadcasting applicant's petition for leave to amend its transmitter site. Applicant's failure to amend within 20 months from vitiation of the reasonable assurance of its original site demonstrated extreme lack of diligence, was disruptive of the hearing, and prejudicial to the other parties.
–*Shoblom Broadcasting, Inc.*
BC Docket No. 82–135

FCC 83R–27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SHOBLOM BROADCASTING, INC. Yucca Valley, California	BC Docket No. 82–135 File No. BPH-800813AA
Deanne C. Davis, John J. Davis, Sammy L. Fields, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–136 File No. BPH-800825AG
BUENA VISTA BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–137 File No. BPH-800827AA
DESERT RADIO, INC. Yucca Valley, California	BC Docket No. 82–139 File No. BPH-800829AI
ROYCE INTERNATIONAL BROADCASTING COMPANY Desert Hot Springs, California	BC Docket No. 82–140 File No. BPH-800829AO
For Construction Permit for a New FM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted:April 15, 1983: Released:April 22, 1983.)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for a comparative hearing by Hearing Designation Order, Mimeo No. 2690, 47 Fed. Reg. 12855, published March 25, 1982, which included a Section 73.315 signal coverage issue against Royce International Broadcasting Company (Royce). On October 22, 1982, Royce filed a petition for leave to amend to specify a change of transmitter site and to supply a supporting engineering showing. By Memorandum Opinion and Order, FCC 83M-395, released February 1, 1983, presiding Administrative Law Judge Frederic J. Coufal (ALJ) denied the Royce petition. Now before the Review Board are Royce's appeal of this denial and an opposition filed by Corinthians XIII Broadcasting Company (Corinthians).[1] We shall affirm the ALJ's Order because we agree that good cause for filing the amendment at this late date has not been shown.

2. In his Order, the ALJ applied the established six-point test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970):

> . . . the moving party must demonstrate that it acted with due diligence that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

In particular, he found that Royce was not diligent in its efforts to obtain a viable transmitter site, that acceptance of the amendment would require changes in the hearing issues and additional hearing,[2] and that the other parties had been prejudiced by having to address three different transmitter site proposals by Royce involving three different engineering showings and by the resulting delays in the timely completion of the proceeding.

3. Royce asserts in its appeal that it did not learn that the U.S. Department of the Interior "no longer approved" Royce's originally-proposed transmitter site at Eureka Park, California (within Joshua Tree National Monument) until after it filed its application on August 29, 1980, and that what followed were "persistent efforts to

[1] Permission to appeal the Order, required by Section 1.301(b) of the Commission's Rules, 47 CFR § 1.301(b), was granted by the ALJ in FCC 83M-531, released February 11, 1983.

[2] The ALJ conducted hearings with respect to issues other than signal coverage and site related matters in November 1982.

secure a suitable transmitter site, culminating in its October 22, 1982 petition for leave to amend." Royce Br. at 1.[3] It argues that a proposed settlement agreement among the other four applicants reduces this proceeding "to a two-party contest," and urges that, "in view of the public interest policy favoring maximum choice among qualified applicants," good cause for accepting the amendment was shown. *Id.* at 1–2. Royce also maintains that no modification or addition of issues would be necessitated by its amendment because any changes may be explored under already designated issues. *Id.* at 3. Finally, it claims that, in denying its petition for leave to amend, the ALJ prejudged the Section 307(b) choice-of-community and contingent comparative issues by implying that Royce's Desert Hot Springs proposal could not be granted because it does not place a 60 dBu signal contour over Yucca Valley. *Id.* at 4.

4. We agree with Corinthians and the ALJ that Royce has not shown good cause for its October 22, 1982 amendment. Initially, we find that Royce was far from diligent in locating and amending to specify a suitable transmitter site. At least as early as January 1981 (five months after its application was filed and fourteen months before designation for hearing) Royce knew that its originally-proposed site was not available. *See* Royce Opposition to Petition to Enlarge Issues, filed June 2, 1982, Attachments B and C, comprised of letters dated January 8 and 12, 1981 from the National Park Service to Mr. Stolz referring to misunderstandings regarding the availability of Eureka Peak and indicating that no transmitter site would be permitted within the national monument boundaries. Indeed, the Park Service letters strongly suggest that Royce may never actually have had reasonable assurance of the original site's availability, because Mr. Stolz apparently misunderstood what the Superintendent of Joshua Tree National Monument told him regarding the availability of Eureka Peak as a transmitter site.[4] In

[3] In a February 2, 1981 affidavit, Royce's owner, Edward R. Stolz, II, stated that "of late" park authorities had decided to deny Royce use of Eureka Peak. After unsuccessful investigation of other sites, Royce learned on July 30, 1982 that it could use Wide Peak as a transmitter site and, on September 27, 1982, filed a petition for leave to amend to specify that site. After objection by the other parties that use of Wide Peak would create a short-spacing problem, Royce indicated that its engineer believed a directionalized antenna could reduce the problem, and Royce was given until October 22, 1982 specifically to supplement its amendment before the ALJ ruled on its acceptability. On that date, Royce filed the completely different engineering showing that is under consideration here, which did not relate to the Wide Peak site, but rather specified a new site near the one now authorized for use by Station KPLM(FM), Palm Springs, California.

[4] In fact, the question of Royce's knowledge of the unavailability of the Eureka Peak site surfaced in a petition to enlarge the issues filed by Corinthians on April 26, 1982, seeking, *inter alia*, a misrepresentation issue against Royce for having specified the site in the first instance. In response, Royce claimed it had not misrepresented the availability of the site in its application because it was not until it received the National Park Service letters in January 1981 that it was

addition, although the Stolz affidavits accompanying Royce's appeal aver that Mr. Stolz made some efforts to procure a new site, in the Board's view these efforts are wholly inadequate to explain the 20-month delay between January 1981 and September 27, 1982, when Royce finally filed its first transmitter site amendment. *See California Broadcasting Corp.*, 90 FCC 2d 800, 809, 51 RR 2d 1539, 1546 (1982) (interval of more than six months before specifying substitute transmitter site not ordinarily due diligence). And after Royce was granted an extension of time specifically to supplement its September 1982 amendment in order to mitigate the short-spacing problem by directionalizing its antenna, it instead filed the October 22, 1982 amendment, which amendment proposed a wholly new transmitter site. Royce's explanation for this second substitute transmitter site shows further lack of diligence. Mr. Stolz states he had been previously unable to get permission from the licensee of Station KPLM(FM) to use the October 22 site and "only days ago" learned that Southern Pacific Land Company, rather than the licensee, actually owned the site. Stolz Affidavit of October 19, 1982 at 1. In other words, at the time that Mr. Stolz claims to have been negotiating with Station KPLM(FM)'s representative for use of part of their site, he failed to ascertain that they did not own the site and "understood" (or, yet again, misunderstood) KPLM(FM)'s denial of a lease to Royce to be "binding and final"! *Id.* Due diligence, like ambition, "should be made of sterner stuff."[5]

5. Where, as here, an applicant is attempting to cure a potentially disqualifying defect in its application, the Commission has held that diligence should be interpreted in light of the equities of the case. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589, 1594 (1981). We recently applied that standard in *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 52 RR 2d 63 (Rev. Bd. 1982), in which we concluded that, under the circumstances of that case, the successive submission of four curative financial amendments involving three different financial proposals over a seven-month period demonstrated, in fact, zealous diligence in the face of "bad luck." Conversely, Royce's failure to produce a single amendment in 20

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alerted to problems with the site. While the ALJ declined to add a misrepresentation or lack of candor issue for failure of evidence (*see* FCC 82M-3157, released October 13, 1982), it does appear that in specifying the Joshua Tree National Monument site and maintaining that specification despite the January 1981 letters from the National Park Service without promptly advising the Commission of these developments (*see* 47 CFR § 1.65), "Stolz has [again] maneuvered as close to the perimeter as should be permitted" (*George E. Cameron, Jr. Communications*, FCC 83R-20, released March 23, 1983, at para. 52) on this matter of his site specification. At a minimum, however, the National Park Service letters of January 1981 refusing use of the specified site clearly vitiated—more than two years ago—the necessary "reasonable assurance" that the Eureka Peak site would be available.

[5] W. Shakespeare, *Julius Caesar*, Act 3, Scene 2, line 97.

months is not cured by its submission of two differing amendments in September and October 1982, respectively. While taking due account of Mr. Stolz's explanatory affidavits, we nevertheless affirm the ALJ's conclusion that Royce's allegedly curative efforts were clearly too little and too late.[6]

6. Furthermore, acceptance of Royce's proffered amendment would be both disruptive of the hearing and prejudicial to the other parties. While we believe that the already specified engineering issue may be broad enough to encompass the new engineering problems posed by Royce's latest proposal without technical modification or addition of issues,[7] we agree with the ALJ that the amount and direction of proof would be increased, as well as hearing time, because of the new proposal's antenna directionalization and shadowing aspects. Not only is this seriously disruptive of the hearing process, but it is also prejudicial to the other applicants: they clearly have a valid interest in the prompt resolution of this proceeding and initiation of a new radio service.

7. Finally, we are unable to find the good cause for postdesignation engineering amendments required by Section 73.3522(b)(1)(i) of the Rules, 47 CFR 73.3522(b)(1)(i), i.e., that, "the amendment is necessitated by events which the applicant could not reasonably have foreseen," since it appears from the information set forth in paragraph 4, *supra*, that Royce had knowledge in January 1981 that its proposed national park site would not be available. Nor, for the same reasons, can we conclude that Royce's proposed engineering amendment is not the result of its voluntary acts. An applicant's lack of due care in choosing a transmitter site cannot be equated

[6] A different ALJ recently erroneously asserted in *Payvision Communications*, FCC 83M-1043, released March 31, 1983, at note 2, that the Board's *Bison City* decision "gutted" the due diligence test because we permitted a fifth curative amendment. The Board looks to both quantity and quality of effort in measuring the "equities" of due diligence, as required by *Anax*, and so must all other adjudicatory authorities.

[7] In so ruling, we moot Royce's concern that the ALJ was prejudging the Section 307(b) and contingent comparative issues in this proceeding by implying that that Report and Order which established a Class B FM channel at Yucca Valley, *FM Table of Assignments (Yucca Valley)*, 45 RR 2d 644 (1979), mandated that the eventual station would be licensed to Yucca Valley or would, at minimum, include Yucca Valley within its 60 dBu contour. (Royce's amended application would do neither.) To construe the Report and Order so narrowly could fly in the face of the "15-mile rule" of Section 73.203(b), 47 CFR 73.203(b), which makes Class B channels available to be located within 15 miles of the community to which the channel is assigned in the Table of Assignments. And we find no specific language to that effect in the Report and Order. *Cf. Campbell and Sheftall*, 7 FCC 2d 658, 667, 9 RR 2d 999, 1010 (Rev. Bd. 1967) (a "Section 307(b) determination is a separate, subsequent determination unrelated to the rulemaking" that assigns a channel to a specified community). While the Commission recently repealed Section 73.203(b) in *The Suburban Community Policy*, 53 RR 2d 681, 48 Fed. Reg. 12094 (1983), the applications herein are subject to that rule because they were filed before adoption of the repeal order. *See* 53 RR 2d at 698.

with either unforeseeability or involuntariness when the need to resolve *pre-existing* site problems finally becomes apparent. *Cf. California Broadcasting Corp., supra* (engineering amendment in response to *subsequent* creation of national park deemed unforeseeable and involuntary). To rule otherwise would put a premium on know-nothingism and sanction Royce's reliance on the vain hope that an unfavorable site situation would right itself.[8]

8. For all these reasons, we affirm the ALJ's denial of Royce's petition for leave to amend. *See Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1315–26, 43 RR 2d 1289, 1293–1304 (1978), *rev'd and remanded on other grounds*, 88 FCC 2d 922, 50 RR 806 (1981); *Charles W. Hurt*, 21 FCC 2d 827, 18 RR 2d 533 (Rev. Bd. 1970); *Louis Vander Plate*, 20 FCC 2d 185, 17 RR 2d 577 (Rev. Bd. 1969). While the Commission does promote the public interest goal of a choice among applicants, this policy does "not . . . entirely relieve [applicants] of the good cause requirements" of Section 73.3522 of the Rules and the *Erwin O'Conner* case. *California Broadcasting Corp., supra*, 90 FCC 2d at 808, 51 RR 2d at 1545. Lacking the "unusual circumstances" (see paragraph 7, *supra*) of the *California Broadcasting Corp.* case, 90 FCC 2d at 808, 51 RR 2d at 1545, but well-endowed with voluntariness, disruptiveness, absence of due diligence, and prejudice to the other parties, Royce's proposed October 22, 1982 amendment must be rejected. *Belo Broadcasting Corp., supra*. While Royce's argument that an impending merger among the remaining four applicants will destroy the last hope for a choice among applicants, unless Royce is allowed to amend, has surface appeal, *cf. Bison City TV 49 Limited Partnership, supra*, that merger has not yet been approved. There is also a countervailing public policy favoring the settlement of cases. *See Oak Television of Everett, Inc.*, FCC 83R-25, released April 7, 1983. Given these competing policy interests and Royce's utter lack of "equities" here, we conclude that a probable loss of choice among applicants is preferable to whitewashing the fatal deficiency in Royce's application and disrupting this proceeding further. The public interest compels a modicum of diligence on the part of applicants so that the initiation of a new broadcast service is not held hostage to the malfeasance (and nonfeasance) of would-be licensees.

9. ACCORDINGLY, IT IS ORDERED, That the appeal filed

[8] See Mr. Stolz's February 2, 1981 Affidavit, at 3:

> "I do believe . . . that an ultimate grant of a use permit for this [Eureka Park] site can still be achieved at some future time. Nevertheless, should the short-term assessment of this aim appear unfavorable, I would voluntarily request an alternate site . . . ." [The first such "request" to the FCC was filed 20 months later.]

February 18, 1983 by Royce International Broadcasting Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Business Radio Service, Eligibility
Business Radio Service, Frequencies
Frequency, Efficent Use of
Frequency, Loading

Memorandum Opinion and Orders adopted affirming the Private Radio Bureau's cancellation of 800 MHz trunked channels for failure to meet the loading requirements of Rule 90.366(d). –*Specialized Mobile Radio*

FCC 83-170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Application for Review of

Specialized Mobile Radio Station WYA-671, licensed to AAT Electronics Corporation, Staten Island, New York

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 16, 1983)

BY THE COMMISSION:

Commissioner Jones absent.

1. The Commission has for consideration AAT Electronics Corporation's Application for Review of the Private Radio Bureau's Order issued September 21, 1982. The Order denied AAT's Petition for Reconsideration of the Bureau's March 22, 1982, determination which deleted 15 of AAT's 20 authorized channels for Specialized Mobile Radio System (SMRS) WYA-671. The channels were deleted as a result of AAT's failure to meet the minimum loading requirements of mobile units specified in Rule 90.375(e).[1] The Bureau's Order denied AAT's alternative request for a waiver of Rule 90.375(e) or a hearing.

2. In its Application for Review AAT is seeking reinstatement of its complete 20 channel authorization for WYA-671 and an additional three year period to meet the minimum loading requirements. Absent reinstatement, AAT asserts it is entitled to a full hearing

[1] Part 90 of the Commission's Rules was amended effective October 16, 1982, by our adoption of our *Second Report and Order* in Docket No. 79-191, 90 FCC 2d 1281 (1982). Rule 90.375 was amended and is now Rule 90.366. 90.366 did not change the construction and loading requirements for existing SMR systems.

under Sections 303(f) and 316 of the Communications Act of 1934, as amended, to show cause why its channels should not be deleted.

3. There is a waiting list of 26 SMRS applicants desiring channels in the area served by AAT. Reassignment of the channels deleted from AAT's authorization has been held in abeyance pending the outcome of our determination.

Background

4. Rule 90.375(e) (now 90.366) governed the loading and construction requirements for trunked SMR systems. Entrepreneurs seeking facilities of more than five channels could elect to build the station in its entirety or in stages. Those seeking to build all at once were required to construct all channels within one year but were given the entire five year license term to load to 70% of system capacity (1400 mobiles for a 20 channel system).

5. Entrepreneurs were required by Rule 90.359(c) to specify in their application if they were seeking to build an SMR system in stages. Staged construction required that the entrepreneur build five channels within a year and load to 70% of five channel capacity (350 mobiles) within two years. The advantage of staged construction is that it requires a smaller initial investment. It imposes, however, an obligation of meeting minimum loading standards within two years to give assurances that the full system will be developed and in full use within the five year license term.

6. On February 26, 1979, AAT submitted an application for a 20 channel SMRS trunked system, specifying that its authorization was requested ". . . pursuant to Section 90.375(e) of the Commission's Rules to construct a 20-channel system in 5-channel stages." AAT's application was accompanied by Form 400-S on which AAT certified that it was electing to construct in 5 channel stages and that 70% of the required mobiles for loading for 5 channels would be in operation within 2 years from the date of grant. Directly above AAT's authorized signature on Form 400-S was this express provision:

> The applicant acknowledges that, where the authorized facilities are not fully (actually) loaded in accordance with the applicable loading requirements set out in Sections 89.801 and 89.802 of Subpart S of Part 89 of the Commission's Rules, any channels not so occupied may be assigned, at the discretion of the Commission, to another applicant in accordance with the policies set out under this Subpart S of Part 89 of the Rules.[2]

Since 20 channel equipment had not yet been type accepted, a license for a 5 channel trunked facility was granted to AAT for station WYA-671 on April 23, 1979.

7. On May 15, 1979, AAT requested modification of its April 23 authorization to permit 10 channel SMRS capability and specified General Electric equipment which had been type accepted for 10

[2] Parts 89, 91 and 93 of the Rules have been consolidated into Part 90.

channels instead of Motorola equipment. AAT requested to build the 10 channels in 5 channel stages pursuant to Rule 90.375(e) and made the same certification on its application concerning loading and the same acknowledgment concerning reassignment of unloaded channels as it did on its original application. Authorization for 10 channels was granted on August 17, 1979. Shortly thereafter, General Electric 20 channel equipment received type acceptance and on August 23, 1979, AAT applied for a 20 channel modification, still to be constructed in 5 channel stages.

8. On October 25, 1979, the Bureau's Licensing Division requested AAT to provide construction information about its SMR Station WYA-671. AAT was reminded that under its election to build in stages, Rule 90.375(e) required construction of the basic 5 channel group within one year and loading of those 5 channels to 70% of capacity within 2 years. The pertinent license grant date was specified as April 23, 1979.

9. AAT responded to the Licensing Division's October 25 status request on November 7, 1979. It reported that the expected completion date for five channels was December 15, with construction to continue in stages. AAT also noted its pending application filed August 23, 1979, for modification from 10 to 20 channels to be constructed in stages.

10. The Licensing Division notified AAT that it had received the application for modification of its SMRS facility from 10 to 20 channels in a letter dated November 2, 1979. The Licensing Division informed AAT that prior to processing its application, AAT should be aware of the required construction of the first 5 channels within one year and the required loading to 70% capacity for these channels within two years when constructing the facility in stages. The Licensing Division cautioned that:

> It has been brought to our attention that it may be some time before 20 channel mobile units are actually available, even though they may have been type accepted. *Thus, a licensee may make a large financial investment in a trunked system and then not be able to put any users on the system for a year or more because of nonavailability of 20 channel trunked mobile units. In this situation, the licensee might run a risk of losing his license due to not meeting the utilization criteria discussed earlier.* Remember, on a 20 channel trunked system only 20 channel mobile units may be licensed . . .
>
> We will hold your application in a pending status to allow you the opportunity to comment on this letter. Please let us know if you wish to change any aspect of your application. Please respond within thirty days from the date of this letter (emphasis added).

11. AAT's reply was received on December 3, 1979. On behalf of AAT a principal stated:

> I must begin by thanking the FCC for bringing the issue of manufacturers' delivery dates on 20 channel units to my attention. It is an area, I must openly admit, I had incomplete information. Without your letter, I would have entered into an obligation without fully having all the facts before me.

> Since that time, I have been in touch directly with several manufacturers by phone, letters, and personal meetings. However, I am still without a firm, clear delivery date on 20 channel mobiles. I am informed by manufacturers that they will, within 90 days be in a position to predict delivery dates related to 20 channel mobile units.
>
> It is with this in mind that I ask the FCC to continue holding my application in a pending status for 90 days. This will enable me to obtain the information to make an intelligent decision.

It was also stated that AAT was proceeding with the first stage of construction and was promised delivery of the first 5 channel system within 30 days.

12. AAT's application was returned by the Licensing Division on January 2, 1980, at which time AAT was requested to resubmit the application within 30 days if it was still interested in a 20 channel system. On January 21 AAT resubmitted its 20 channel application stating that it had received a delivery date from General Electric. It was further stated that "It is with [the delivery date] in mind that I know we will meet your loading requirements." The application contained the same certification and acknowledgment regarding loading and reassignment of channels as the earlier applications.

13. On February 6, 1980, AAT was granted an authorization increasing its capacity for station WYA-671 to 20 channels. The expiration of the license term shown on the face of the license document was April 23, 1984, five years from the original five channel grant. Also on the face of the license was the following statement:

> This grant does not extend the period within which you must place the station in operation. That period begins from the date of your original authorization.

14. On May 23, 1980, Commission engineers inspected station WYA-671 and determined that AAT had constructed the initial 5 channels. The total loading of the system was less than ten mobile units.

15. On October 26, 1981, AAT sent a letter to the Licensing Division stating:

> This is to notify the Commission that we are proceeding with the construction of the remaining fifteen channels of our above referenced twenty channel trunked system. As the Commission knows, the first five channels of the system have already been constructed and put into operation.
>
> By proceeding in this manner, we will not be constructing in five channel stages, as we had previously indicated. Furthermore, the applicable channel loading deadline will be five years from the grant of our modified license, in accordance with Section 90.375(c), rather than at the end of two years from the grant of our modified license.

The letter indicated that AAT's attorney should be contacted if the Bureau disagreed with the applicability of the five year loading deadline.

16. Bureau Licensing Division records indicate that as of Febru-

ary 22, 1982, only 62 mobiles, or 17% of the 350 mobiles required for minimum loading within the two-year period, were in operation on the initial 5 channels. On March 12, 1982, AAT notified the Licensing Division that the final channel of its 20 channel SMRS facility was operational.

The Bureau's March 22, 1982, Action

17. On March 22 the Bureau advised AAT that its October 26, 1981, assertion that construction of the remaining 15 channels released it from Commission's two year minimum loading requirement was erroneous. The Bureau stated:

> AAT's notification was submitted two and one-half years after its system was initially licensed and more than one and one-half years after a modified authorization was issued. The five channels now constructed have been loaded, according to our records, with 62 mobile units as of February 22, 1982, approximately 12 percent of the maximum specified in Rule 90.375(e) and only 17 percent of the minimum loading requirement (350 mobile units) which it was to have by February 6, 1982, the date on which the two-year loading period for the first stage expired.

The Bureau noted that 90.375(e) contained no provision allowing a licensee to change the election two and one-half years after initial licensing to avoid the consequences of its failure to load the first stage by the end of the two year loading period. The Bureau further stated:

> The inappropriateness of such a change of election in this instance is underscored by the fact that the change would occur long after construction of the first stage was completed and that AAT's system is located in an area where there is a waiting list of applicants for assignment of trunked channels. Furthermore, even were such a change contemplated by our rules, your client failed to satisfy the one-year construction requirement for the balance of the twenty-channel facility, a matter which is confirmed by the language of AAT's letter of October 23, 1981.

In view of AAT's failure to meet the minimum loading requirement the Bureau reclaimed 15 channels from AAT's facility for reassignment to entrepreneurs on the waiting list for that service area. A superseding authorization was issued on March 22, 1982, for the five channels initially constructed.

AAT's Petition for Reconsideration and Request for Waiver or Hearing

18. In its Petition for Reconsideration and Request for Waiver or Hearing, AAT requested the following relief:

> a) a declaration of the Bureau's March 22 letter to allow AAT to change its election so that the 2 year loading deadline of Rule 90.375(e) would not apply to their already fully constructed system; and
>
> b) waiver of the one year construction deadline for completion of AAT's full system.

In the alternative AAT requested the Bureau to grant for compelling

equitable reasons a waiver and extension of the 2 year channel loading deadline. In the absence of a waiver, AAT argued it was entitled to an evidentiary hearing prior to modification of its license under Sections 303(f) and 316 of the Communications Act of 1934, as amended, and Section 558 of the Administrative Procedure Act.

19. AAT asserts that its failure to meet the minimum loading for its initial 5 channel stage was due to factors beyond its control. It maintains that there initially were enormous uncertainties about the equipment and licensing standards for the new 20 channel trunked technology. In view of these uncertainties, AAT postponed construction of the initial five channels until the full 20 channel grant was authorized on February 6, 1980. The first 5 channel stage was constructed shortly thereafter on March 15, 1980.

20. AAT contends and has documented that technical problems were experienced with the General Electric system when the mobiles were first placed in service. General Electric instituted a recall program of its GE-Marc V System whereby it redesigned its trunked signaling system. As of February 23, 1981, General Electric had ordered 4 mandatory changes to its repeaters, 9 to crystal control stations, 15 to synthesized control stations, 7 to crystal mobile units and 14 to synthesized mobile units. There were approximately 23 other changes which, although not mandatory for equipment performance in all cases, were to be done on equipment as required.

21. In May 1981 General Electric introduced a new product line - the GE Marc V Centura, Corona and Classic units. However, the new product line was not readily available until September 1981, approximately 18 months after AAT's first 5 channels were constructed.

22. AAT contends that the combination of delays in equipment delivery and defects in design and performance interfered with its ability to meet its two year minimum loading requirement. As soon as General Electric's technical problems were resolved, AAT asserts, the loading of its system accelerated by 60 mobile units, increasing from 13 to 73 mobile units between August 1981 and March 1982.

23. AAT further states that, as a result of the technical success it was experiencing with its General Electric system, it desired to go forward with the construction of the remaining 15 channels. However, AAT recognized that the two year channel loading deadline of Rule 90.375(e) was rapidly approaching. AAT knew it would have difficulty meeting the loading standard in view of the marketing time lost due to equipment problems. AAT questioned whether the staged construction two year loading dealine in Rule 90.375(e) would apply if it constructed the remaining 15 channels or whether the five year period in Rule 90.375(c) was applicable for a system constructed in its entirety.

24. AAT claims that in September 1981 its counsel discussed the issue with a Bureau staff member who reportedly advised that

construction of all 20 channels would extend the loading period to five years. It is contended that the staff member discouraged AAT from requesting a formal rule interpretation, suggesting that AAT only inform the Bureau's Licensing Division of its intention to fully construct its facility. AAT submits no written evidence of such advice by the Bureau.

25. On October 26, 1981, AAT advised the Licensing Division of its intention to construct the 15 remaining channels and of its assumption that the five year loading period applied. It was requested that the Bureau contact AAT's counsel if the Bureau disagreed with the applicability of the five year loading rule.

26. Having heard nothing from the Bureau, on November 25, 1981, AAT allegedly committed itself to a financial investment in excess of $100,000 by ordering General Electric equipment for expansion of its system to 20 channels. AAT indicates that on January 8, 1982, the same Bureau staff member advised AAT's counsel that the Bureau response to AAT's assumption that the five year loading period applied might "not be favorable". On March 12, 1982, construction of the 15 remaining channels was completed.

AAT Asserts a Change of Election Should be Allowed and a Waiver of the One Year Construction Period Granted

27. Relying on General Electric's equipment problems, AAT argues that the Bureau erroneously concluded that AAT's attempted change of election from staged to entire construction would be inappropriate because it occurred long after the first stage was completed and would result in avoiding the consequences of AAT's failure to load. AAT asserts that the Commission's fundamental policies of maximizing spectrum efficiency and availability would be served by allowing its change in election. It is argued that staged construction was enacted to provide trunked licensees the option of starting a 20 channel system with a modest investment. AAT maintains the two year loading rule was not intended to serve as an early basis for taking a fully constructed system off the air. Since Rule 90.375 is silent with regard to a change of election, AAT claims the Bureau's interpretation prohibiting AAT's change of election is erroneous.[3]

28. AAT maintains that a waiting list of entrepreneurs for assignment of trunked channels is not a legitimate basis for "revoking" AAT's channels. It asserts that since most applicants are already SMRS licensees, there would be no advantage to the public to redistribute AAT's channels to existing SMRS facilities.

29. For the above "compelling public interest reasons" AAT

[3] New Rule 90.366 expressly limits the period for a change of election to the first year of authorization. See para. 41 *infra*.

seeks permission to change its construction election and a waiver of the one year construction period in Rule 90.375(e) for a system constructed in its entirety. Such a waiver would provide AAT the five year loading period specified in Rule 90.375(c) for a fully constructed 20 channel system.

In the Alternative, AAT Requests Waiver of the Two Year Loading Deadline

30. In the alternative, AAT seeks a waiver of the two year minimum loading deadline in Rule 90.375(e) to extend the time for loading its first five channels. It is argued that an extension of time would provide AAT with the opportunity to market its system which was denied due to technical problems with General Electric equipment.

31. AAT asserts that an extension of time would also avoid loss of AAT's substantial investment in constructing its 20 channel system. AAT maintains its investment was made in good faith and in reliance of assurances by a "Bureau official" that the two year loading period would not apply if the full 20 channel system were constructed. Although the waiver request comes after the expiration of the two year period, AAT contends it is timely because it had no reason or opportunity to request waiver prior to the Bureau's March 22, 1982, action.

AAT Maintains it is Entitled to a Hearing Prior to Modification of its License

32. AAT notes that Sections 303(f) and 316(a) of the Communications Act of 1934, as amended, require that a licensee be afforded the right to a hearing prior to modification of a license. Therefore, it is argued that the Bureau's deletion of 15 of AAT's channels violated Sections 303(f) and 316(a) of the Act as well as Section 558 of the Administrative Procedure Act (APA) (5 U.S.C. § 558).[4]

The Bureau's Order Denying AAT's Petition for Reconsideration

33. The Bureau's Order summarized the history of rulemakings in which the Commission authorized trunked SMRS facilities under a regulatory approach which would permit the operation of a free competitive market as the best method for developing new system designs, technology and marketing techniques necessary for the

[4] In its Petition for Reconsideration AAT also noted our *Further Notice of Proposed Rulemaking*, Docket No. 79-191, 46 F.R. 37927 (July 23, 1981), wherein the Commission proposed to adopt rules, to be given retroactive effect, authorizing the Commission to "take back" unloaded or lightly loaded channels. The issue raised by AAT that the Commission had not adopted rules which would apply to previously authorized systems is moot in view of our adoption of our *Second Report and Order*, Docket No. 79-191, *supra*. See paras. 42-44, *infra*.

fuller development of the new spectrum. The Bureau emphasized that the Commission developed loading standards to insure that channels made available to the public were put "in use" and not "in storage." To cope with the uncertainties of a new technology, the Commission gave entrepreneurs the alternatives of constructing their SMRS facilities in stages or in their entirety. The Bureau concluded that the technical problems AAT experienced with General Electric's 20 channel trunked equipment were not an unanticipated consequence of marketing a new technology. It denied AAT's October 1981 request to construct its facility in its entirety since it had already failed to meet the applicable one year construction deadline for the remainder of the channels under an election to build at once and had not even met minimum loading for staged construction.

34. The Bureau noted that at the time there were 26 SMRS applicants waiting for channels in the area served by AAT and determined there was no basis for granting AAT additional time to meet the Commission's loading and construction standards at the expense of other entrepreneur-applicants. The Bureau emphasized that although 15 channels were being returned to the marketplace for reassignment, AAT was not deprived of the 5 channel system initially constructed despite its failure to meet the two year minimum loading criteria. The Bureau noted that AAT's current users retained the benefit of the 5 channel system.

35. With regard to AAT's assertion that it was entitled to a hearing, the Bureau relied upon the Commission's rulemakings establishing the SMR systems and the fact that deletion of the 15 channels was accomplished by superseding the original authorization rather than modifying the license. Therefore, the Bureau concluded that Sections 303(f) and 316 of the Act did not apply to its deletion action.

AAT's Application for Review

36. In its Application for Review, AAT incorporates by reference the arguments presented in its Petition for Reconsideration. It asserts that the Bureau did not address itself to AAT's equitable arguments and plea for waiver on the grounds that the equipment problems precluded loading and were beyond AAT's control. Finally, AAT contends the Bureau has attempted to add an automatic cancellation term onto AAT's April 1979 license grant based upon the Commission's cancellation rules which were adopted in the Commission's August 16, 1982, release of its *Second Report and Order* in Docket No. 79-191, *supra*. It claims that these recently adopted rule changes do not apply to prior issued licenses such as AAT's.

Discussion

37. In our *Second Report and Order*, In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, Docket 18262, 46 FCC 2d 752 (1974), we concluded a detailed rulemaking proceeding, initiated in 1968, dealing with the allocation and future use of frequency spectrum in the 806–947 MHz band in the land mobile radio service. In order to realize our goal of maximizing spectrum use and efficiency we chose allocation by "system", rather than radio services, using trunked or conventional technology. We chose to permit the competitive market place to ultimately determine how much spectrum would be utilized by the various types of users. To help promote competition and to provide access to the small business user who could not afford the expenditure required to build these new systems, we created a new entity, the Specialized Mobile Radio System (SMRS) licensee. The SMRS licensee was to be a commercial entity or entrepreneur authorized to make radio facilities available for use by private services eligibles. These licensees would assume the financial risks and obligations of building the expensive 800 MHz systems and were authorized to provide a communications service on a *for profit* basis. *Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975).

38. We determined we would not examine in advance the financial qualifications of each SMRS applicant but would ensure their performance as licensees through mandatory system construction and loading requirements. We stated:

> In meeting our obligations under Section 308(b), all of the requirements for obtaining a radio station authorization have been spelled out in detail in the rules. Each application will be examined to determine if the proposal meets minimum legal and character qualifications, as well as technical, operational, frequency loading, and other requirements. However, the new rules do not require an applicant to show that he has the financial qualifications to construct the proposed facilities. Instead, licensees of "trunked" SMR systems, for example, will be required to begin construction of the authorized facilities within six months of authorization and to complete construction within one year. Further, the *licensee must "load"* his facility in accordance with express standards set out in the new rules. *If he does not, the frequencies assigned, or some of them, will be made available for use by other eligible persons.* This method, in our view, is preferable to the examination of a financial statement to ensure that the frequencies assigned will be used effectively. The Communications Act gives us ample flexibility in this area to adopt measures most conducive "... to the proper dispatch of [our] business and to the ends of justice." *Section 4(i) of the Act. See Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), 51 FCC 2d 945, 960 (emphasis added).

39. We sought to ensure that the 800 MHz channels authorized to SMRS licensees were put in "use" and not "in storage". We required "... channels assigned to be 'occupied' in accordance with express loading criteria or, if they are not, they become available to other users." *Memorandum Opinion and Order*, Docket No. 18262,

supra, at p. 983. Thus, in developing loading standards for trunked systems we stated:

> . . . we further realize that initial investment . . . required . . . regardless of the number of channels will be . . . heavy. Thus, should we permit licensees to proceed in five-channel stages, it is not likely that there would be any incentive not to go forward with completion of the system, as the greater capacity it has, the greater will be the return on the investment . . . However, we still must emphasize that our objective . . . is to maximize spectrum efficiency and to get these systems established, because they are needed to achieve the degree of efficiency . . . we feel is desirable in terms of the public interest. Therefore, in reaching some balance between that objective and the monetary consideration mentioned, we are going to modify our loading requirement for "trunked" systems to specify that the licensee must show that the system is being developed and loaded so that it will be in full use in the five year term. Thus, we will permit the licensee of a "trunked" facility which has been assigned more than the minimum five channels to proceed with construction as proposed, i.e., in five channel stages; however, the basic facility designed to accommodate a minimum of five channels in "trunked" mode must be completed within the one-year limit specified in the rules. Further, where the licensee elects to proceed in this fashion, *he must show that his system is "occupied" to 70 percent of its capacity at the end of a period of two years* from the date of the grant of his station authorization. *If it is not loaded to this capacity, the unused channels may be assigned to others.* 51 FCC 2d 945, 986 (emphasis added).

40. In our *Further Notice of Proposed Rule Making* in Docket No. 79–191, *supra*, we addressed the problem of spectrum lying vacant while lists of entrepreneurs for trunked channels exist. We stated:

> These rules for trunked systems have allowed the situation in larger urban areas where large numbers of trunked channels have been assigned to SMRs but have only a handful of mobile units on them. Under the present rule structure, we cannot make these channels available to others for two—and in many cases five—years. There is no explicit provision now contained in our rules for cancellation of part or all of these trunked authorizations at the end of the prescribed loading period where the minimum levels have not been achieved. 46 F.R. 37927 at para. 63.

We proposed clarifying our Rules by specifying that at the conclusion of the loading period, where the requisite minimum level has not been achieved, the channels not so loaded would automatically be cancelled. We proposed that any new loading and construction standards adopted should be applied to all existing conventional and trunked systems to provide the requisite efficiency of spectrum usage and enable us to reclaim unused spectrum for reassignment to others. *Further Notice of Proposed Rulemaking*, *supra*, at paras. 68–69.

41. In our *Second Report and Order* in Docket No. 79–191, *supra*, at para. 42, we clarified the sanctions that would be applied to trunked systems which had failed to meet minimum loading criteria. We replaced Rule 90.375 with Rule 90.366 and provided in 90.366(d) that:

> (d) Licensees of trunked facilities must complete construction within one year of initial grant; provided, however, that a licensee of a "trunked" facility assigned

more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five channel group of the authorized facility within one year. At the end of two years the licensee must demonstrate notwithstanding the provisions of subparagraph (b) that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. *If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent and a waiting list for frequencies exists in the system's geographic area, authorization for channels in excess of five cancels automatically.* If at the end of five years the 5 channel system is not loaded to 70 percent of the prescribed level for this period of time and a waiting list for frequencies exists in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. *All licenses are subject to this condition. A licensee may only modify the election to build or not build a system in stages with(in) the first year of authorization. If the election is changed there will be no extension of time to complete construction* (emphasis added).

We stated that Subpart M, Part 90 of our Rules, as modified by our proceeding, applied to *all trunked systems* existing at that time. *Second Report and Order, supra*, at para. 113.

AAT'S Assertion that the Rules as Amended in Docket No. 79–191 Do not Apply to Existing Licensees

42. Despite AAT's recognition in its Petition for Reconsideration that our amended Rules concerning the cancellation of unloaded or lightly loaded channels would be retroactively applied when adopted, AAT now argues in its Application for Review that our amended Rules in Docket 79–191 do not apply to existing SMRS trunked licensees such as AAT. AAT maintains that application of Rule 90.366(d) "grafts an automatic cancellation term on AAT's license" which is *ex post facto* in nature. We reject AAT's argument as we have rejected similar arguments before us. Significantly, the amended Rules do not in any way alter the substantive loading and construction standards placed upon AAT at the time of its license grant. The amended rules merely make explicit the consequences of failing to meet those standards.

43. Even assuming *arguendo* that application of Rule 90.366(d) substantively alters the obligations of AAT, we have previously concluded that there is a legal basis for application of substantive Rule changes to existing licensees. In our *Report and Order* in Docket No. 79–106, 44 F.R. 58737 (October 11, 1979), we amended the Rules governing co-channel mileage separation and frequency loading standards for conventional 800 MHz systems. There we rejected arguments that licensees of existing systems should be permitted to operate under the old standards. Docket No. 79–106, *supra*, at para. 16. We noted that failure to apply the revised Rules to existing licensees would negate the beneficial effects of the entire rulemaking

process with respect to urbanized areas where conventional channels have or in the future would be exhausted. We stated:

> There can be no question that a license is issued subject to the Commission's rules as well as any future revisions thereto. Moreover, the authorizations held by 800 MHz licensees do not specify any quality of service, so that retroactive application of these frequency assignment and loading standards do not impinge upon a specific license provision. *Id.*, para. 16.

See also *California Citizens Band Association v. U.S.* 375 F.2d 43, 51–52 (9th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967); *General Telephone Co. of Southwest* v. *U.S.*, 449 F.2d 846, 863–64 (5th Cir. 1971); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Airlines* v. *C.A.B.*, 359 F.2d 624 (D.C. Cir. 1966), *cert denied*, 385 U.S. 843 (1966); *Air Line Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968). It is with the above stated policies in mind that we apply new Rule 90.366, adopted in Docket No. 79–191, to AAT as a licensee of an existing trunked system. See *Second Report and Order* in Docket No. 79–191, *supra*, at para. 113.

44. New Rule 90.366(d), which explicitly limits the period for changes in election to the first year of authorization and prohibits extensions of time to complete construction, supports the Bureau's denial of AAT's attempt, made more than 2 1;2 years after it was initially licensed, to change its election to entire construction. The new Rule also supports the Bureau's deletion action since it is undisputed that AAT, having elected to construct in stages, did not load its initial 5 channels to the 70% standard (350 mobiles) within two years. Thus, we find the Bureau's March 22, 1982, action which deleted 15 of AAT's 20 channels for SMRS facility WYA-671 consistent with our Rules as modified in Docket 79–191.

AAT's Request for Waiver

45. AAT seeks a waiver of the provisions of Rule 90.375, now contained in new Rule 90.366, which provide a one year construction period for a system constructed in its entirety, or, in the alternative, a waiver of the two-year minimum loading period for systems constructed in stages. AAT asserts that a waiver should be granted on equitable grounds because equipment problems were beyond its control and that it relied on a "Bureau Official's" representation that it would be permitted to change its selected method of construction. AAT also maintains that a grant of its waiver request would be in the public interest. We disagree.

46. Equipment problems inherent with new 800 MHz system technology are a potential impediment to all SMRS licensees. In fact, upon initial receipt of AAT's modification to a 20 channel system in November 1979, the Bureau advised AAT of possible equipment delays which could result in financial loss to AAT if it decided to pursue a 20 channel authorization. On January 21, 1980, AAT

resubmitted its application for 20 channels asserting that it was certain it would "... meet [the Commission's] loading requirements." The application contained AAT's certification and acknowledgement that channels not loaded in accordance with the Commission's Rules could be reassigned to another applicant. AAT's subsequent decision not to vigorously pursue marketing of its 20 channel system because of equipment uncertainties was an independent business judgment and its failure to meet the requisite loading and construction standards is attributable to circumstances under its control. See *In Re applications of Radio Longview, Inc.* 19 FCC 2d 966, 968 (1969), and cases cited therein. Moreover, notwithstanding the technical problems experienced by AAT, we note that during the eight month period August 1981 to March 1982, after equipment defects had been corrected, AAT by its own admission only increased its loading by 60 mobiles, still far short of the necessary pace to meet the required minimum of 350 mobile units in two years.

47. We find AAT's contention that it relied on a "Bureau Official's" representation that it could change its method of construction and would not be bound by the two year loading deadline equally unpersuasive. At the outset we note that the Bureau employee in question was a staff attorney who did not have policy making authority. Moreover, AAT never mentioned any representations made by any Bureau staff member in its October 26, 1981, letter in which AAT advised that it was proceeding to construct its 20 channel system in its entirety. AAT simply offered its preferred Rule interpretation of Section 90.375 and proceeded to act accordingly by ordering 20 channel equipment on November 25, 1981, and completing construction of the equipment on March 12, 1982. Despite AAT's admission that on January 8, 1982, the same Bureau staff member advised that the Bureau's response to AAT's interpretation of Rule 90.375 may not be favorable, there is no evidence that AAT attempted to cancel or delay delivery of the equipment. In the absence of an explicit waiver, AAT's actions were taken at its own risk in an effort to create equities for itself and bind the Commission. We decline to be so manipulated.

48. Finally, AAT argues that the existence of an applicant waiting list is not a legitimate basis for deletion of AAT's channels. It contends that since most applicants are already SMRS licensees, there would be no public benefit to redistributing AAT's channels to existing SMRS facilities. AAT's position is without merit. In keeping with our desire to encourage spectrum use we adopted Rule 90.621 in Docket No. 79-191, which provides that SMRS licensees may be assigned a maximum of 5 additional channels at any one time only if their existing channels are loaded to 90% of the minimum (90% of 500 mobile units or 450 mobile units for a 5 channel system). Thus, contrary to AAT's claim, reassignment of AAT's 15 channels, *minimally utilized by AAT for three years*, would serve the public

interest by making those channels available to the public through entrepreneurs who have demonstrated an immediate need for additional spectrum. Likewise, if AAT ever fully loads its five channels, Rule 90.621 will provide AAT the opportunity to apply for additional channels. For these reasons we find no basis for granting AAT a waiver of our Rules.

AAT's Request for a Hearing

49. We find the Bureau's deletion of 15 channels from AAT's SMRS facility WYA-671 was not a modification of its license as AAT asserts. Rather it was the enforcement of construction and loading conditions which were placed upon the original license grant. In fact these conditions were repeatedly and expressly certified to on Form 400-S by AAT.

50. Therefore, we reject AAT's contention that it is entitled to an evidentiary hearing prior to the modification of its license under Sections 303(f) and 316 of the Act and Section 558 of the Administrative Procedure Act (5 U.S.C. § 558). The Bureau's deletion action was predicated upon *conditions imposed on AAT as well as all other similarly situated SMRS licensees at the time their licenses were initially granted.* Routine enforcement of conditions imposed upon the entire private land mobile community is not a modification as contemplated by Sections 303(f) and 316 of the Act. AAT's failure to meet the construction and loading conditions associated with its license grant is undisputed. A hearing would serve no purpose in that a hearing is not the appropriate vehicle for seeking a waiver of the conditions imposed by our Rules. As we stated in Docket No. 79-106, *supra*, at para. 16:

> In short, we are convinced that the frequency assignment and loading standards can be revised with respect to existing licensees by rulemaking without compromising hearing rights under Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 316(a).[4]

We repeat that application of new Rule 90.366(d) to all SMRS licensees does not alter the loading or construction requirements imposed on AAT at the time of its initial license grant by Rule

[4] Section 316(a) is designed to protect individual licensees by allowing a right to a hearing before the Commission can modify a particular license. Section 316's hearing rights, however, are not applicable when the Commission enacts rules directed against an industry in general or a broad class of licensees. *E.g., Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1160-1165 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601, 617-20 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *Satellite Business Systems, et. al.*, 62 FCC 2d 997, 1063-68 (1977); *Multiple Ownership*, 53 FCC 2d 589, 594-95 (1975). This is especially so when, as here, we do not expect that any party will encounter substantial harm through the rule change. And if any party should encounter substantial harm, we will of course entertain petitions for waiver under Section 1.3 of the Commission's rules (47 C.F.R. § 1.3). See *E.g. WBEN, Inc.* v. *U.S.* v. *supra*, at 618.

90.375. New Rule 90.366(d) merely provides an explicit Rule provision which reflects our cancellation and reassignment policy consistently enunciated since 1975. As previously noted, any financial loss incurred by AAT is a consequence of its own inexpedient action. AAT's request for waiver has been considered and denied.[5]

Conclusion

51. Public benefit of this new trunked radio service must not be delayed. In the rulemakings establishing new SMR systems, we clearly recognized that a new technology was being made available to the public and that marketing and engineering problems would be inherent in its development. We considered this in setting the construction and loading standards and gave entrepreneurs options of how to proceed. AAT has failed to meet the Commission requirements placed on entrepreneurs in this new service and the next entrepreneur must now be given the opportunity to successfully deliver this new service to the public. There are 26 waiting to do so. Some have been waiting longer than three years. The 15 channels that AAT has not been able to fully deliver to the public must now be returned to the marketplace. To do otherwise would frustrate our longstanding policy against spectrum lying vacant while waiting lists of applicants exist. There are now waiting lists in 14 major cities.[6]

52. Finally, this action allows AAT and its users to retain a 5 channel SMR facility for the remainder of AAT's license term. Upon renewal the Bureau will determine, consistent with our Rules, if AAT's facility is sufficiently loaded to allow it to retain all of its remaining 5 channel system.

53. Based on all of the foregoing, we affirm the Bureau's March 22, 1982, action which deleted 15 channels from AAT's SMRS trunked facility WYA-671. We also affirm the Bureau's denial of

[5] AAT also asserts a right to a hearing under Section 558 of the Administrative Procedure Act (5 U.S.C. § 558). Section 558 of the APA does not mandate a hearing prior to agency action. It only requires written notice and an opportunity to demonstrate or achieve compliance prior to "the withdrawal, suspension, revocation or annulment of a license." Assuming *arguendo* that this section applies, AAT repeatedly acknowledged the Commission's loading requirements in its applications and was provided written notice on March 22, 1982. AAT concedes that it is not in compliance with the Commission's loading standards and it has had ample opportunity to demonstrate its position during the course of the proceeding. We find no merit to AAT's contention that Section 558 of the APA requires a hearing in this matter.

[6] On November 15, 1982, the Licensing Division began accepting applications for the 80 new channels made available in the 800 MHz band for SMR systems by our release of our *Second Report and Order* in Docket No. 79-191, *supra*. This resulted in applications for 341 channels in AAT's area alone although only 80 channels are available.

AAT's request for waiver or hearing. The deleted channels should be routinely reassigned by the Bureau.

54. Accordingly, AAT's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

FCC 83-171

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Application For Review of

Specialized Mobile Radio Station WZC-792, licensed to P & R Temmer, d/b/a Mobile Communications Service Company Brooklyn, New York

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 16, 1983)

BY THE COMMISSION:

Commissioner Jones absent.

1. The Commission has for consideration P & R Temmer's, d/b/a Mobile Communications Service Company, Application for Review of the Private Radio Bureau's Order issued September 21, 1982. The Order denied Temmer's Petition for Reconsideration of the Bureau's March 22, 1982, determination which deleted 15 of Temmer's 20 authorized channels for Specialized Mobile Radio System (SMRS) WZC-792. The 15 channels, which were unconstructed, were deleted as a result of the Bureau's finding that Temmer failed to meet the minimum loading requirements for mobile units as specified in Rule 90.375(e).[1] The Bureau denied Temmer's alternative request for waiver of Rule 90.375(e) or hearing.

2. In his Application for Review Temmer is seeking reinstatement of his complete 20 channel authorization for WZC-792 and an extension of time to meet the minimum loading requirements. Absent reinstatement, Temmer asserts he is entitled to a full hearing under Section 316 of the Communications Act of 1934, as amended, to show cause why his channels should not be deleted.

3. There is a waiting list of 26 SMRS applicants desiring channels in the area served by Temmer. Reassignment of the channels deleted from Temmer's authorization has been held in abeyance pending the outcome of our determination.

[1] Part 90 of the Commission's Rules was amended effective October 16, 1982, by our adoption of our *Second Report and Order* in Docket No. 79-191, 90 FCC 2d 1281 (1982). Rule 90.375 was amended and is now Rule 90.366. 90.366 did not change the construction and loading requirements for existing SMR systems.

Background

4. Rule 90.375(e) (now 90.366) governed the loading and construction requirements for trunked SMR systems. Entrepreneurs seeking facilities of more than five channels could elect to build the station in its entirety or in stages. Those seeking to build all at once were required to construct all channels within one year but were given the entire five year license term to load to 70% of system capacity (1400 mobiles for a 20 channel system).

5. Entrepreneurs were required by Rule 90.359(c) to specify in their application if they were seeking to build an SMR system in stages. Staged construction required that the entrepreneur build five channels within a year and load to 70% of five channel capacity (350 mobiles) within two years. The advantage of staged construction is that it requires a smaller initial investment. It imposes, however, an obligation of meeting minimum loading standards within two years to give assurances that the full system will be developed and in full use within the five year license term.

6. On March 21, 1979, Temmer submitted an application for an SMRS trunked system specifying that it was his intention to expand to a 20 channel system as soon as 20 channel equipment was type accepted by the Commission. Temmer's application was accompanied by Form 400-S on which Temmer certified that, if granted a 20 channel authorization, he was electing to construct in 5 channel stages and that 70% of the required mobiles for loading for 5 channels would be in operation within 2 years from the date of the grant. Directly above Temmer's signature on Form 400-S was this express provision:

> The applicant acknowledges that, where the authorized facilities are not fully (actually) loaded in accordance with the applicable loading requirements set out in Sections 89.801 and 89.802 of Subpart S of Part 89 of the Commission's Rules, any channels not so occupied may be assigned, at the discretion of the Commission, to another applicant in accordance with the policies set out under this Subpart S of Part 89 of the Rules.[2]

Since 20 channel equipment had not yet been type accepted, a license for a 5 channel trunked facility was granted to Temmer for station WZC-792 on May 31, 1979.

7. On December 10, 1979, Temmer advised the Bureau's Licensing Division that construction of his 5-channel facility began in September 1979 and that he anticipated his station would begin operating in early February 1980. Temmer also requested a modification to increase to a 20-channel system as stated on his original application since he was advised by Motorola that 20-channel equipment was now type accepted.

8. In a letter dated May 1, 1980, Temmer again requested to

[2] Parts 89, 91 and 93 of the Rules have been consolidated into Part 90.

amend his application for a 20-channel system repeating that it was his desire ". . . to build the system by the five channel add-on option." Temmer also requested to move his transmitter site from one location to another in Brooklyn, New York.

9. On May 19, 1980, Temmer was granted an authorization increasing the capacity of station WZC-792 to 20 channels. On the face of the license was the following statement:

> This grant does not extend the period within which you must place the station in operation or meet loading requirements. That period begins from the date of your original authorization.

The expiration date was May 31, 1984, five years from the original 5 channel authorization. The authorization also granted Temmer's request to change the transmitter location.

10. A Commission engineer visited Temmer on January 19, 1982, to obtain information about station WZC-792. Temmer stated 5 of the authorized 20 channels were constructed and that he elected to construct his facility in stages. Bureau Licensing Division records indicate that as of February 17, 1982, 75 mobiles, or 21% of the 350 mobiles required for minimum loading within the two-year period, were in operation on the initial 5 channels.

11. On April 6, 1982, Temmer filed a request for modification of his transmitter site from Brooklyn to Manhattan. Temmer's license was modified on July 2, 1982. The modification was without prejudice to the matters in issue in this proceeding.

The Bureau's March 22, 1982, Action

12. On March 22 the Bureau advised Temmer that station WZC-792 was not in compliance with Rule 90.375(e) because the entire 20 channel system was not constructed within 1 year.[3] The Bureau noted that even if Temmer was permitted to construct in stages, the 75 mobile units authorized to use his facility was less than 25% of the minimum loading (350 mobiles) required within two years by Rule 90.375(e). In view of Temmer's failure to meet the requirements of Rule 90.375(e), the Bureau reclaimed 15 unconstructed channels from Temmer's facility for reassignment to entrepreneurs on the waiting list in the New York City area. An authorization was issued March 22, 1982, limiting WZC-792 to the 5 constructed channels.

Temmer's Petition For Reconsideration

13. In his Petition for Reconsideration Temmer requested the following relief:

[3] In his Petition for Reconsideration Temmer asserted that he properly elected to construct in stages and that he was not required to build the entire system at once. This matter is no longer in issue since the Bureau, in its September 21, 1982, Order denying Temmer's petition, agreed that Temmer's election to construct in stages was proper and timely.

a) a vacating of the Bureau's March 22 determination, reinstatement of the 15 deleted channels and a waiver of the two year loading period in Rule 90.375(e) for facilities constructed in stages to allow Temmer "a reasonable additional period to achieve complete compliance."

or

b) In the alternative, a full adjudicatory hearing in accordance with Section 316 of the Communications Act of 1934, as amended.

Temmer's Request for Waiver and Extension of the Two Year Loading Period in Rule 90.375(e)

14. Temmer acknowledges that his system has not achieved the required mobile loading but contends that loading was delayed by ". . . unforseen (sic) circumstances essentially outside of [his] control." Temmer asserts that his facility was one of the first Motorola trunked systems operating in the New York City market. As a result, his facility experienced all of the technical problems associated with a pioneering system. While Temmer concedes that Motorola corrected the major problems, he maintains that his system developed a "bad reputation." As a result, Temmer alleges that Motorola salespeople, who SMRS licensees using Motorola equipment depend upon to market their system, were reluctant to sell mobiles for operation on Temmer's facility.

15. Temmer also asserts that Motorola sales people avoided selling mobiles for use on his system because of its location in Brooklyn rather than Manhattan. Temmer characterizes his transmitter site location as ". . . more of a problem of perception than one of substance."

16. Temmer states that he has taken steps to alleviate his problems which will result in expeditious loading of his system. Temmer has entered into a tentative agreement with a communications company to participate in the ownership and operation of his system. Temmer has moved his station location, at considerable expense, to a desirable site in Manhattan. Motorola has provided assurances that it will work in full cooperation with Temmer to market his system. Finally, Temmer has ordered the equipment for the remaining 15 channels from Motorola.

17. Temmer contends that his request for an extension of the two year loading period in Rule 90.375(e) is analogous to applications for extensions of broadcast construction permits. He argues that the Commission routinely grants extensions of broadcast construction permits where there are factors that militate in favor of an extension (see paras. 34–35 *infra*).

18. Temmer asserts that his expensive and agressive steps to overcome his system's problems warrant the extension of time he is seeking. He argues an extension would expedite 800 MHz trunked service in the New York City area because he can promote his system better than a new SMRS licensee. Temmer states that if he is

not permitted to keep the 15 additional channels, he will face financial ruin. The annual cost of the Manhattan antenna site is approximately $30,000 with annual service contracts costing $10,000. With other costs the annual operating costs total approximately $50,000. Temmer asserts a five channel system would only allow him to recover his annual operating expenses with no hope of recovery of his initial $160,000 investment.

Temmer Maintains he is Entitled to a Hearing Prior to Modification of his License

19. Temmer notes that Section 316 of the Communications Act of 1934, as amended, requires that a licensee be afforded the opportunity to appear at a hearing prior to modification of his license. Temmer argues that the Bureau's deletion action was an individual action directed against him as a licensee and was not the result of a general rulemaking proceeding. Therefore Temmer contends that the Bureau's March 22, 1982, deletion must be set aside since the hearing procedures in Section 316 of the Act were not followed.

The Bureau's Order Denying Temmer's Petition for Reconsideration

20. The Bureau's Order summarized the history of rulemakings in which the Commission authorized trunked SMRS facilities under a regulatory approach which would permit the operation of a free competitive market as the best method for developing new system designs, technology and marketing techniques necessary for the fuller development of the new spectrum. The Bureau noted that the Commission developed loading standards to insure that channels made available to the public were put "in use" and not "in storage". The Bureau emphasized that the Commission stated, on the occasion of its initial offering of SMRS systems to entrepreneurs on a for profit basis seven years ago, that systems not loaded to 70% (350 mobiles) within two years would have their channels assigned to others. To cope with the uncertainties of a new technology, the Commission gave entrepreneurs the alternatives of constructing their SMRS facilities in stages or in their entirety. The Bureau concluded that Temmer's large financial investment and actions to improve the marketability of his system did not obviate his responsibility to meet minimum loading standards.

21. The Bureau noted that at the time there were 26 SMRS applicants waiting for channels in the area served by Temmer and determined there was no basis for granting Temmer additional time to meet the Commission's loading requirement at the expense of other entrepreneur-applicants. The Bureau emphasized that although 15 channels were being returned to the marketplace for reassignment, Temmer was not deprived of the 5 channel system

initially constructed despite his failure to meet the two year minimum loading criteria. The Bureau noted that Temmer's current users retained the benefit of the 5 channel system.

22. With regard to Temmer's assertion that he was entitled to a hearing, the Bureau relied upon the Commission's rulemakings establishing SMR systems and the fact that deletion of the 15 channels was accomplished by superseding the original authorization rather than modifying the license. Therefore, the Bureau concluded that Section 316 of the Act did not apply to its deletion action.

Temmer's Application For Review

23. In his Application for Review, Temmer reiterates the arguments presented in his Petition for Reconsideration. Temmer urges us to set aside the Bureau's March 22 deletion of his 15 channels asserting that Rule 90.375(e) provides no basis for the Bureau's action. Temmer makes no reference to Rule 90.366(d), which amended and replaced Rule 90.375(e) effective October 16, 1982. See footnote 1, *supra*. Temmer's specific contentions are addressed in detail below.

Discussion

24. We affirm the Bureau's deletion of Temmer's 15 channels. Our decision is based upon our application to Temmer, as an existing SMRS licensee, of Rule 90.366(d) which was adopted in our *Second Report and Order* in Docket No. 79–191, *supra*, and became effective October 16, 1982. Rule 90.366(d) serves to clarify the procedures followed when the Commission's loading and construction standards are not met and furthers our goal of maximizing spectrum efficiency and use. Docket 79–191, *supra*, at para. 42. The rule makes no substantive change to the loading and construction requirements of existing licensees; it states that channels in excess of 5 cancel automatically when minimum loading standards are not met. We believe a brief history of our proceedings involving SMRS 800 MHz systems would be helpful prior to further discussion of Rule 90.366(d).

25. In our *Second Report and Order*, In the Matter of An Inquiry Relative to the Future Use of the Frequency Band 806–960 MHz, Docket 18262, 46 FCC 2d 752 (1974), we concluded a detailed rulemaking proceeding, initiated in 1968, dealing with the allocation and future use of frequency spectrum in the 806–947 MHz band in the land mobile radio service. In order to realize our goal of maximizing spectrum use and efficiency we chose allocation by "system", rather than radio services, using trunked or conventional technology. We chose to permit the competitive marketplace to ultimately determine how much spectrum would be utilized by the various types of users. To help promote competition and to provide

access to the small business user who could not afford the expenditure required to build these new systems, we created a new entity, the Specialized Mobile Radio System (SMRS) licensee. The SMRS licensee was to be a commercial entity or entrepreneur authorized to make radio facilities available for use by private services eligibles. These licensees would assume the financial risks and obligations of building the expensive 800 MHz systems and were authorized to provide a communications service on a *for profit* basis. *Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975).

26. We determined we would not examine in advance the financial qualifications of each SMRS applicant but would ensure their performance as licensees through mandatory system construction and loading requirements. We stated:

> In meeting our obligations under Section 308(b), all of the requirements for obtaining a radio station authorization have been spelled out in detail in the rules. Each application will be examined to determine if the proposal meets minimum legal and character qualifications, as well as technical, operational, frequency loading, and other requirements. However, the new rules do not require an applicant to show that he has the financial qualifications to construct the proposed facilities. Instead, licensees of "trunked" SMR systems, for example, will be required to begin construction of the authorized facilities within six months of authorization and to complete construction within one year. Further, the *licensee must "load"* his facility in accordance with express standards set out in the new rules. *If he does not, the frequencies assigned, or some of them, will be made available for use by other eligible persons.* This method, in our view, is preferable to the examination of a financial statement to ensure that the frequencies assigned will be used effectively. The Communications Act gives us ample flexibility in this area to adopt measures most conducive "... to the proper dispatch of [our] business and to the ends of justice." *Section 4(i) of the Act. See Federal Communications Commission v. Pottsville Broadcasting, Co.*, 309 U.S. 134 (1940), 51 FCC 2d 945, 960 (emphasis added).

27. We sought to ensure that the 800 MHz channels authorized to SMRS licensees were put in "use" and not "in storage". We required "... channels assigned to be 'occupied' in accordance with express loading criteria or, if they are not, they become available to other users." *Memorandum Opinion and Order*, Docket No. 18262, *supra*, at p. 983. Thus, in developing loading standards for trunked systems we stated:

> ... we further realize that initial investment ... required ... regardless of the number of channels will be ... heavy. Thus, should we permit licensees to proceed in five-channel stages, it is not likely that there would be any incentive not to go forward with completion of the system, as the greater capacity it has, the greater will be the return on the investment ... However, we still must emphasize that our objective ... is to maximize spectrum efficiency and to get these systems established, because they are needed to achieve the degree of efficiency ... we feel is desirable in terms of the public interest. Therefore, in reaching some balance between that objective and the monetary consideration mentioned, we are going to modify our loading requirement for "trunked" systems to specify that the licensee must show that the system is being developed and loaded so that it will be in full use in the five year term. Thus, we will permit the licensee of a "trunked" facility which has been assigned more than the

> minimum five channels to proceed with construction as proposed, i.e., in five channel stages; however, the basic facility designed to accommodate a minimum of five channels in "trunked" mode must be completed within the one-year limit specified in the rules. Further, where the licensee elects to proceed in this fashion, *he must show that his system is "occupied" to 70 percent of its capacity at the end of a period of two years* from the date of the grant of his station authorization. *If it is not loaded to this capacity, the unused channels may be assigned to others.* 51 FCC 2d 945, 986 (emphasis added).

28. In our *Further Notice of Proposed Rule Making* in Docket No. 79–191, 46 F.R. 37927 (July 23, 1981), we addressed the problem of spectrum lying vacant while waiting lists of entrepreneurs for trunked channels exist. We stated:

> These rules for trunked systems have allowed the situation in larger urban areas where large numbers of trunked channels have been assigned to SMRs but have only a handful of mobile units on them. Under the present rule structure, we cannot make these channels available to others for two—and in many cases five—years. There is no explicit provision now contained in our rules for cancellation of part or all of these trunked authorizations at the end of the prescribed loading period where the minimum levels have not been achieved. 46 F.R. 37927 at para. 63.

We proposed clarifying our Rules by specifying that at the conclusion of the loading period, where the requisite minimum level has not been achieved, the channels not so loaded would automatically be cancelled. We proposed that any new loading and construction standards adopted should be applied to all existing conventional and trunked systems to provide the requisite efficiency of spectrum usage and enable us to reclaim unused spectrum for reassignment to others. *Further Notice of Proposed Rulemaking*, *supra*, at paras. 68–69.

29. In our *Second Report and Order* in Docket No. 79–191, *supra*, at para. 42, we clarified the sanctions that would be applied to trunked systems which had failed to meet minimum loading criteria. We replaced Rule 90.375 with Rule 90.366 and provided in 90.366(d) that:

> (d) Licensees of trunked facilities must complete construction within one year of initial grant; provided, however, that a licensee of a "trunked" facility assigned more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five channel group of the authorized facility within one year. At the end of two years the licensee must demonstrate notwithstanding the provisions of subparagraph (b) that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. *If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent and a waiting list for frequencies exists in the system's geographic area, authorization for channels in excess of five cancels automatically.* If at the end of five years the 5 channel system is not loaded to 70 percent of the prescribed level for this period of time and a waiting list for frequencies exists in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. *All licenses are subject to this*

condition. A licensee may only modify the election to build or not build a system in stages with(in) the first year of authorization. If the election is changed there will be no extension of time to complete construction (emphasis added).

We stated that Subpart M, Part 90 of our Rules, as modified by our proceeding, applied to *all trunked systems* existing at that time. *Second Report and Order*, *supra*, at para. 113.

30. Our application of Part 90 as modified in Docket 79–191, *supra*, is consistent with our stated policies since 1975. While we determined that the allocation of spectrum in Docket No. 18262, and the subsequent promulgation in that proceeding of Rules governing its use were appropriate at that time, we anticipated and acknowledged that experience in dealing with novel and untried standards in 800 MHz systems might warrant revisitation and adjustment to our regulatory structure. See 46 FCC 2d at 781–2 and 51 FCC 2d at 978–9.

31. In our *Report and Order* in Docket No. 79–106, 44 F.R. 58737 (October 11, 1979), we amended the Rules governing co-channel mileage separation and frequency loading standards for conventional 800 MHz systems. There we rejected arguments that licensees of existing systems should be permitted to operate under the old standards. Docket No. 79–106, *supra*, at para. 16. We noted that failure to apply the revised Rules to existing licensees would negate the beneficial effects of the entire rulemaking process with respect to urbanized areas where conventional channels have been or in the future would be exhausted. We stated:

> There can be no question that a license is issued subject to the Commission's rules as well as any future revisions thereto. Moreover, the authorizations held by 800 MHz licensees do not specify any quality of service, so that retroactive application of these frequency assignment and loading standards do not impinge upon a specific license provision. *Id.* para. 16.

See also *California Citizens Band Association v. U.S.* 375 F.2d 43, 51–52 (9th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967); *General Telephone Co. of Southwest* v. *U.S.*, 449 F.2d 846, 863–64 (5th Cir. 1971); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *American Airlines* v. *C.A.B.*, 359 F.2d 624 (D.C. Cir.1966), *cert denied*, 385 U.S. 843 (1966); *Air Line Pilots Ass'n* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968). It is with the above stated policies in mind that we apply new Rule 90.366, adopted in Docket No. 79–191, to Temmer as a licensee of an existing trunked system. See *Second Report and Order* in Docket No. 79–191, *supra*, at para. 113.

32. Rule 90.366(d) supports the Bureau's deletion action since it is undisputed that Temmer, having elected to construct in stages, did not load his initial 5 channels to the 70% standard (350 mobiles) within two years. Thus, we find the Bureau's March 22, 1982, action which deleted 15 of Temmer's 20 channels for SMRS facility WZC-792 consistent with our Rules as modified in Docket 79–191.

Temmer Asserts the Bureau did not Adequately Consider Circumstances Beyond his Control which Delayed Loading

33. Temmer's contention that his failure to load his system was due to circumstances beyond his control is without merit. Any technical problems associated with Motorola's new equipment were common to all early 800 MHz Motorola systems and were ultimately resolved. Temmer admits a major impediment to loading was that his initial transmitter site was in Brooklyn rather than Manhattan, which he describes as "... more of a problem of perception than one of substance." Regardless of how the problem is characterized, in the final analysis it is Temmer's problem created by his choice of transmitter location. The location of his transmitter was not a circumstance beyond his control. The fact that the Motorola sales force did not exercise its best efforts to market Temmer's system because of its Brooklyn location does not release Temmer from the Commission's loading requirements. Temmer's decision to invest in Motorola equipment, his initial selection of a transmitter location, and his reliance on Motorola to market his system were independent business judgments. His failure to meet the requisite loading standards as a result of these business decisions is attributable to circumstances under Temmer's control. See *In Re application of Radio Longview, Inc.*, 14 FCC 2d 966, 968 (1969).

Temmer Argues that Denial of his Request for an Extension of Time is Against Commission Policy and Precedent

34. Temmer maintains the Bureau ignored his showing that he has taken vigorous and expensive steps to place him in a better position to load his system at a much faster rate. These steps include moving the transmitter to Manhattan, entering into a tentative joint ownership agreement with a communications company and ordering the remaining equipment to complete his 20 channel system. Temmer seeks to have his efforts serve as the basis for an extension of time citing, by analogy, Commission precedent in applications for extensions of time in broadcast construction permits. Temmer argues that the Commission normally grants extensions of construction permits where failure to timely construct was due to unforseen circumstances beyond the licensee's control or where "other matters," such as commencement of construction or financial commitment, militate in favor of an extension. *Northeast TV Cablevision corp., et al.*, 21 FCC 2d 442 (1970); *Radio Longview, Inc.*, 19 FCC 19 FCC 2d 966 (1969); *St. Anthony TV Corp.*, 22 FCC 2d 375 (1970); *Beta T.V. Corp.*, et al., 25 FCC 2d 496 (1970); *Leon County Communications Corp., et al.*, 27 FCC 2d 877 (1971); *Chicago Federation of Labor and Industrial Union Council*, 54 FCC 2d 471 (Rev. Bd. 1975).

35. Temmer's reliance on the above cases is misplaced. Broadcast construction permits are granted after the Commission has determined, on a comparative basis, which application will best serve the public interest. See our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398–9 (1965). Having identified the permittee who will best utilize the spectrum, there may be a public interest basis for granting extensions for construction permits. In contrast, we allow the marketplace to establish which licensees are utilizing channels to the prescribed minimum levels. Those who successfully load their channels are allowed to retain them. Those who do not must return them to be reassigned to other would-be providers, some of whom have waited a number of years for the opportunity to utilize the reassigned channels. Temmer's failure to approach the minimum loading standards after two years is not in dispute. Clearly, we cannot permit Temmer to retain unused spectrum while waiting lists for additional spectrum exist.

Temmer Contends an Extention of Time is in the Public Interest

36. We disagree with Temmer's contention that there is no public benefit in reassignment of Temmer's channels to other SMRS licensees. In keeping with our desire to encourage spectrum use we adopted Rule 90.261 in Docket No. 79–191, which provides that SMRS licensees may be assigned a maximum of 5 additional channels at any one time only if their existing channels are loaded to 90% of the minimum (90% of 500 mobile units or 450 mobile units for a 5 channel system). Thus, contrary to Temmer's claim, reassignment of Temmer's 15 channels would serve the public interest by making those channels available to the public through entreprenеurs who have demonstrated an immediate need for additional spectrum. Likewise, if Temmer ever fully loads his five channels, Rule 90.261 will provide Temmer the opportunity to apply for additional channels. For these reasons we find no basis for granting Temmer an extention of the two year minimum loading period for systems constructed in stages.

Temmer's Request for a Hearing

37. We find the Bureau's deletion of 15 channels from Temmer's SMRS facility WZC-792 was not a modification of his license as Temmer asserts. Rather it was the enforcement of a loading condition which was placed upon the original license grant. In fact the condition was expressely certified to on Form 400-S by Temmer.

38. Therefore, we reject Temmer's contention that he is entitled to an evidentiary hearing prior to the modification of his license under Section 316 of the Act. The Bureau's deletion action was predicated upon *conditions imposed on Temmer as well as all other similarly situated SMRS licensees at the time their licenses were initially granted*. Routine enforcement of conditions imposed upon

the entire private land mobile community is not a modification as contemplated by Section 316 of the Act. Temmer's failure to meet the loading conditions associated with his license grant is undisputed. A hearing would serve no purpose in that a hearing is not the appropriate vehicle for seeking a waiver of the conditions imposed by our Rules. As we stated in Docket No. 79–106, *supra*, at para. 16:

> In short, we are convinced that the frequency assignment and loading standards can be revised with respect to existing licensees by rulemaking without compromising hearing rights under Section 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 316(a).[4]

We repeat that application of new Rule 90.366(d) to all SMRS licensees does not alter the loading or construction requirements imposed on Temmer at the time of his initial license grant by Rule 90.375. New Rule 90.366(d) merely provides an explicit Rule provision which reflects our cancellation and reassignment policy consistently enunciated since 1975. Any financial loss incurred by Temmer as a result of our decision is unfortunate. However, the Commission cannot insure an entrepreneur against business losses at the expense of other entrepreneurs who are waiting for additional spectrum. Temmer's request for a waiver and extension of time has been considered and denied.

Conclusion

39. Public benefit of this new trunked radio service must not be delayed. In the rulemakings establishing new SMR systems, we clearly recognized that a new technology was being made available to the public and that marketing and engineering problems would be inherent in its development. We considered this in setting the construction and loading standards and gave entrepreneurs options of how to proceed. Temmer has failed to meet the Commission requirements placed on entrepreneurs in this new service and the next entrepreneur must now be given the opportunity to successfully deliver this new service to the public. There are 26 waiting to do so. Some have been waiting longer than three years. The 15 channels that Temmer has not constructed must now be returned to the

[4] Section 316(a) is designed to protect individual licensees by allowing a right to a hearing before the Commission can modify a particular license. Section 316's hearing rights, however, are not applicable when the Commission enacts rules directed against an industry in general or a broad class of licensees. *E.g., Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1160–1165 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975); *WBEN, Inc.* v. *U.S.*, 396 F.2d 601, 617–20 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *Satellite Business Systems, et. al.*, 62 FCC 2d 997, 1063–68 (1977); *Multiple Ownership*, 53 FCC 2d 589, 594–95 (1975). This is especially so when, as here, we do not expect that any party will encounter substantial harm through the rule change. And if any party should encounter substantial harm, we will of course entertain petitions for waiver under Section 1.3 of the Commission's rules (47 C.F.R. § 1.3). See *E.g. WBEN, Inc.* v. *U.S.* v. *supra*, at 618.

marketplace. To do otherwise would frustrate our longstanding policy against spectrum lying vacant while waiting lists of applicants exist. There are now waiting lists in 14 major cities.[4]

40. Finally, this action allows Temmer and his users to retain a 5 channel SMR facility for the remainder of Temmer's license term. Upon renewal the Bureau will determine, consistent with our Rules, if Temmer's facility is sufficiently loaded to allow it to retain all of its remaining 5 channel system. Likewise, if Temmer sufficiently loads his 5 channel system the Commission will entertain his application for additional channels.

41. Based on all of the foregoing, we affirm the Bureau's March 22, 1982, action which deleted 15 channels from Temmer's SMRS trunked facility WZC-792. We also affirm the Bureau's denial of Temmer's request for waiver and extension of time or hearing. The deleted channels should be routinely reassigned by the Bureau.

42. Accordingly, Temmer's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[4] On November 15, 1982, the Licensing Division began accepting applications for the 80 new channels made available in the 800 MHz band for SMR systems by our release of our *Second Report and Order* in Docket No. 79–191, *supra*. This resulted in applications for 341 channels in Temmer's area alone although only 80 channels are available.

READEX FICHE best copy available

Citizens Radio Service
License, Revocation

Where licensee engaged in repeated and willful violations of three CB rules and also willfully interfered with Commission inspection of his station, license revocation was imposed. Mitigating arguments were rejected.
–Theodore E. Sousa
SS Docket No. 78–89

FCC 83R-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License of THEODORE E. SOUSA 14909 Cottage Grove Dolton, Illinois 60419 Licensee of Station KEV-6939 in the Citizens Band Radio Service	SS Docket No. 78–89

Appearances

Elizabeth H. Smith on behalf of Theodore E. Sousa, and *Daniel A. Sarno* on behalf of the Chief, Private Radio Bureau, Federal Communications Commission.

DECISION

(Adopted: March 14, 1983; Released March 18, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. The Commission remanded this proceeding to the Review Board for consideration of the merits of Theodore E. Sousa's exceptions to an Initial Decision (79 FCC 2d 545 (1979)) which recommended that Mr. Sousa's Citizens Band radio license be revoked. Memorandum Opinion and Order, FCC 82–480, released November 4, 1982.[1] In the Order to Show Cause by which the Bureau initiated this proceeding (SS-198–78, released January 24, 1978), Mr. Sousa was alleged to have operated his station on June 15, 1977 in willful and repeated violation of the following Commission Rules:

[1] The Commission's Order reversed the Board's earlier Decision (71 FCC 2d, 330 (Rev. Bd. 1979)) which had held that a license could not be revoked solely on the basis of licensee misconduct that occurred during a previous license term and was known by Commission investigators prior to a grant of license renewal.

Section 95.471(c) — failure to identify the station by its assigned call sign; Section 95.501(b) — communicating with another station at a distance of more than 150 miles; and Section 95.469(b) — communications in excess of five consecutive minutes.[2] The violations were deemed to be repeated because Mr. Sousa had paid forfeiture liabilities for violations of these Rules in 1973 and 1976. The show cause Order further alleged that on June 15, 1977 Mr. Sousa failed to make his radio station available for inspection when requested to do so by authorized Commission representatives, in willful violation of Section 95.521 of the Commission's Rules.[3] The Order concluded that it appeared "the Commission would be warranted in refusing to grant an application filed by Sousa for a Citizens Band radio station license if the original application were now before it."[4]

2. In his Initial Decision, Administrative Law Judge Joseph Stirmer found that Sousa had engaged in repeated and willful violations of the Rules as charged. He stated that Mr. Sousa's proclivity to violate the same rules for which he had been fined on two previous occasions established his unfitness to remain a licensee and that his failure to allow an inspection of his station constituted an additional basis for revocation. In his exceptions, Sousa argues that his refusal to allow inspection of his station was not willful because he was not personally familiar with the rules in this regard and relied on the advice of counsel, that his past forfeiture payments for the other rule infractions were not admissions of previous violations, and that the ALJ ignored substantial mitigating evidence in Mr. Sousa's favor. We reject these exceptions and affirm the ALJ's conclusion that revocation is warranted.

3. To begin with, the record plainly establishes, and Sousa does not dispute, that on June 15, 1977, he committed the rule violations with which he is charged. *See I.D.*, paras. 7, 9, 13, 19. Sousa's exceptions relate only to whether the violations found were repeated and willful as alleged in the show cause order. His specific claim that the particular rule violations for which he also paid forfeitures for violating in 1973 and 1976 (Sections 95.501(b), 95.469(b), and 95.471(c)) were not repeated because he did not admit guilt on those previous occasions is not only fanciful but is belied by the facts of record. Thus, the evidence shows that Sousa responded to the 1973 Notice of Violations by explaining the corrective measures he had taken to insure that there would be no future recurrences (*I.D.*, para. 5), and responded to the 1976 Notice with attempts to explain (but

[2] These rule sections were subsequently simplified in ways not relevant here, and renumbered.

[3] *Id.*

[4] Section 312(a)(2) of the Communications Act of 1934, as amended, provides that the Commission may revoke any station license because of conditions coming to its attention "which would warrant it in refusing to grant a license or permit on an original application."

not deny) the violations. *I.D.*, para. 6. In again violating these rules on June 15, 1977, Sousa must be found to have acted willfully not only because he knew he was doing the acts in question, *see Kenneth L. Gilbert*, 52 RR 2d 965, 966 (Rev. Bd. 1982); *Bernard J. Winner*, 48 RR 2d 799, 801 (Rev. Bd. 1980), but also, as the ALJ found (*I.D.*, para. 18), because he must have known of the Commission's requirements from his earlier forfeitures.

4. With regard to his refusal to allow the inspection we reject Sousa's denial of willfulness based on his claimed ignorance of the relevant rule because Sousa testified that he was award from information printed on the back of his license application form that his station should be available for inspection. Tr. 133. Moreover, as stated in the cases cited above, a finding of willfulness does not require a showing that the licensee knew he acted wrongfully but only that he knew he was doing the acts in question, *see* Section 312(f) of the Communications Act (47 U.S.C. § 312(f) (1982); *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141 (1963), and there is no question here that Sousa knew he was preventing an inspection. His further contention that he relied on counsel's advice that a warrant was needed before the inspection could take place is not exculpatory either since the Commission engineers seeking to make the inspection at the time informed him that this advice was erroneous, that the Commission's rules required that he make the station available for inspection, and that his refusal could result in revocation of his license. Tr. 91–2. While advice of counsel may in appropriate circumstances be a mitigating factor, it "cannot excuse a clear breach of duty by a licensee." *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969). Here, because Sousa knew from his license form of the inspection requirement, and was given independent corroboration by the Commission engineers, his reference to counsel's advice is not sufficient in and of itself to excuse his conduct.

5. Finally, we also reject Mr. Sousa's claim that there is other evidence of mitigation in the facts that he now complies with the Commission's rules and has organized a CB organization which advocates operation in compliance with the rules. In the ALJ's words, these actions "came much too late". *I.D.*, para. 24. Mr. Sousa did not reform after the 1973 or 1976 forfeitures but only after revocation proceedings were begun and, in any event, the Commission has held that reform is expected as a result of legal sanctions and cannot exonerate past misconduct once it is established. *WWIZ, Inc.*, 37 FCC 685 (1964). In view of the totality of evidence of repeated and willful rule violations established on this record, we conclude that revocation is the only appropriate result. *See Roy A. Filbert*, 6 FCC 2d 883 (Rev. Bd. 1967); *Ralph Yago*, 35 FCC 113 (Rev. Bd. 1963).

6. ACCORDINGLY, IT IS ORDERED, That the license of Theo-

dore E. Sousa for Station KEV-6939 in the Citizens Band Radio Service IS REVOKED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

NOTE: Pursuant to Section 1.104 of the Rules, 47 CFR § 1.104, the revocation ordered herein becomes effective 40 days after the release date of this Decision, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or the Commission. Immediately upon the effective date of this Decision, the licensee shall forward to the Commission the license revoked. Operation of the Citizens Band Radio Station herein after the effective date will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person in violation to the penal sanctions specified in Section 501 of the Communications Act. A copy of this Decision shall be served by Certified Mail, Return Receipt Requested on Theodore E. Sousa at his last known address, 14909 Cottage Grove, Dolton, Illinois 60419.

Equipment Authorization Program
Radio Frequency Device, Authorization
TV Interface

Report and Order adopted revising rules in Subpart H of Part 15 for Class I TV Devices, now to be called TV Interface Devices. These are devices such as TV games and video cassette recorders which feed a signal to the antenna input of a TV receiver for display. The revision relaxes the limits on radiated emissions and permits use of stand-alone RF modulators.
–TV Interface Devices
Gen. Docket No. 79–244

FCC 83–57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 15 of the Commission Rules to provide for the operation of a TV Interface Device.	Gen. Docket 79–244 RM-3328 RM-2876

REPORT AND ORDER

(Adopted: February 9, 1983; Released: March 4, 1983)

BY THE COMMISSION:

I. *INTRODUCTION*

1. In 1972 the Commission adopted the rules in Subpart H of Part 15 to permit the attachment of TV games and similar devices to a TV receiver.[1] The old rules required the complete device (which includes both the RF modulator and video source) to be tested and approved by the Commission. It was defined as a Class I TV Device.[2]

[1] Report and Order, FCC Docket 19281: In the Matter of Amendment of Part 15 of the Commission's Rules to regulate the operation of a Class I TV Device - a new restricted radiation device which produces a RF carrier modulated by a TV signal. Adopted December 6, 1972, 38 FCC 2d 430.

[2] A Class I TV device is defined in § 15.4(m) as a restricted radiation device that produces on frequencies allocated for TV broadcasting, a radio frequency carrier modulated by a video signal and which feeds the modulated RF signal to the TV receiver by wire or cable.

In response to petitions filed by Texas Instruments, Inc. (TI) and RCA Corporation (RCA)[3], requesting the Commission to permit a stand-alone RF modulator and to consolidate the Commission's requirements for composite devices, respectively, the Commission initiated this proceeding on September 18, 1979.[4]

2. In the *Notice of Proposed Rule Making (Notice)* in this proceeding, we proposed to replace the definition of Class I TV device in § 15.4(m) of the Commission's Rules with the term TV Interface Device, which would cover any device that attaches to and uses the TV receiver to display video images.[5] This definition would permit the use of a stand-alone RF modulator, whereas the present Class I TV device definition does not. We also proposed in the *Notice* to relax the emission limits for such devices to coincide with the technical limits recently adopted by the Commission for personal computers.[6] A number of other changes to Subpart H of Part 15 were also proposed.

3. In general, the proposed Rules, with a few exceptions, are adopted as proposed. A discussion of the comments filed in this proceeding along with our response to them is given below. The eleven parties who filed comments are listed in Appendix A, attached. The new rules adopted herein are in Appendix C, attached. The measurement procedure the Commission will use to test the equipment to determine compliance with the Commission's Rules is given in Appendix B, attached.

4. In addition to filing a petition requesting the Commission to relax the Class I TV device Rules, TI concurrently filed a petition for waiver of the present rules in Subpart H of Part 15 to allow TI to immediately market its personal computer and separate RF modulator. In response to this petition for waiver, the Commission granted a conditional waiver of the Rules.[7] The waiver permitted TI to market a TV Interface Device subject to certain conditions, including those set out in the *Notice*. It also granted the Chief Scientist delegated authority to grant similar waivers to other persons willing to meet the same conditions. Since the *Order Granting Waiver in Part* was adopted, approximately 90 such waivers have been granted.

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[3] The RCA petition was filed on April 6, 1977 and designated RM-2876. The TI petition was filed on February 16, 1979 and designated RM-3328.

[4] Notice of Proposed Rule Making, FCC General Docket 79-244, FCC 79-556, released October 11, 1979, 44 Fed. Reg. 59570 (1979).

[5] The number of devices that use the TV receiver as a display device has been steadily increasing. Examples include personal computers, video disc players and video tape recorders, teletext and videotex decoders and TV games. Some of these products include a built-in RF modulator and some depend on connection to a stand-alone RF modulator.

[6] *See* 47 C.F.R. Subpart J of Part 15.

[7] Order Granting Waiver in Part, 73 FCC 2d 720 (1979).

II. *DISCUSSION*

A. *TV Interface Device vs. Class I TV Device*

5. As noted above, the *Notice* in this proceeding proposed to replace the Class I TV device rules with a single set of rules for all devices incorporating an RF modulator, including a stand-alone RF modulator. In general, all of the commenters with the exception of Atari supported the proposal to permit stand-alone modulators. In support of the proposal, TI argued that the availability of the TV Interface Device Rules would decrease the cost of personal computer systems to the consumer, since a separate RF modulator would not be needed for each component of the system that feeds a signal to the antenna terminals of the TV receiver.

6. Atari, in its comments, opposed the adoption of the proposed rules on the grounds that since Atari was capable of manufacturing a composite device (one including both the video source plus RF modulator) that complied with the strict Class I TV device requirements, other manufacturers should be capable of doing the same. In our opinion, it is immaterial whether one manufacturer can meet the more stringent requirements for a Class I TV device. The more important issues are whether they are so stringent that the costs to the manufacturer of meeting the Class I TV device requirements are too high and whether the relaxed requirements for the TV Interface Device would be a source of interference to TV reception.

7. As will be shown below, there is nothing in the record to warrant the Commission precluding stand-alone RF modulators, especially since RF modulators already authorized as TV Interface Devices under the waivers granted to TI and others (including Atari) have not resulted in interference complaints. Accordingly, we are revising Subpart H of Part 15 to adopt the definition of TV Interface Device. The present rules relating to Class I TV Devices are deleted. Class I TV devices already approved by the Commission are not affected by this action.

B. *Emission Limits*

8. In the *Notice* we proposed to relax the radiation limits for the TV Interface Device rather than retain the more stringent limits for the Class I TV device. We adopt without change those proposed limits. The comments were generally split between equipment manufacturers like TI and producers of TV receivers such as RCA and GTE, who supported less stringent limitations, and television broadcast interest groups like the Association of Maximum Service Telecasters, Inc. (AMST) and the National Association of Broadcasters (NAB), which opposed the relaxation of emission standards. Atari also opposed the relaxation.

9. Comments submitted by RCA were most representative of the support for the relaxed radiation and conduction limits for the TV

Interface Device. RCA emphasized, with support from the Consumer Electronics Group of the Electronic Industries Association (EIA), that the Commission should institute a follow-up program to assess the effectiveness of the new emanation standards in avoiding interference to TV reception. Should such interference arise, RCA pointed out, the Commission would be alerted early-on to persuasive evidence of interference caused by the TV Interface Device. A follow-up program could then be instituted and would reveal the necessary changes (to be implemented through rulemaking) to avoid such interference. AMST suggested in reply that the rulemaking process is too slow to modify the rules to prevent widespread interference, since great numbers of TV Interface Devices would already be in the hands of the public before tighter standards could be instituted.

10. Broadcast interests, represented by NAB and AMST, alleged that the radiation limits we proposed would result in harmful interference to television reception within the Grade B signal contour. AMST argued that in closely spaced dwellings like apartment buildings or townhouses at the outer reaches of the grade B signal contour, interference could be caused when the TV Interface Device is "separated by as much as 100 meters—more than 300 feet" from the victim TV receiver. Atari agreed, stating that for the lowband VHF, a TV receiver in a grade B signal area would have to be separated from the TV Interface Device by more than 200 feet to avoid harmful interference. These arguments are very much like those advanced by these same parties in recommending against the adoption of the very same emissions standards for computers. Those standards were, nevertheless, found adequate to protect television reception and were adopted in the *First Report and Order* in Docket 20780 concerning computing devices.[8]

11. We reject the arguments of Atari and the broadcasters alleging potential interference to TV reception for the same reasons given in the reconsideration of the *First Report and Order* as quoted below:

> . . . both Atari and AMST fail to acknowledge the large number of variables in developing such a [radiation] limit. The likelihood of worst case factors occurring at the same time is very small. In addition to the dimensions of time, space and frequency, paragraph 55 of the *First Report* discusses additional factors such as: greater attenuation due to walls and orientation of both the TV antenna and home computers could substantially reduce emissions of computers located closer than 10 meters . . . Moreover, the population density in areas lying outside of Grade A service contours [i.e. Grade B or beyond] (another parameter in determining the limit) of TV stations there is usually a reduction in population density and viewers are more likely to utilize outdoor antennas. Thus, there should be a low inciden[ce] of interference because of reduced population density and the distance separating computers located in homes and outdoor television

[8] Computing Devices, Subpart J of Part 15, Section 15.801 et. seq., 47 C.F.R. § 15.801 et seq. *See* Computing Devices, First Report and Order in Docket 20780, 79 FCC 2d 28 (1979), *reconsideration*, 79 FCC 2d 67 (1980), *clarification*, 85 FCC 2d 638 (1981).

receiving antennas. (Paragraph 47 of the *Order Granting in Part Reconsideration of the First Report and Order*, 79 FCC 2d 67, 80 (1980).)

12. Further, in actual practice the TV signal in the Grade B contour has been adequate to preclude interference to TV reception. We have not received the complaints of interference predicted by the model of the environment assumed by Atari and AMST, even though we have been permitting via waivers the marketing and use of TV Interface Devices subject to the higher limits.

13. Nonetheless, some parties questioned why radiation interference limits for the TV Interface Device should be less stringent than those for the category of devices it replaces—the Class I TV device. First, as we had concluded in the *Notice*, the Class I limits were apparently unnecessarily stringent and that no measurable benefit has been revealed from having more stringent radiation limits. Lending support to our conclusion is the experience of the last few years in which the predicted compliants of interference have not been received.[9] Second, we intend to minimize and simplify the regulatory scheme the Commission imposes. We do so by setting emission limits for the TV Interface Device designed to provide adequate protection for broadcast TV. Also by making the limits identical to those for the personal computers, we avoid more than one emission classification and provide for the application of a single standard for the computer (or any other video source) and the TV Interface Device, both employed in the home.[10] Therefore, we promote clarity in the rules, minimizing confusion in determining how different pieces of equipment should be categorized. The costs of compliance are thereby reduced, presumably leading to lower cost personal computing systems and other devices. For the foregoing reasons, we adopt the proposed emission limits, which are identical to the limits we adopted for personal computers. (*See* Appendix C, Rule § 15.610)

C. *Equipment Authorization*

14. In the *Notice*, the Commission proposed Certification as the equipment authorization procedure for the TV Interface Device rather than Type Approval, which was required for Class I TV device.[11] The broadcasters and Atari objected to this relaxation of

[9] Since 1980, the Chief Scientist has granted over 90 waivers of the Class I TV device rules, authorizing the operation of the TV Interface Device under the rules proposed in the *Notice*. As related above, the Commission is not aware of any interference cases where the TV Interface Device was identified as the source of the interference.

[10] We treat in more detail the video source, attachments and other accessories to the TV Interface Device below in paragraph 23.

[11] Type Approval is an equipment authorization procedure in which the FCC Laboratory tests a representative sample of a device and issues an approval. Certification is a procedure in which we review test data submitted to the

the equipment authorization requirement. AMST and Atari argued that Certification does not provide the necessary assurances of compliance and that the Commission should use whatever resources are necessary to test such equipment to protect TV reception. Atari also asserted that new manufacturers of a TV Interface Device, who have never made radiation measurements to determine compliance with FCC Rules, will not possess the necessary skills to accurately test a device for compliance. This, Atari suggested, would lead to more non-compliant devices on the market and as a result more potential for interference.

15. Our proposal to relax the equipment authorization requirement for such devices was based on our experience with manufacturers who over the past 10 years have acquired the necessary skills to produce and measure compliant Class I TV devices. At the time Subpart H of Part 15 was adopted, the Commission imposed the stricter Type Approval requirements for two reasons. First, the rules permitted a new class of devices to be attached to the TV receiver and we wanted to be sure that the devices did not interfere with TV reception. Second, manufacturers who began building Class I TV devices were unfamiliar with making radiated emission measurements, particularly to meet the tight limits adopted for Class I TV Devices. Consequently, we felt that imposing the additional burden of Type Approval on these manufacturers was appropriate in 1972. We have now relaxed the limits, which reduces the complexity of the testing, and experience tells us we can also relax the regulatory burden of Type Approval for the TV Interface Device. In response to Atari's argument concerning the lack of skill of new manufacturers in meeting the technical requirements including the testing for compliance, it should be noted that the Commission reserves the right to call in a sample for testing as part of the Certification process, if the situation so warrants. (*See* 47 C.F.R. § 2.943). In addition, we can engage in sampling of products already on the market. For the foregoing reasons, we adopt Certification as the equipment authorization procedure for the TV Interface Device. (*See*, Appendix C, Rule § 15.616.)[12]

Commission and issue an approval, if the submittal is satisfactory. (See 47 C.F.R. Part 2, Subpart J) Both procedures are a prerequisite for marketing pursuant to 47 C.F.R. Part 2, Subpart I.

[12] On January 13, 1983 the Commission adopted a Notice of Proposed Rulemaking entitled "In the Matter of Amendment of the regulations to expand the notification and verification equipment authorization procedures", General Docket No. 83-10, FCC 83-4, released January 21, 1983. In that NPRM we proposed to relax the equipment authorization requirements for certain equipment. For the TV Interface Device, however, we are not further relaxing such requirements because of its potential for interference. This concern was raised in paragraph 18 of that NPRM for equipment not proposed to be included under notification. Despite no reports of interference as cited in paragraphs 12 and 13 above, the potential remains high since TV Interface Devices are high-volume

D. *Miscellaneous Issues*

16. Most of the rules regarding design requirements are adopted as proposed in the *Notice*, with exception of some minor changes in response to the comments. As to the Section 15.614(a), General design requirements, and Section 4.0, General Test Conditions, in our recommended measurement procedures we have revised the range of video input signal levels required to test the TV Interface Device (*See* Appendix B, *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3.) All parties commenting on this question took issue with the one to ten volt range proposed in the *Notice*. EIA recommends five volts as the maximum video input signal because it asserted that most measurement facilities do not possess costly video amplifiers capable of producing ten volts into the typical 75 ohm load. We have been convinced by TI and Sony that designing the TV Interface Device to prevent excessive emissions when it is presented with a ten volt input voltage is unnecessarily expensive. Most video sources operate in the range of only one to two volts. Furthermore, overload circuitry may be easily incorporated to preclude the TV Interface Device from operating with excessive input voltage. We are persuaded by TI, Sony and EIA that five volts should be the maximum. Therefore, a TV Interface Device shall operate within the emissions limits of the new Subpart H when presented with a video input signal level of one to five volts. (*See* Appendix C, Rule § 15.614(a) and § 4 0, Appendix B.)

17. Another modification to the proposed rules involves a change recommended by TI that limits the interference potential of the TV Interface Device and promotes design flexibility. We proposed in Section 15.603 that the maximum output signal level for the video modulated signal be specified as 346.4 $\sqrt{R}$ microvolts (where R is the output impedance of the device) and that the power of the sound modulated signal be specified as 13 dB below the corresponding power of the video modulated signal. Both of these requirements now apply to the Class I TV device. We adopt the 346.4 $\sqrt{R}$ microvolt level for the video modulated signal and an absolute maximum level of 77.5 $\sqrt{R}$ microvolts for the sound modulated signal rather than the 13 dB for the power ratio between them. We reject the contention by EIA that since the rules for broadcasting and cable TV specify visual/aural ratios of 7–10 dB and 13–17 dB, respectively, deviation from these ranges can cause impairment of the sound or picture reception or both. We believe that setting of those ratios for TV Interface Devices should be largely a marketplace decision subject to compliance with the above-stated limit. Furthermore, the voltage level maximum that we do set leads to a more flexible design, and is

consumer items used in close proximity to TV receivers. The possibility exists, however, of changing to notification should our future experience so indicate, as generally stated in paragraph 19 of the NPRM.

consistent with the absolute levels in Sections 15.606 and 15.608. This flexibility is appropriate because of the considerably broad ranges of the output signal level of video sources. Equipment designers are permitted greater flexibility by not having to maintain that 13 dB ratio between the two signals when the voltages are lower than maximum levels. Of particular importance, the interference potential of the TV Interface Device will not be increased at all given the establishment of maximum output signal levels.

18. At paragraph 24 in the *Notice* we addressed the problem of the inadvertent connection of the output of the TV Interface Device to the receiving antenna of the TV receiver. This connection could result in the receiver antenna acting as a transmitting antenna for the TV Interface Device, thus greatly increasing the potential for interference to nearby TV receivers. To date we are not aware of any reports attributable to such a misconnection. Our discussion in the *Notice* and the comments thereto, however, focused on TV receivers as used for reception of conventional over-the-air TV signals via an associated antenna. We are, of course, aware of the increasing prevalence of the use of TV receivers for reception of signals via direct cable connection, thereby eliminating the necessity for an attached antenna. Although some cable converters are regulated under the Rules for cable television in Part 76, there are some that fall outside the jurisdiction of Part 76. A cable converter attached to a Master Antenna TV system is an example of such a converter. For such systems it is extremely unlikely for the output of the TV Interface Device to be connected to the antenna of the TV receiver. Thus, we do not believe it is necessary to incorporate a switch to minimize the possibility of such misconnection. We therefore will not require that a transfer switch be incorporated in a TV Interface Device which converts or otherwise processes all TV channels including standard terrestrial broadcast TV signals. In other words, when the TV Interface Device provides for reception of conventional over-the-air TV and the receiver's associated antenna is not required, the transfer switch will not be required either. (*See* Appendix C, Rule § 15.606(b)). It should be noted, however, that this relaxation of the switch requirement will only be permitted for non-radiating systems in which it is not possible for the signal from the TV Interface Device to be radiated and cause interference. For example, for systems using Subscription TV decoders that feed only subscription TV signals to the TV receiver there is no relaxation, and a decoder must be used incorporating an isolation switch (when the decoder includes an RF modulator).

19. In the *Notice*, we proposed that a TV Interface Device must include a switch which provides a certain level of isolation between the antenna terminals and RF modulator. In addition to the switch, AMST suggests that we should adopt a requirement that would provide for foolproof design or construction such that under no

circumstances could the device be connected directly to the receiving antenna. Unfortunately, AMST did not suggest how this could be accomplished. Furthermore, we do not believe such measures are practical or necessary, especially in light of the lack of complaints involving such devices. Therefore, the suggestion made by AMST to add additional restrictions to Section 15.606 is not accepted.

20. Another aspect of interference caused at the output of the TV Interface Device is the potential for harmful interference when emissions beyond a certain strength fall outside of the desired channel. We had proposed that at any RF output terminal the voltage of any emission outside of the band 4.25 MHz below and 7.75 MHz above the video carrier frequency on which the TV interface operates shall not exceed 10.95 $\sqrt{R}$ microvolts. TI, Atari and EIA in particular took issue with this proposal because it was alleged that manufacturers would be forced to utilize either more sophisticated modulation techniques, sharper filters, or other techniques, any of which would entail greater expense in the transmission of both video and sound information.[13] The consumer in turn would incur greater expense in purchasing the TV Interface Device incorporating an RF modulator. To accommodate the double sideband generated sound carrier, without added expense, we are adopting EIA's recommendation, that emissions more than 4.6 MHz below and 7.4 MHz above the video carrier frequency be attenuated. We incorporate such modification in the Rules. (*See* Appendix C, Rule § 15.608.)

21. In the *Notice*, we proposed in Section 15.610 to consolidate the requirements for a composite TV Interface Device that includes an RF modulator and a video source or some other component that might be subject to another part of the Rules. This proposal was intended to replace the present requirements of filing two or more applications for equipment approval of a composite device. For example, under the Class I TV device rules, a video tape recorder (VTR), which includes a TV tuner and an RF modulator plus other components, was subject to the technical and Certification requirements in Subparts C and H of Part 15, respectively. Under the proposal, a single application for Certification would be filed for the

[13] Typically, the commenters economically derive the sound carrier in an RF modulator by employing double sideband modulation such that one sound carrier is 4.5 MHz above the visual carrier frequency and the other (undesired) 4.5 MHz below the visual carrier. Under the rules for a Class I TV device, emissions outside of the channel 3 MHz above and 3 MHz below the respective edges of the 6 MHz TV channel had to be attenuated. To have the undesired carrier fall within 3 MHz of the edges of the TV channel, the class I TV device would be operated on a visual carrier frequency at least 250 kHz higher than that used for broadcast TV. Under the proposed rule, because the emission limits were referenced to the visual carrier rather than the channel edges, operation of the TV Interface Device on a higher visual carrier would no longer keep the undesired sound carrier within limit. Manufacturers would have been required either to employ a single sound carrier below use more expensive filters, etc. to attenuate emissions falling 250 kHz or more outside of the lower channel edge.

VTR. The technical requirements for the composite device would be determined by the applicable requirements for each part of the composite device. Most commenters supported this part of the proposal, but questioned the proposed language and asked that it be clarified. Atari, on the other hand, argued that the most restrictive technical requirement for the composite device should be applied to the complete device.

22. A closely related question concerns the proposed definition of video source, which was defined as a device that applies a video input to a TV Interface Device. RCA argued that this definition is too restrictive, since it does not encompass stand-alone or external video sources that do not connect to a TV Interface Device. The definition, RCA asserts, should be broadened to include video cameras and other devices which may or may not be connected to a TV Interface Device.

23. The above concerns about the definition and proposed Section 15.610 deal with the applicable limits for a composite TV Interface Device and for external attachments to the TV Interface Device. Upon further reflection, it now appears that the proposed language may have been confusing and that some clarification is needed. A TV Interface Device, by definition, may include a video source (and possibly other components), or it may be marketed separately as an RF modulator. In general, most attachments to a TV Interface Device (one exception being that of controllers for TV games) incorporate digital circuitry and, as such, are classified by the Commission to be computing devices. The Rules for computing devices were adopted by the Commission in late 1979 in FCC Docket 20780. In that proceeding, we made home computing devices subject to the same emission limits proposed and adopted herein for TV Interface Devices. Therefore, as to their respective interference potentials it does not matter whether the video source is internal or external to the TV Interface Device, since both devices must meet the same emission limits. Video disc players and video tape recorders, however, constitute an exception that caused some confusion. VTRs contain a TV tuner, which by itself is subject to the receiver requirements in Subpart C of Part 15. Some disc players on the other hand, contain a capacitive coupling mechanism which is subject to the requirements for a Field Disturbance Sensor in Subpart F of Part 15 of the Rules.

24. In the *Notice*, we proposed a single authorization for these devices and an adjustment in the limit for emissions from the TV tuner and the capacitative mechanism of the disc players. The present rules for a Class I TV device permit this and we do not know of any reason not to allow an adjustment of the limit for these products. By doing this we disagree with and reject the contrary recommendation by Atari to require the composite TV Interface Device to be governed by the tightest technical requirements. We

believe such a requirement to be impractical and unnecessary for these two products, since there does not appear to be an interference problem with video tape and disc players. Also, since most video sources, such as personal computers, are already required to be certificated by the Commission pursuant to Subpart J of Part 15, there is no longer a reason to retain a separate definition and Certification requirement for video sources. The few attachments to TV Interface Devices that contain digital circuitry and are not classified as personal computers will be handled as Class B computing devices subject to Verification by the manufacturer. Attachments, such as paddle controllers (i.e., a connecting wire plus a few variable resistors), that do not include active components, do not have to be certificated by the Commission. Such controllers do, however, have to be exercised with the TV Interface Device when it is tested for compliance. In response to RCA's concern about a video camera that does not contain digital circuitry, we are deferring this question to the resolution of the proposal to revise Section 15.7 in FCC Docket 20780. For the above reasons, proposed Section 15.610 (redesignated Section 15.618) has been revised as indicated and the definition for video source has been deleted. (*See* Appendix C, Rule § 15.618.)

25. In the *Notice* we proposed to provide for the marketing of a TV Interface Device kit. The hazards of allowing such a kit are pointed out in Atari's comments. Our intention in this proceeding to provide broadcast television with sufficient protection from harmful interference would be undermined by the authorization of TV Interface Device kits, asserts Atari. There are two problems. First, since we proposed that all necessary components need not be provided with a kit, radiation limits could be exceeded, or the carrier frequency could wander or both. Second, since, according to our proposal, consumers may be required to tune their TV Interface Devices, a serious risk exists that the device might be mistuned, thereby causing interference to nearby receivers. We are aware of these potential hazards as well as the hazard of kits on the marketplace not explicitly subject to any regulation. We believe that the potential for interference is less if all kit manufacturers and consumers are required to comply with our Rules than if there were a prohibition on kits, since this would be difficult to enforce, or if there were a laissez-faire environment in which there were no specific guidelines for compliance. Thus, we adopt the proposed rule authorizing TV Interface Device kits. We require that two kits be fully assembled and tested rather than the one we had proposed in the *Notice*. The manufacturer of the kit shall comply with the procedure for obtaining Certification. Additionally, these new rules incorporate a labelling requirement. (*See* Appendix C, Rule § 15.620.)

26. Finally, we adopt an expanded version of the proposed Section 15.622. This version includes a labeling requirement for the

TV Interface Device itself. Manufacturers must affix a label whose wording is specified in the Section to inform the consumer of the interference potential of the device.

27. We have considered the contentions by some of the commenters that by granting waiver of the Rules to permit operation of the TV Interface Device prior to the completion of this rulemaking we have prejudiced its outcome. We disagree. In each case of approval of a request for waiver, we considered foremost the particular facts presented by each petitioner. We granted each petitioner interim relief on this basis. We did so to further the public interest in realizing the benefit of the latest technologies incorporated in devices such as the stand-alone RF modulator. In deciding upon the final rules adopted herein we relied very heavily on the informed pleadings of the commenting parties made in response to the proposed rules and have modified them accordingly. As a by-product of the operation of TV Interface Devices pursuant to individual waivers, moreover, we had available a field test of sorts of the interference potential the TV Interface Device posed to home TV reception. If operation of TV Interface Devices had resulted in unacceptable interference, we certainly would have taken appropriate action in this rulemaking. For these reasons, we believe that each of the waivers specifically responding to the good cause shown by the petitioner was granted in the public interest, and did not prejudice the outcome of the rulemaking. In fact, because of the favorable experience with the TV Interface Device, the soundness of our decision is enhanced.

28. In the *Notice*, we had proposed a set of procedures for measuring whether a device met with the emanation limits we had proposed. These measurement procedures were proposed as part of the Rules for the TV Interface Device. (*See* Appendix B, proposed § 15.701 et seq. of the *Notice*.) Upon reevaluation of those proposals, in part because of the comments, we have made small changes in the measurement procedures. Among the more important is the elimination of references to broadband noise. Our experience in testing TV Interface Devices has shown that the emission voltage peaks are separated sufficiently that they can be resolved by the measuring instrument—more indicative of narrowband noise. On another point, we eliminate the options of mounting the TV Interface Device on a turntable or of moving the measuring equipment about the device to test it for the direction of maximum radiation for each predominate emission. We believe that specifying that only a turntable may be used will enhance the certainty and repeatability of the tests.

29. As noted above, we have authorized by grants of waivers of the Rules the marketing and operation of TV Interface Devices prior to the effective date of the attached Rules. Marketing of TV Interface Devices authorized under the terms of the waiver may continue without any further action on the part of the grantee. Operation of

such devices may continue indefinitely, subject only to the non-interference requirements in § 15.3 of FCC Rules. (*See* Appendix C, Rule § 15.626.)

30. In addition to the revisions in the measurement procedures themselves, we have decided that they should serve only as recommended procedures for determining compliance with our Rules. The Commission's laboratory however will utilize the procedures set out in the publication, *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3, to check compliance with the Rules. It will be available through the FCC's duplicating contractor and the National Technical Information Service (NTIS) or both.[14]

V. ORDERING CLAUSES

31. Under the authority contained in Section 1, 4(i), 302 and 303 of the Communications Act of 1934, as amended, IT IS ORDERED THAT the rules including the title, text and table of contents of Subpart H of Part 15 are rescinded and new rules including the title, text, and table of contents of Subpart H of Part 15 are adopted, as set out in Appendix C, attached, effective 30 days after publication of this *Report and Order* in the Federal Register.

32. IT IS FURTHER ORDERED that this docket proceeding, General Docket No. 79–244, is terminated.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Appendixes A and B-may be seen in the FCC Dockets Branch.

APPENDIX C

Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 15.4 is amended by replacing the present text of paragraph (m) with the word (Reserved) and by adding a new paragraph (u) to read as follows:

§ 15.4 General definitions.

* * * * * * *

(u) *TV interface device.* A restricted radiation device that produces a radio frequency carrier modulated by a video signal derived from an external or internal signal source, and which feeds the modulated radio frequency energy by conduction to the antenna terminals of a conventional television receiver.

NOTE: A TV interface device may be a stand alone RF modulator, or a composite device consisting of an RF modulator, video source and other components. Specifically excluded is a device that is primarily intended to be part of a cable television system, as defined in Part 76 of this chapter, *and* is owned by the cable system operator.

[14] Currently, the Commission's contractor is the DownTown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037, (202) 452-1422. NTIS is located at 5285 Port Royal Road, Springfield, VA. 22161, (703) 321-8521.

2. Section 15.7 is amended by changing the appended note to read as follows:

§ 15.7 General requirements for restricted radiation devices.

• • • • • • •

NOTE: Radio receivers, cable television systems, computing devices, TV interface devices, low power communication devices, and power line carrier systems as used by electric utilities on power transmission lines are regulated elsewhere in this chapter and are not regulated by this section.

• • • • • • •

3. The present title, text, and table of contents of Subpart H is deleted in its entirety and is replaced with a new title, text, and table of contents to read as follows:

SUBPART H—TV INTERFACE DEVICES

15.601 Cross reference.

15.602 Conditions of operation.

15.604 Output signal level.

15.606 Transfer switch

15.608 Output terminal conducted interference limits.

15.610 Radiation interference limits.

15.612 Line conducted interference limit.

15.614 General design requirement.

15.616 Equipment authorization requirements for the TV interface device and attachments thereto.

15.618 Certification of complete TV interface device.

15.620 TV interface device kit.

15.622 Labelling requirement.

15.624 Interference from a TV interface device.

15.626 TV interface device approved prior to (effective date of these Rules).

§ 15.601 Cross reference.

The provisions of Subpart A and B of this Part and Suparts J and K of Part 2 of this chapter shall apply to a TV interface device.

§ 15.602 Conditions of operation.

(a) A TV interface device shall at all times comply with the requirements of this Subpart.

(b) The output signals of a TV interface device shall be coupled to the TV receiver by either wires or coaxial cable provided by the manufacturer of the TV interface device.

§ 15.604 Output signal level.

The voltage corresponding to the peak envelope power of the video modulated signal during maximum amplitude peaks across a resistance (R ohms) matching the rated output impedance of the device, shall not exceed $346.4\sqrt{R}$ microvolts. The voltage corresponding to peak envelope power of the sound modulated signal, if provided by the TV interface device, shall not exceed $77.5\sqrt{R}$ microvolts.

NOTE: If R = 300 ohms, the maximum allowable RMS output voltage of the video carrier is 6000 microvolts and that of the sound carrier, if provided, is 1342 microvolts. If R = 75 ohms, the maximum allowable RMS output voltage of the video carrier is 3000 microvolts and that of the sound carrier if provided is 671 microvolts.

§ 15.606 Transfer switch.

(a) A TV Interface Device shall be equipped with a receiver transfer switch for connecting the antenna terminals of the TV receiver selectively either to the receiving antenna or to the radio frequency output of the TV Interface Device. In either position of the receiver transfer switch, the maximum voltage at the receiving antenna input terminals of the switch when terminated with a resistance (R ohms) matching the rated impedance of the antenna input of the switch, shall not exceed $0.346\sqrt{R}$ microvolts. The maximum voltage shall correspond to peak envelope power of the video modulated signal during maximum amplitude peaks.

(b) A transfer switch is not required for a TV Interface Device designed and marketed for use with a television receiver that receives signals by wire or cable and does not receive over-the-air standard broadcast signals, provided that the device include on the label required by § 15.622 the following statement:

This device is intended to be attached to a TV receiver, which does not receive over the air broadcast signals. Connection of this device in any other fashion may cause harmful interference to radio communications and is in violation of FCC Rules. See 47 C.F.R. Part 15, Subpart H.

NOTE: This statement is to be used in lieu of the statement in § 15.622, on equipment to which § 15.606(b) applies.

§ 15.608 Output terminal conducted interference limits.

At any RF output terminal, the maximum voltage of any emission appearing on frequencies removed by more than 4.6 MHz below or 7.4 MHz above the video carrier frequency on which the TV interface device is operated shall not exceed $10.95\sqrt{R}$ microvolts when terminated with a resistance (R ohms) matching the rated output impedance of the TV interface device.

§ 15.610 Radiation interference limits.

The field strength of any electromagnetic energy radiated from the cabinet, control circuitry and power leads of a TV interface device including that radiated from any associated accessories or attachments shall not exceed the following limits:

Frequency (MHz)	*Field Strength (uV/m at 3 meters)*
30-88	100
88-216	150
216-1000	200

NOTES: 1. The tighter limit shall apply at the edge between two frequency bands.
2. The output terminal of the device shall be terminated by a resistance equal to the rated output impedance.

§ 15.612 Line conducted interference limits.

The RF voltage measured between each power line and ground at the power terminals of the TV interface device shall not exceed 250 microvolts at any frequency between 450 kHz and 30 MHz, inclusive.

§ 15.614 General design requirements.

(a) A TV interface device shall incorporate circuitry to automatically prevent

emanations from the device from exceeding the technical specifications in this subpart. These circuits shall be adequate to accomplish their function when the TV interface device is presented with video input signal levels in the range of one to five volts. This requirement is not applicable to a TV interface device that incorporates a built-in signal source and has no provisions for the connection of an external signal source.

(b) The TV interface device must be so constructed that adjustments of any control accessible to the user will not cause operation in violation of the requirements of this Subpart.

(c) The TV interface device shall be designed and constructed to the extent practicable so as to preclude the possibility that the consumer may inadvertantly attach the output of the device directly to the receiving antenna, if any, without first going through the transfer switch.

§ 15.616 Equipment authorization requirements for the TV interface device and attachments thereto.

(a) A TV interface device shall be certificated pursuant to Subpart J of Part 2 of this chapter to show compliance with the technical specifications in this Subpart. To determine compliance, the TV interface device must be fully exercised with all external devices or accessories that are intended to be marketed and used with it.

(b) An external device or accessory that is intended to be attached to the TV interface device shall comply with the technical and administrative requirements set out in the Rules under which it operates. For example, a personal computer must be certificated to show compliance with Subpart J of this Part.

(c) To determine compliance with the technical requirements of this Subpart, measurements shall be made in accordance with the applicable procedures set forth in the *Recommended FCC Measurement Procedure for the TV Interface Device*, MP-3 or equivalent procedures, provided the applicant can adequately demonstrate to the Commission that such procedures are in fact, equivalent.

Note: MP-3 is available from the National Technical Information Service (NTIS) located at 5285 Port Royal Road, Springfield, Va. 22161 and from the Commission's current duplicating contractor, whose name is available from the Commission's Consumer Assistance Office.

§ 15.618 Certification with the source and internal accessories.

(a) A TV interface device that is submitted to the Commission as a composite device in a single enclosure containing an RF modulator, video source and other component devices shall be submitted on a single application (FCC Form 731) and certificated as a single TV interface device.

(b) Required measurements shall be made with all components operating simultaneously under the test procedures specified in § 15.616(c).

(c) The composite TV interface device shall comply with the technical specifications in this Subpart, with two exceptions. The emanations of a tuner section of a TV interface device, so identified, shall not exceed the technical limits in Subpart C of this Part. The emanations of a TV interface device incorporating a field disturbance sensor shall not exceed the limits in Subparts F and H of this Part, whichever is higher for each frequency.

(d) A TV interface device incorporating a TV tuner shall meet the all channel requirements in §§ 15.65–15.68.

§ 15.620 TV interface device kit.

A TV interface device marketed as a kit shall comply with the following requirements:

(a) All parts necessary for the assembled TV interface device to comply with the technical requirements of this Subpart must be supplied with the kit. No mechanism for adjustment that causes operation in violation of the requirements of this Subpart shall be made accessible to the builder.

(b) Assembly of two TV interface device units of a specific type shall be made in accordance with the instructions being supplied with the product being marketed. If all components required to fully complete the kit (other than those specified in paragraph (a) of this section) are not normally furnished with the kit, assembly shall be made using the recommended components. The assembled unit shall be certificated as any other TV interface device.

(c) The measurement data required for certification shall be obtained for both of these units and submitted with an application for certification.

(d) A copy of the exact instructions that are provided for assembly of the device shall be submitted with the application in addition to other material required by § 2.1033 of this Chapter.

(e) In lieu of the statement required by § 15.622, the following label shall be included in the kit with instructions to the builder that it should be attached to the completed kit:

CERTIFICATION LABEL

(*Manufacturers Name*)
FCC ID _____

This assembled device can be expected to comply with Subpart H of Part 15 of FCC Rules, provided it is assembled in exact accordance with the instructions provided with this kit.

_____
Name, Title, and Signature of Compny Official

STATEMENT OF COMPLIANCE

I certify that I have constructed this kit in exact accordance with the instructions provided with this kit using only the parts provided or recommended by the manufacturer. I understand that the operation of the assembled devices is subject to the following two conditions: (1) This device may not cause harmful interference, and (2) this device must accept any interference received ilncluding interference that may cause undesired operation.

_____ _____
Signature of assembler Date assembled

§ 15.622 Labelling requirements.

A TV interface device shall be identified pursuant to the requirements in Subpart J of Part 2 of this Chapter.

In addition, the name plate or label shall include the following statement:

This device complies with FCC Rule Part 15. Operation is subject to the following two conditions: (1) This device may not cause harmful interference and (2) this device must accept any interference that may be received, including interference that may cause undesired operation.

§ 15.624 Interference from a TV interface device.

(a) Operation of a TV interface device is subject to the general conditions of operation set forth in § 15.3.

(b) The operator of a TV interface device shall promptly stop operating the device when that operator is advised by the Commission that the TV interface device is causing harmful interference, and shall not resume its operation until the condition causing the harmful interference has been corrected.

§ 15.626 TV interface device approved prior to (effective date—30 days after publication in Federal Register).

A TV interface device that has been type approved as a Class I TV device prior to (effective date of new rules) and that has been labeled with an FCC type approval number may be marketed and operated indefinitely subject only to the non-interference provisions of §§ 15.3 and 15.614. A TV interface device that has been authorized as such prior to (eff. date) by a grant of a waiver of the Rules may continue to be marketed and operated under the provisions of this Subpart without further action on the part of the grantee.

Educational Noncommercial TV Station
License, Renewal of

Application for renewal of educational TV station license granted. Complainant failed to raise substantial and material question of fact as to whether the grant would be in the public interest.
–*WHYY, Inc.*

FCC 83–89

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHYY, INC.	File No. BRET-177 BRET-810401KP
For Renewal of License of Station WHYY-TV Wilmington, Delaware	

MEMORANDUM OPINION AND ORDER

(Adopted: March 3, 1983 Released: March 22, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration the 1978 license renewal application, as supplemented in 1981, of WHYY, Inc. (hereinafter "WHYY" or "licensee") for noncommercial educational television station WHYY-TV, Wilmington, Delaware; a complaint against the licensee filed by the Broadcast and Communications Committee of the City Council of Wilmington, Delaware ("Committee"); comments on the complaint from WHYY and the Committee's response thereto; and supplemental comments by WHYY. Also before the Commission is a letter from the licensee filed in response to a request by the Broadcast Bureau for additional information regarding local Delaware programming broadcast by WHYY and current staffing of the WHYY-TV Wilmington studio.

2. The complaint alleges that WHYY has violated Commission rules in its failure to: (1) serve Wilmington as its community of license and primary service area; (2) operate and maintain its main studio in its city of license; and (3) maintain a public file at its main studio or an accessible place to its community of license. In the Committee's view, ". . . past and current policies and actions of the

WHYY Board of Directors and Management provide evidence that these violations will not cease without action by the Commission."

Procedural Matters

3. In January 1979, the Broadcast and Communications Committee of the City Council of Wilmington filed the above-described complaint against WHYY. At the time the complaint was filed, the license renewal application for WHYY-TV was on deferred status pending resolution of certain questions pertaining to the Commission's inquiry into the adequacy of VHF television coverage in the state of New Jersey. See, *First Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 58 FCC 2d 790, 36 RR 2d 1105 (1976); *Second Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 59 FCC 2d 1386, 37 RR 2d 1275 (19760 and *Third Report and Order, Inquiry Into the Need for Adequate Television Service for the State of New Jersey* (Docket No. 20530), 62 FCC 2d 604, 39 RR 2d 137 (1976).[1] Based upon the allegations in the complaint and the deferred status of the WHYY-TV renewal application, the Broadcast Bureau determined that the complaint should be handled as an informal objection to the license renewal application. This decision was based on the fact that the issues raised in the complaint were of the type that are commonly handled in the renewal context. The Commission believes the Bureau acted reasonably and within its discretion to resolve the Committee's allegations in the most efficient manner possible. The Commission therefore will consider the allegations described herein as an informal objection to the 1978 license renewal application, as supplemented, of WHYY, Inc.[2]

Background

4. The following will serve to present the general background and history of WHYY-TV. In 1952, the Commission allocated the Channel 12 frequency to Wilmington as the only VHF allocation in

[1] In the *Second Report and Order, supra*, all area licensees, including those in New Jersey, Delaware, Pennsylvania and New York, were directed to supplement future renewal applications with statements concerning their respective New Jersey service and physical presence commitments. Area licensees were also advised that the Commission would carefully review each future renewal application with special attention being given to New Jersey service commitments. See, *Third Report and Order, supra*, at 609. On June 19, 1978, WHYY filed a supplemental statement to its 1978 renewal application describing programming aimed at the interests and needs of New Jersey residents. Based on our analysis, the Commission finds that WHYY has fulfilled its New Jersey service obligation.

[2] Comments of the parties regarding the allegations contained in the complaint were requested by the Broadcast Bureau following the Commission's decision in *Educational Broadcasting Corporation*, 74 FCC 2d 414, 46 RR 2d 1077 (1979).

the state of Delaware. *Sixth Report and Order*, 41 FCC 148 (1952). During the years 1952–1958, the Channel 12 license was held by several companies operating a commercial broadcast service. None of these licensees, however, was able to make the station profitable and in 1959, the Channel 12 license reverted to the Commission. In that same year, the Commission rejected a petition to reallocate the Channel 12 frequency to Atlantic City, New Jersey. *Allocation of Television Channel in Wilmington-Atlantic City Area*, 18 RR 1653 (1959). In its decision, the Commission stressed the importance of Channel 12 as the only VHF allocation in Wilmington and in the state of Delaware and emphasized "that any station authorized to operate on it will have a duty and obligation to serve the local needs and interests of that community." 18 RR at 1661.

5. In the same proceeding, the Commission rejected a petition by the Joint Council on Educational Television to reserve Channel 12 for noncommercial educational use.[3] The Commission stated that as an allocation matter, it was not prepared to reserve the only VHF channel assigned to Wilmington and to Delaware for educational use, particularly where applications for commercial use of the channel were pending before the Commission. More importantly, the Commission rejected the contentions of several commenters, including MPERTC, that Wilmington is merely a part of the Greater Philadelphia area, stating:

> [I]t is clear that, within the meaning of Section 307(b), Wilmington is a distinct and separate community whose needs and interests are entitled to consideration apart from those of Philadelphia. [18 RR at 1661.]

However, following a comparative hearing to determine which applicant could best operate on the Channel 12 allocation, WHYY was granted a construction permit to operate a noncommercial educational service on the Channel 12 frequency. *Rollins Broadcasting, Inc.*, 34 FCC 1 (1962). At the time of grant, WHYY (as the Metropolitan Philadelphia Educational Radio and Television Corporation) was the licensee of noncommercial television station WHYY-TV, which operated on Channel 35 in Philadelphia[4] and noncommercial radio station WHYY-FM (now WUHY(FM)) in Philadelphia, which is still operated by the licensee today. The Commission determined that a greater need existed for the educational, cultural, and instructional programs proposed by WHYY than the programs

[3] The reservation proposal was supported by the Metropolitan Philadelphia Educational Radio and Television Corporation (MPERTC), the predecessor organization of WHYY, Inc.

[4] The license to operate on Channel 35 was granted to MPERTC in September 1957. The northern portion of Delaware, including the city of Wilmington, was within the interference-free Grade B contour of the Channel 35 station. In March 1963, the call letters of the station were changed from WHYY-TV to WUHY-TV. Operation of WUHY-TV ceased in August 1976.

proposed by the remaining commercial applicant, particularly as WHYY proposed to offer 16 hours weekly of programming directed to local Delaware interests, groups, and organizations. 34 FCC at 97–98. WHYY began operation on Channel 12 in 1963. In 1970, at the request of WHYY, the Commission reserved Channel 12 in Wilmington for noncommercial educational broadcast use. *Amendment of Table of Assignments . . . . Wilmington, Delaware.* 18 RR 2d 1603 (1970).

Service to Wilmington

Committee's Allegations.

6. The Committee alleges that WHYY has failed to fulfill its statutory obligation to serve Wilmington as its community of license and primary service area. Citing the language of Section 73.613,[5] the Committee states that all broadcast licensees are required to program primarily for their community of license and only secondarily to other communities in the service area. The Committee contends that the Commission has always mandated ". . . a distinctively higher level of broadcast service to the community of license than to the broader secondary service area" and notes that "larger metropolitan areas within the secondary service contour cannot receive a disproportionate amount of programming attention simply because they are of a size larger than the particular city of license." This "principal and primary obligation" of a licensee to its community of license, the Committee maintains, is the expressed policy of the Commission and applies equally to noncommercial as well as commercial broadcasters. In this regard, therefore, the Committee contends that WHYY has failed to fulfill its programming and service obligations to its city of license.

7. The Committee maintains that WHYY has programmed primarily for the city of Philadelphia and not for Wilmington, its community of license. This issue becomes more relevant and of prime importance, the Committee contends, in light of the fact that the frequency on which WHYY-TV operates, Channel 12, is the only VHF allocation in the state of Delaware. As Channel 12 provides the primary means of broadcast service to the state of Delaware, the Committee maintains that WHYY (and indeed any licensee) of the Channel 12 frequency "must provide a significant and primary level of service to the state of Delaware." Citing language of the Commission in its decision to deny a 1959 request to reallocate the

[5] The language of Section 73.613 is now contained in Section 73.1120(a) of the Commission's Rules. That section has been amended to read as follows:

> Each AM, FM and TV broadcast station will be licensed to the principal community or other political subdivision which it primarily serves. This principal community (city, town, or other political subdivision) will be considered to be the geographical station location.

Channel 12 frequency from Wilmington to Atlantic City, New Jersey, see ¶ 4 *supra*, the Committee asserts the Commission specifically recognized that any licensee of Channel 12 would have a duty and obligation to serve the local needs and interests of Wilmington and that this duty was not to be reduced "by the presence of the larger Philadelphia SMSA within Channel 12's broadcast contour." Yet, the Committee states, the licensee of WHYY-TV has chosen to treat Philadelphia as its primary service area and the point of emphasis for the great majority of its programming. The Committee contends this attitude is reflected in WHYY's deviation from its program proposals made in the 1962 comparative hearing to secure authority to operate on the Channel 12 frequency and in its reduction of Delaware-oriented programming during the 1975–1978 license term.

8. The original program proposals of WHYY contained a promise to broadcast 16 hours and 40 minutes per week of Delaware-oriented programming.[6] The Committee contends these program proposals constituted "substantial and specific promises" concerning the provision of locally produced, Delaware oriented programs, including an explicit and implicit promise that WHYY "would in the long run maintain similar Delaware-oriented programming although changes would be made in formats and content of specific programs." According to the Committee, WHYY has not fulfilled those promises. The failure of the licensee to program to provide Delaware-oriented programming "in either the amount, variety, or spirit promised" is seen as especially acute by the Committee in light of the fact that WHYY's Delaware program proposals were a major factor in its selection to operate on the Channel 12 frequency (which was a commercial allocation at that time) over a commercial applicant. As these proposals were made in the context of a comparative hearing for the only VHF allocation in the state of Delaware, the Committee maintains that WHYY must be held to a "very strict standard of compliance" in any assessment of its Delaware program service. The Committee contends that the failure of WHYY to fulfill the spirit and intent of its 1962 program proposals is illustrated by analyzing Delaware-oriented programming broadcast by WHYY during the 1975–1978 license term. As an example, the Committee states that from January to June 1978, WHYY offered only 2 1;2 hours per week of regularly scheduled programs that dealt exclusively or primarily with Delaware news and public affairs. This amount of time was represented solely by *Today in Delaware*, a 30-minute news program broadcast Monday through Friday by WHYY. The Committee states that this 2 1;2 hours per week falls far short of the 16 hours of

[6] This total included the following categories of programs: News - 3 hours and 50 minutes; Public Affairs - 2 hours; Agriculture - 30 minutes; Culture - 5 hours and 30 minutes; Educational (separate from instructional programming) - 3 hours and 50 minutes; and Religion - 1 hour.

Delaware-oriented programming proposed by WHYY and represents only one of the six proposed categories of programs (news, public affairs, culture, agriculture, education, and religion). The Committee notes that, in general, news programming by itself has been found by the Commission to be an inadequate method of programming to meet the needs and interests of a licensee's community of license, citing the *Primer on Ascertainment of Community Problems By Broadcast Applicants*, 27 FCC 2d 650, 677–678 (1971).

9. In regard to reduction in program service to Delaware, the Committee maintains that WHYY has elected to decrease its program commitment to Delaware in order to effectuate an increase in Philadelphia and Pennsylvania-oriented locally originated programs. The Committee contends that during the year 1977, WHYY broadcast only 3 hours per week of regularly scheduled Delaware-oriented programming, including *Today in Delaware* and *Getting on Top of It* (GOTOI), a weekly one-half hour public affairs program. According to the Committee, both these shows devoted their programming orientation exclusively to Delaware. The Committee asserts, however, that certain policy changes initiated in late 1977 by WHYY management indicated that "Wilmington and Delaware public affairs were becoming secondary in WHYY's priorities to the affairs of Philadelphia and Pennsylvania." In January 1978, the production location of GOTOI (WHYY-TV's only local Delaware-oriented public affairs program) was moved from WHYY's Wilmington studio to its Philadelphia studio. The Committee contends the focus of the program then became the institutions, issues and personalities of the city of Philadelphia. According to the Committee, in the six months prior to the move, the 21 GOTOI programs broadcast by WHYY were devoted exclusively to Delaware affairs while in the six months subsequent to the move, only 3 of a total of 19 programs broadcast (15.8%) dealt exclusively with Delaware topics or persons.[7]

10. The Committee maintains that further evidence of a reduction in program service to Delaware and in WHYY's commitment to program to meet the needs and interests of Wilmington is reflected in new programs initiated in 1978 by the licensee. *This Week* and *Neighborhood* are described by the Committee as having Philadelphia as their primary focus. The Committee contends that in 1978 over 82% of the air time of *This Week* focused upon news events and personalities in Philadelphia. Of the five monthly programs of *Neighborhood* broadcast during early 1978, the Committee contends that four were studies of Philadelphia neighborhoods while only one focused on Delaware. Likewise, the Committee asserts that begin-

[7] The Committee's analysis of *GOTOI* programs broadcast from January to June 1978 showed the following geographical focus: 8 (42.1%) - Pennsylvania; 5 (26.3%) - Delaware, New Jersey, Pennsylvania; 2 (10.5%) - New Jersey; and 1 (5.3%) - Delaware and New Jersey.

ning in 1978, the content of *Today in Delaware* was shifted to contain brief summaries of Philadelphia, New Jersey and Maryland news and a review of national news, limiting the amount of time that could be devoted to coverage of Delaware news and events. Moreover, the Committee contends that WHYY's *ad hoc* public affairs programming shows an orientation to Philadelphia as five of the ten *ad hoc* programs broadcast from January to June 1978 were devoted exclusively to Philadelphia and Pennsylvania affairs.

11. As further evidence of WHYY's failure to serve Wilmington as its primary service area, the Committee cites the fact that all of WHYY's management staff and executive officers and offices are located in Philadelphia and that the majority of the Board of Directors (20 of 25 members) are not residents of Delaware. The Committee contends these two factors result in (1) WHYY having little knowledge of Delaware affairs and (2) the needs of the community not being reflected in the licensee's day to day operational and general programming decisions. This insensitivity is highlighted, states the Committee, by the fact that in 1977 the Wilmington studio manager was reassigned to Philadelphia, but was not replaced. The Committee maintains that "the failure to appoint anyone else as station manager is a clear indication of the down grading of the status of the Wilmington studio in WHYY operations."

12. In conclusion, the Committee reasserts its contention that WHYY has failed to serve Wilmington as its primary service area. As stated by the Committee, "it is not contended that WHYY must be held to the exact amount or to the precise type of programming proposed in 1962 to meet its responsibilities to its community of license. It is reasonable to assume that tastes change and considerations, such as financial as well as others, may intervene. However, this does not relieve WHYY of providing adequate Delaware-oriented programming."

Licensee Response

13. In its comments, WHYY denies that it has failed to program to meet local needs and serve Wilmington as its primary service area. The licensee claims that WHYY has provided "the citizens of Wilmington and the tri-state area which it serves with a substantial, meritorious, public television service." WHYY maintains that it has a commitment to serve Wilmington *and* the tri-state area, this commitment being reflected in its choice of programming. According to the licensee, WHYY-TV is a "regional facility with responsibilities to the entire tri-state Delaware Valley area." The licensee contends its regional character is reflected in the composition of its Board of Directors and Community Advisory Board which represents a cross-section of citizens from Delaware, Pennsylvania and New Jersey. WHYY argues, however, that its regional responsibility has not

prevented WHYY from fulfilling its service obligations to Wilmington. For example, WHYY states that in 1978, it produced several local programs responsive to Delaware needs and interests. These programs included *Today in Delaware*, *Blue Hen Review* (a weekly 30 minute review of University of Delaware football[8]), 5 one-half hour political debates and election night coverage, 3 one-hour specials on school desegregation and the Delaware school strike, and a nightly broadcast of the Delaware lottery. In the year 1979, the licensee cites such programs as *Today in Delaware* and the regionally oriented *Ask WHYY* as examples of programs which addressed the needs and interests of Wilmington. WHYY asserts that a great majority of its local program hours are programmed to the needs and interests of Wilmington. In addition, the licensee contends its responsibility to serve Wilmington is achieved through the regional and national programs that WHYY-TV broadcasts. It is the licensee's contention that programs exclusively oriented to Delaware are not the only means by which the service obligations of WHYY can be met.

14. In regard to its 1962 program proposals, WHYY maintains that it is "inappropriate" to evaluate its current Delaware programming based on "programming proposals and promises made nearly twenty years ago." WHYY maintains that the needs and interests of Delaware have changed over the years and that its current program schedule has been devised to meet those changing needs and interests. It notes that the station "conducts on-going ascertainment efforts in Delaware and throughout the tri-state region it serves to monitor how these interests and needs change and to provide programming to reflect them." The licensee contends that it would have neither the funds nor the capacity to produce and broadcast sixteen hours per week of locally originated Delaware-oriented programming while continuing to purchase the quality national programs which it broadcasts. The extent and variety of the national programs available to WHYY today, the licensee states, could not have been anticipated at the time of its 1962 program proposals. Moreover, the licensee asserts that the national system of programs available today addresses the needs and interests of Delaware residents. WHYY maintains it is investing a "significant and meaningful level of program and physical resources to its community of license" while demonstrating its commitment to its Delaware audience through its national programs and a diverse number of programs "devoted exclusively to Delaware interests and needs."

15. In response, the Committee restates its position that WHYY has not met its programming obligations and must comply with the "intent and spirit" of its 1962 programming proposals in order to meet its obligation to serve Wilmington. The Committee notes that many of the programs listed by WHYY as meeting its Delaware

[8] Broadcast for 13 weeks during 1978.

service obligations, including *Getting on Top of It*, *Blue Hen Review* and *The Garden Club* were discontinued in 1979. The only programs broadcast to address Delaware needs and interests in 1979, the Committee claims, were *Today in Delaware* and the daily one-minute *Delaware Lottery* which represented the broadcast of less local Delaware programming in 1979 than in 1978. The Committee again states that it requests only that WHYY make a commitment to program, at a minimum, an additional 2 1;2 hours per week of programming "relating to issues that have substantial impact on the people and businesses of the State of Delaware."

Discussion

16. We are of the view that the Broadcast Committee of the Wilmington City Council has failed to raise a substantial and material question of fact as to whether WHYY-TV has served Wilmington as its primary service area and reasonably met the needs and interests of its residents. Petitioners have not described any significant problem, need or interest in the Wilmington community which has not been addressed by the licensee. Further, the Committee has not adequately alleged facts to show that WHYY's overall past programming did not meet the needs and interests of the residents within its service area or that its proposed programming is inadequate to meet the needs and interests of Wilmington in the future.

17. The Committee argues that WHYY has not fulfilled its "promises" as outlined in the program proposals submitted by WHYY in the comparative hearing for the Channel 12 frequency and, as such, has not programmed to the needs and interests of Wilmington as its primary service area. To the extent that this argument suggests the need for review of WHYY's program efforts since 1963, we note that WHYY's programming for the period from the inception of its broadcast operations to its last license renewal in 1975 has previously been reviewed and not found to be a bar to grant of WHYY's renewal applications. Indeed, in 1975, the Commission specifically addressed the station's local programming performance. *WHYY, Inc.*, 53 FCC 2d 421 (1975). Among the matters relied upon there by the Commission was that the station had broadcast 10 hours and 5 minutes of locally produced programming during the composite week. We shall not now review those findings. As we stated in *Educational Broadcasting Corporation*, 70 FCC 2d 2204, 2235 (1979), in regard to grant of an renewal application:

> [D]etermination made therein are final, and the most fundamental concepts of fairness and administrative finality preclude our revisiting them in this proceeding.

For this reason, the Commission will not attempt to discuss or review WHYY's programming in prior license terms nor compare that

programming with the licensee's 1962 comparative program proposals. We will, however, analyze and discuss herein the relationship of the licensee's 1962 comparative program proposals and programming broadcast since its last license renewal in 1975.

18. WHYY has an unique position in relation to Delaware television - it is the licensee of the only VHF allocation in the state of Delaware. In acquiring that position, WHYY was accorded preference over a commercial applicant due to its program proposals and its ability to effectuate those proposals to the benefit of the citizens of Wilmington and of Delaware. See *Rollins Broadcasting, supra.* WHYY's original proposal called for 16 1;2 hours per week of Delaware-oriented programming. It is clear, however, that over the last license term, WHYY provided an average of less than 3–3 1;2 hours per week of programming exclusively addressed to the needs and interests of Delaware residents. Thus, it would appear that there has been an erosion in the commitments which lead the Commission to grant the construction permit application of WHYY. This erosion, however, does not indicate that WHYY has failed to fulfill its obligations and to treat Wilmington as its primary service area. As the Commission has stated previously, "licensees are not bound to strict, inflexible adherence to program proposals, but are afforded broad discretion in the manner in which they respond to community problems." *Educational Broadcasting Corporation, supra* at 2237, citing *KORD Inc.*, 31 FCC 85 (1961). It is not unreasonable to expect that over a number of years changes in the interests and needs of the community would precipitate changes in programs presented as well as a change in the number of hours broadcast. It appears that a significant factor in the changes that have occurred at WHYY since grant of its construction permit application is the development of the national public broadcasting system, a factor which was unforeseen in 1962.

19. WHYY describes the national public broadcasting system at the time of its 1962 program proposals as "insular and severely limited in quality, depth and scope." WHYY notes that in 1962, no one, including WHYY, "could have possibly anticipated the extent and variety of national programming currently available to supplement local program production." We agree with the licensee that the current availability of national programming provided by PBS enhances the program schedule that can be presented to Wilmington as WHYY's community of license and that such programming can address and meet the needs and interests of Wilmington as WHYY's primary service area. Programming which reflects service to Wilmington as WHYY's primary service area is not limited to programming which exclusively involves Delaware persons and issues. Regional, national and international topics may be of interest to the residents of Wilmington as well as programs specifically designed for Delaware. The interests of Delaware residents, it can be concluded,

flow beyond the confines of the borders of Delaware to topics of interest outside the state. Such interests are addressed by such national programs as the *McNeil-Lehrer Report*, *Wall Street Week*, *Over Easy*, and *The Advocates*, which are broadcast by the licensee. However, despite the wealth of national programs, an educational licensee must also provide a local program service which addresses the unique problems, needs and interests of the community it is licensed to serve.

20. Both the Committee and WHYY have addressed the service obligation of WHYY and the manner in which that service can be provided. The Committee believes WHYY's service obligation should be met through the provision of a greater amount of locally-produced, Delaware-oriented programs (exclusive Delaware programming) than the licensee has provided in the past (approximately 3–3 1;2 hours per week). WHYY maintains that its regional orientation and regional emphasis in its program schedule meets the needs and interests of Wilmington and Delaware residents.[9] Although WHYY believes that it is a television station licensed to serve Wilmington and the "[a]lmost equally important . . . adjacent metropolitan areas of Philadelphia and Camden," the licensee's first and primary obligation is to serve the local needs and interests of its community of license - Wilmington. This primary obligation to Wilmington, contrary to WHYY's assertions, has been emphasized by the Commission for at least the last twenty-three years. See paras. 4–5, *supra*. As noted previously, Wilmington is a separate and distinct community whose needs and interests are entitled to consideration apart from those of Philadelphia. While regional programs can address the interests of Wilmington residents, such programs cannot serve other service area residents to the detriment of the citizens of Wilmington. The licensee's prime and most important focus must be on the problems, needs, and interests of its community of license. However, as we outlined in our 1975 decision to renew the license of WHYY, 53 FCC 2d 421 (1975), while the station's primary obligation is to serve the needs of its city of license, WHYY also has a *secondary* duty to serve other nearby areas including Philadelphia, Camden, and Trenton, New Jersey. Thus, the broadcast of certain program material by WHYY addressed to Pennsylvania and New Jersey residents (as well as to those of Wilmington and Delaware) does not indicate a lack of commitment on the part of WHYY to serve Wilmington as its primary service area. The broadcast of such programs in 1978 and 1979 as *Ask*

[9] In its comments, the licensee places great emphasis on its regional responsibility and the fact that "Wilmington is part of the fourth largest television market in the nation." Indeed, WHYY describes itself as "a regional facility with responsibilities to the entire tri-state Delaware Valley area." At several junctures in its pleadings, WHYY submits language from past Commission decisions which it purports is an indication that the Commission approves its "regional mission."

WHYY, Black Perspective on the News, Another Voice, and *This Week*, described by the licensee as regional in their orientation but of interest to Delaware residents, aids in the fulfillment of WHYY's obligation to serve its community of license.

21. In addition to the national and regional programs it has presented, it appears that WHYY has also broadcast local programs that were primarily, if not exclusively, addressed to the needs and interests of Wilmington residents. During the license term 1975–1978, such programs as *Getting on Top of It* (public affairs), *Take 12*, and specials on school desegregation and the school strike in Wilmington were broadcast by WHYY. In 1978, the licensee broadcast such local programs as *Today in Delaware* (news), *Blue Hen Review* (University of Delaware football review), a special on the visit of then President Carter to Wilmington in February 1978, and the *Delaware Lottery*. All these programs were oriented primarily to address the specific interests of Wilmington residents. We are concerned that in 1978, WHYY did not broadcast a public affairs program which was oriented primarily to Wilmington residents. However, we have sufficient information to conclude that the licensee's programming during the years 1975–1978, with its mix of Wilmington and Delaware-oriented programming, programming addressed to the tri-state area and national programming, was sufficient to meet its obligation to serve its primary service area.

22. Analysis of WHYY's program schedule for the period after 1978 again reveals a mix of national, regional, and some Delaware-oriented programming. WHYY broadcast such "regional" programs as *Ask WHYY* and *Another Voice*, which addressed such general topics as the mortgage crunch, condominium conversion, job stress, trends in education, problems of the elderly, taxes and inflation, health care and social services, and the environment and energy - all topics that can be assumed to be of interest to the residents of Wilmington and Delaware.

23. We are concerned that in 1979 the *only* locally produced programming which was oriented primarily to Wilmington residents was the daily news show *Today in Delaware* and the Delaware lottery. Further, in 1978 and 1979, WHYY did not broadcast a public affairs program addressed primarily to the needs and interests of the residents of Wilmington. The provision of Delaware-oriented news and public affairs is of prime importance as Channel 12 is the only VHF television station licensed in the state of Delaware and the only television station licensed to Wilmington. As such, it is the only station which currently must place its primary focus of local news and public affairs on Wilmington.[10] Continuation of Delaware-ori-

[10] There are presently outstanding two construction permits for new stations to serve Delaware - WDPB, Channel 64, Seaford, Delaware (noncommercial) and WKME-TV, Channel 38, Seaford, Delaware (commercial). Seaford is located in the extreme southern portion of the state. Additionally, there are currently

ented news and public affairs programming by WHYY thus is of prime importance and is paramount to the licensee's fulfillment of its service obligations. The decision to give Delaware's only public affairs program, *Getting on Top of It*, a regional orientation and then to delete such programming entirely in 1979 would ordinarily be of concern to this Commission. We note, however, that in April 1980, WHYY began broadcast of the *First State*, a weekly 30-minute public affairs program described by the licensee as an "in-depth look at Delaware issues." In addition, at the same time, WHYY began broadcast of *First Statements*, a "point-counterpoint commentary on topical issues by private citizens and public officials" broadcast for 2 minutes on weekday nights. With the addition of these programs and continuation of *Today in Delaware*, we believe that WHYY has not abused its discretion as to the amount of Delaware-oriented programming which is directed primarily at Wilmington residents. Based on these circumstances, no substantial or material question of fact is raised as to the sufficiency of WHYY's program service.

Establishment of Main Studio in Philadelphia

24. The Committee contends that WHYY has, without authorization or the prior approval of the Commission, located its main studio in Philadelphia rather than in Wilmington, its community of license. WHYY has maintained two studios since it began operation on the Channel 12 frequency, one in Wilmington and one in Philadelphia. The Committee asserts that the Philadelphia studio functions as WHYY's main studio and primary base of operation in contravension of Commission rules which require a licensee to operate and maintain its main studio in its community of license. The Committee notes that while auxiliary studios may be constructed or maintained, the main studio of a licensee may only be located outside the community of license after specific Commission authorization. WHYY, the Committee contends, has never petitioned the Commission for authority to move its main studio from Wilmington to Philadelphia.

25. The Committee bases its allegation that WHYY's main studio is located in Philadelphia on three factors: (1) the proportion of programming which originates in the Philadelphia studio vis-a-vis the Wilmington studio; (2) the number and status of personnel and staff located at the Philadelphia studio; and (3) the location of the public file in the Philadelphia studio. In support of its allegations, the Committee contends that the Wilmington studio fails to meet the test established by the Commission in *Nationwide Communications Inc.*, 18 FCC 2d 171 (1969), that a studio is a licensee's main studio if

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pending several applications for a new commercial station to operate on Channel 61 - Wilmington. These stations will have an obligation to serve Delaware residents.

more than 50% of its non-network programming hours originate from that studio. Utilizing this test, the Committee states that analysis of the non-network programming originated by WHYY-TV during the first six months of 1978 indicates that WHYY's Philadelphia studio is its main studio. The Committee has included in its petition a breakdown of the regularly scheduled non-network programs broadcast each week during the first six months of 1978 and their place of origination. The Committee found that 2 hours and 45 minutes per week of regularly scheduled programming (52.4%) were produced in Philadelphia while only 2 hours and 30 minutes per week (47.6%) originated in Wilmington.[11] As to ad hoc programming (specials, etc.), the Committee did not submit specific data, but stated its belief that a greater proportion of ad hoc programming originated in the Philadelphia studio than in the Wilmington studio. Part of this assumption, the committee states, is based on the fact that fund raising and related programming originate solely from the Philadelphia studio.

26. As to personnel, the Committee notes that WHYY's 1978 license renewal application indicated that WHYY had 95 employees. According to the Committee, based on "the best information available to the petitioners, a maximum of 15 or 16 people are employed at the Wilmington facility."[12] The Committee also claims that the status of personnel at each studio reflects the de facto establishment of the WHYY main studio in Philadelphia. The Committee notes that *all* corporate offices of WHYY are located in Philadelphia and that all of WHYY's managment and executive level personnel work in Philadelphia. The Committee submits that "[g]iven the number and status of Philadelphia studio personnel in comparison to Wilmington, no serious claim can be made that WHYY's main studio is located in Delaware."[13]

27. Finally, the Committee maintains that WHYY's placement of its public file in Philadelphia is reflective of WHYY's use of the

[11] The Committee also noted that the 2 hours and 30 minutes per week which originated in Wilmington were attributable to only one program - the local news show *Today in Delaware*. No public affairs programming was produced in Wilmington during this period.

[12] The Committees notes this number represents less than 20% of the total staff of WHYY and reflects a 5 to 1 ratio as to the distribution of personnel between Philadelphia and Wilmington.

[13] The Committee maintains that the establishment of a de facto main studio in Philadelphia deprives the citizens of Wilmington and Delaware of an accessible studio. The 60 mile roundtrip between Wilmington and Philadelphia is described by the Committee as a "insurmountable barrier to the ability of the residents of the city of license to freely communicate and interact with personnel of WHYY, particularly at the management level." The Committee further contends that "in the absence of a day-to-day presence in the community of license of management and corporate personnel, WHYY decisionmakers fail to acquire a working knowledge of the city."

Philadelphia studio as its main studio and is in itself a violation of Commission rules. The Committee alleges that WHYY failed to maintain a public file in its Wilmington studio or in a place that is convenient and accessible to the residents of Wilmington. The Committee notes that the WHYY-TV public file is located in Philadelphia and that no part of the public file or copies thereof are maintained in Wilmington. Indeed, the Committee states that on several occasions representatives of the Committee sought to review the public file at the Wilmington studio, only to be told that the public file was available only in Philadelphia and that the licensee had no obligation to maintain a public file in Wilmington.

28. In response, WHYY rejects the allegations of the Committee that the Philadelphia studio functions as its main studio. Noting that WHYY has a long history of ties to Philadelphia, the licensee contends that "its Philadelphia-licensed FM station, its formerly-licensed UHF television station, and its regional mission explain its major Philadelphia presence."[14] Notwithstanding its Philadelphia presence and "its responsibilities as a Pennsylvania corporation", the licensee maintains that use of its Wilmington studio is in full compliance with the main studio rule. As to programming, the licensee asserts that analysis of the full calendar year 1978 indicates that a majority of the local programming broadcast by WHYY-TV originated from the Wilmington studio. WHYY contends that a total of 206.25 hours of local programming was produced and broadcast by WHYY-TV of which 139.75 hours (67.8%) originated in the Wilmington studio and 66.50 hours (32.2%) in the Philadelphia studio.[15]

29. As to the public file, WHYY acknowledges that *until the fall of 1978*, the public file was maintained in Philadelphia and not at the Wilmington studio. According to the licensee, the public file was moved to Wilmington in the fall of 1978 and has been available to the residents of Wilmington for inspection since that time.[16] As to staffing, WHYY states that as corporate entity it employs 134 people, 70 of whom work in television alone.[17] Of this number, WHYY states that 18 or 26% work in Wilmington alone while 30 or

[14] WHYY, Inc. is the licensee of Station WUHY-FM, Philadelphia. In 1957, WHYY became the licensee of WHYY-TV (changed to WUHY-TV in 1963), Channel 35, Philadelphia. The license for WUHY-TV was relinquished by the licensee in August 1976.

[15] The licensee's analysis of programming originated in Wilmington includes such programs as *Today in Delaware, Blue Hen Review, Delaware lottery, TV Garden Club*, and political specials.

[16] The Committee, however, in response to WHYY's comments, claims that while the public file is now located in Wilmington, it is not kept current or complete so as to comply with Commission regulations.

[17] According to WHYY, 24 persons work exclusively for WUHY-FM. Another 40 supervise or support both the radio and television operations (i.e. membership, development, finance and administration). It appears that all these persons are located in Philadelphia.

so work in both locations. The others are technical staff who mainly work at WHYY's transmitter site. Despite the lower number of staff assigned to Wilmington, the licensee contends that allocation of staff does not violate any Commission rule or policy. WHYY argues that as the licensee of both a Philadelphia and a Wilmington facility (and due to the asserted "regional character" of its broadcast service and its engaging in program production for national distribution), it would not be financially possible or prudent for WHYY to maintain duplicate staffs in Wilmington and Philadelphia. Moreover, WHYY states that the primary concern behind the main studio rule is not "staff location *per se*", but that service be maintained to the community of license. It asserts that WHYY meets that test.[18]

Discussion

30. This Commission has long adhered to an established policy that the public interest is best served by a licensee maintaining its main studio in the community it is licensed to serve. This policy is predicated on the belief that a requirement that the main studio be located in the community of license will assure that licensees will meet their service obligations by presenting programming that addresses the needs and interests of the city of license. As we stated in *Nationwide Communications, supra*, " . . . the definition of a main studio is directly related to our policy of requiring a licensee to place a primary emphasis on the needs and interests of its city of license." 18 FCC 2d at 174. Unlike the situation involving radio licensees, we have considered in the past several factors in determining a television licensee's compliance with our rule requiring the location of the station's main studio in the principal community to be served, See, *e.g.*, *Gulf Television Co.*, 20 FCC 734 (1956). Such indicia have included the number and function of employees at each studio and the facilities that each studio contains. However, a prime factor has been the percentage of programming originating from the respective studios. In this regard, in the *Nationwide Communications* case, we considered whether the majority of not only the local, but also the total non-network programming presented by the station originated from the claimed main studio. Later, in *KTVE, Inc.*, 22 FCC 2d 477 (1970), we found the television licensee in compliance with the rule where approximately 53.1% of its "local live programs" originated from the station's main studio. It was noted, however, that as the

[18] WHYY maintains that other fundamental reasons exist for its major corporate presence in Philadelphia, the most important of which is the need of WHYY to "be visible and active in the community from which it derives the greatest share of individual and private sector support. While aggressively seeking support in its community of license, WHYY, Inc.'s presence in the Philadelphia area is critical to its ability to reach the greatest concentration of financial resources in the region. The ability to generate those funds can only help Station WHYY-TV's service to Delaware."

percentage of local programming approached 50%, the other indicia became more important. *Id.* It is against this backdrop[19] that WHYY-TV's past performance will be considered.

31. The licensee provides information that in 1978 WHYY-TV broadcast a total of 250.75 hours of local programming,[20] of which 139.75 hours (55.7%) were produced in Wilmington and 111 hours (44.3%) were produced in Philadelphia, as follows:

Produced in Wilmington

Today in Delaware[21]	117.50 Hours
Blue Hen Review	7.00
TV Garden Club	4.50
Others (political specials, etc.)	10.75
	139.75 Hours

Produced in Philadelphia

This Week	17.0 Hours
Getting on Top of It	20.0
TV Garden Club	19.5
Ask WHYY[22]	22.5
Neighborhood	4.0

[19] Effective December 10, 1979, however, the television program origination rule was amended and incorporated with the radio rules. 44 Fed. Reg. 69933. The joint rule, Section 73.1130, provides in pertinent part that "*more than 50%* of an AM, FM or TV station's *non-network programs* shall originate from the station's main studio or from points which are remote from the main studio as long as such origination points are situated in the principal community which the station is licensed to serve." (Emphasis added.)

[20] Neither the Committee nor WHYY provided data pertaining to years prior to 1978. Accordingly, our analysis will begin with that year. Further, although we have information as to the total amount of local programming produced in Wilmington and Philadelphia, we have insufficient information to determine the total amount of non-network programming (local and other) broadcast from each studio for neither the Committee nor WHYY provided an analysis based on non-network, as opposed to local programming.

[21] Includes the one-minute Delaware lottery.

[22] WHYY, in its response to the petition, did not include the hours broadcast of *Ask WHYY* and *Black Perspective* in its analysis of non-network program hours originated in Philadelphia, noting that *Ask WHYY* was specifically underwritten and *Black Perspective* was a national PBS program produced by WHYY. We conclude that these programs should be included in this analysis. The source of funding is not determinative of whether a program is local and non-network. *Ask WHYY* was produced and originated as a local, non-network program by WHYY and should be included in these totals. While *Black Perspective* was a program produced for national distribution on the PBS system, it also meets our definition of a local program. Section IV of the license renewal form for noncommercial licensees includes a definition of "local programs." A program produced by a station and fed to a network, such as *Black Perspective*, is classified by the originating station as local. Further, *Black Perspective* is broadcast by WHYY to

Black Perspective[22]	22.0
Others (as above)	6.0
	111.0 Hours

32. Based on WHYY's 1978 program showing, it is clear that the station did slightly exceed the minimum level of local programming expected to be originated from its Wilmington studio. Under the circumstances of this case, however, this showing is not dispositive of the question of whether WHYY-TV has *fully* complied with the main studio location rule. As previously indicated, no information has been provided as to the amount of all non-network programming originated from either WHYY-TV's Wilmington or its Philadelphia studio. We are also concerned by the fact that the vast majority of WHYY's total television employees (95) are based in Philadelphia.[23] The licensee's response to the Commission's request for a list of the staff based in Wilmington shows that in 1981, only twenty-two people worked at the Wilmington studio. In addition, all top management and executive-level personnel have their offices in Philadelphia. The highest ranking and only management-level employee located in Wilmington is WHYY-TV's News Director. Finally, it appears that WHYY considers its Philadelphia presence to be of prime importance. The factors contributing to this conclusion include: (1) the statements of the licensee of its "responsibilities as a Pennsylvania corporation"; (2) its description of its "regional mission"; (3) its emphasis on individual and private sector support in Philadelphia; (4) its apparent view that Wilmington is really only a part of the "fourth largest television market in the country" - namely Philadelphia; and (5) its apparent emphasis in ascertainment efforts on Philadelphia. Additionally, the retention of the public file at the Philadelphia studio until the fall of 1978 is also an indication of the importance WHYY has placed on the Philadelphia studio.

33. From the information before us, it would appear that WHYY has chosen to place primary emphasis on the Philadelphia studio. Although WHYY may have in the past operated the Philadelphia studio as its main studio, there are several factors which we believe indicate the Wilmington studio is now functioning in a manner more consistent with our rules. First, we note that in 1979 there was a dramatic increase in the number of hours of local non-network programming produced in WHYY's Wilmington studio. Analysis of the local programs broadcast in 1979 by WHYY-TV and their place of origination indicates a total of 257 broadcast hours of local

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meet local needs and interests. It is, therefore, not a network program, but a local program which should be included in these totals.

[23] In its 1981 renewal application, the licensee indicated that 51 employees are involved in joint operation of WHYY and the licensee's radio station while 45 are involved in television operation alone.

programming, of which 232.5 hours (90.5%) were produced in Wilmington and 24.5 hours (9.5%) were produced in Philadelphia. Such operation greatly exceeds the level of local programming expected from a main studio in Wilmington. Furthermore, the Wilmington studio is described by the licensee as a modern broadcasting facility with modern equipment, capacity to edit film, studio color cameras, minicam units, and videotape and color film chains for color film reproduction. Thus, while the Wilmington studio may not be as elaborate as the Philadelphia studio in terms of personnel and total office space, it appears to be structured in such a manner as to provide at least the same facilities as the Philadelphia studio. In view of these factors, taken together, it is not clear that the licensee is in violation of Commission rules.

34. As regards the location of the public file, it is apparent that for a number of years WHYY was in violation of Commission rules[24] which require that a licensee's public file be maintained in its community of license. While the public file is now located in Wilmington, it appears that the shift of the location of the public file from Philadelphia to Wilmington occurred only after complaints by residents of Wilmington and the possibility of the filing with the Commission of allegations of violations of Commission rules. The licensee has stated that as soon as the matter of the public file was brought to the attention of its General Manager, the file was placed in the Wilmington studio. It is clear, however, that this matter was brought to the attention of management during the discussions, public meetings and correspondence between the licensee and the Committee which took place from the fall of 1977 to June 1978. Responding after several months to public notice of Commission rule violations does not alter the fact that a continuing violation of Commission rules occurred over a number of years. Such a violation indicates a lack of responsibility to adhere to Commission rules as is required of all broadcast licensees and would normally require some action by this Commission. In the present case, however, we have taken into account the fact that the public file has apparently been maintained in Wilmington since the fall of 1978. No evidence exists that the file, since that time, has not been maintained in full compliance with Commission rules.[25] Under such circumstances, we do not believe that further action is warranted with regard to this issue. While WHYY has violated our rules, we are satisfied that the violation has been remedied. We would admonish and remind the licensee, however, that all Commission licensees are required to be diligent in their responsibility to comply with the rules of the Commission and should take *prompt* self-regulatory measures on

[24] See Section 73.3527 (formerly Section 1.527).

[25] The Committee has not listed any specific or material item of information which is missing from the WHYY-TV public file in contravention of Commission rules.

their own initiative when violations of Commission rules are brought to their attention. Further, we caution the licensee that the Commission may take stricter action should similar allegations against WHYY be substantiated on a future occasion. See *SSS Broadcasting Inc.*, 53 FCC 2d 1231 (1975).

Conclusion

35. In view of the foregoing, the Commission finds that the Broadcast and Communications Committee of the City Council of Wilmington, Delaware has failed to raise a substantial and material question of fact as to whether grant of the license renewal application, as supplemented, of WHYY, Inc. for station WHYY-TV, Wilmington, Delaware would be in the public interest. Despite this conclusion, it is the Commission's belief that the licensee in this case has engaged in practices and procedures which detract from its responsibilities as the licensee of a Wilmington facility. It appears that WHYY has engaged in practices and adopted policies regarding operation of WHYY-TV which have resulted in only minimal service to its community of license. In *Educational Broadcasting Corporation*, *supra* at 2241, ("WNET"), the Commission concluded, among other things, that a public educational licensee who maintained its main studio outside its community of license must maintain a presence in its city of license which is a functional extension of the licensee and includes a visible, *accessible* and fully staffed facility. We therefore directed the licensee to submit a proposal to the Commission, consistent with our findings, which was to include a staffing proposal. Ultimately, the Commission approved a staffing proposal which included a Vice President of New Jersey Operations and a Community Affairs Coordinator, both of whom were to be based in New Jersey. We believe that the WNET case is somewhat analagous to the present case under consideration. While the WNET case involved the operation of an auxiliary studio in WNET's community of license, the Commission believes that our findings in that proceeding stand for the proposition that a licensee, such as WNET or WHYY, who operates the only VHF station in its state of license, must maintain an accessible, fully staffed facility in its community of license and that the Commission may determine whether the staff, as presently constituted or proposed, is adequate to meet that requirement. We conclude that the management staff of the Wilmington studio, as presently constituted, is insufficient to render the licensee accessible to its community of license.

36. As we noted previously, all of the executive and corporate offices and officers of WHYY and all management-level personnel of the licensee, except WHYY's News Director, are based in Philadelphia. It is important that the licensee of any station have decision-making personnel who are readily accessible to the citizens of its community of license for discussion of topics of interest (*e.g.*, public

service programming) to the community. There must be an opportunity for constructive dialogue between the licensee and the community. It appears that the citizens of Wilmington do not have that opportunity to the extent available to the citizens of most communities which have stations licensed to them. To engage in the type of meaningful dialogue described above, the citizens of Wilmington must either travel to Philadelphia (a distance of approximately 60 miles roundtrip) or make a toll-call to Philadelphia.[26] This places too great a burden on the citizens of Wilmington. We believe WHYY should exhibit a more viable and accessible presence in its community of license. Accordingly, grant of the license renewal application for WHYY-TV will be conditioned on establishment by the licensee of personnel based in Wilmington with functions adequate to address the concerns expressed above. The Commission believes such action would render WHYY more accessible to the residents of Wilmington.

37. Further, WHYY is advised of our expectation that it fully comply with the requirements of Section 73.1130 of the Commission's rules. To ensure such compliance, WHYY-TV's license renewal application will also be conditioned upon a demonstration as to the amount of non-network programming broadcast from the Wilmington and from the Philadelphia studios.

38. Accordingly, IT IS ORDERED, That the complaint filed by the Broadcast and Communications Committee of the City Council of Wilmington, Delaware, when treated as an informal objection, IS DENIED.

39. IT IS FURTHER ORDERED, That the application of WHYY, Inc., as supplemented, for renewal of license of Station WHYY-TV, Wilmington, Delaware, IS GRANTED, subject to the following condition:

> That the licensee submit, within sixty (60) days of the date of this Order, a proposal to establish a management-level presence in Wilmington whose functions are designed to address the concerns expressed in paras. 35 and 36, above; and a programming proposal to ensure compliance with the programming origination rule (Section 73.1130).

40. IT IS FURTHER ORDERED, That WHYY, Inc., will submit with its next renewal application a list of all non-network programming broadcast, indicating whether each program originated from the Philadelphia or Wilmington studios and a list of all personnel and their respective functions, indicating to which studio they are each assigned.

41. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send, by Certified Mail - Return Receipt Requested, a copy of

[26] The licensee states that a toll-free telephone line is available from Wilmington to Philadelphia. The Committee contends, however, that the experience of its members and members of the public is that the "toll-free" number actually connects to the Wilmington studio and that one must pay a toll to reach personnel located in Philadelphia.

this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Two major factors lead me to support the imposition of reporting conditions on WHYY-TV.

First, it seems evident that WHYY-TV has largely abandoned its city of license in order to base its operations in Philadelphia. It is clear, for example, that WHYY-TV has located the overwhelming majority of its staff—particularly its management staff—in Philadelphia and that its principal programming emphasis has been shifted over the years to Philadelphia. The station even admits that it is engaged in a self-appointed mission as a "regional" station, rather than as a station primarily licensed to Wilmington.

In doing this, WHYY-TV has accomplished what the Commission has twice rejected: the reassignment of channel 12 to a city outside of Delaware. As indicated in our decision, channel 12 was originally assigned to Wilmington as that city's—and indeed, the state's—only commercial VHF assignment. *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148 (1952). In fact, the Commission specifically rejected a proposal by The Pennsylvania Broadcasting Co., the Daily News Television Co., the City of Philadelphia and the Philadelphia Chamber of Commerce to assign channel 12 to Philadelphia rather than Wilmington by stating:

> [w]e recognize the size and importance of the City of Philadelphia and the need for the encouragement of economic competition; nevertheless it is our view that under the circumstances presented, the assignment of a fourth VHF channel to Philadelphia would not justify the deletion of the sole VHF channel from [a] cit[y] as large and as important as . . . Wilmington . . . . Moreover . . . in the case of Wilmington, the state of Delaware would lose its only local VHF service.

41 F.C.C. at 266–67.

Even after an unsuccessful attempt to use the channel as a commercial station in Wilmington during the early days of television, the Commission in 1959 rejected yet another attempt to reassign channel 12, that time to Atlantic City, New Jersey. *Allocation of Television Channel in Wilmington-Atlantic City Area*, 18 Rad. Reg. (P&F) 1653 (1959). The Commission found that "there are compelling reasons for retaining the channel in Wilmington and that the mandate of Section 307(b) of the Act supports that result as between Atlantic City and Wilmington." 18 Rad. Reg. (P&F) at 1660. The Commission also made clear that any station authorized to operate on channel 12 in Wilmington would "have a duty and

obligation to serve the local needs and interests of that community." 18 Rad. Reg. (P&F) at 1661.[1] It seems clear to me that the Commission should not allow its clear statements concerning the need for local television service in Delaware to be ignored by a licensee which would prefer to operate from somewhere else.

WHYY's abandonment of Wilmington has reached such a level that the station appears to be in violation of the studio origination rule[2] and, thus, the main studio rule.[3] I am aware that prior to 1979 the Commission used various, and at times contradictory, definitions of main studio. *E.g.*, *compare Nationwide Communications, Inc.*, 18 F.C.C. 2d 171 (1969) (emphasis by the Commission on *non-network* programming broadcast from city of license), *with KTVE, Inc.*, 22 F.C.C. 2d 477 (1970) (emphasis by the Commission on *local* programming broadcast from city of license). However, at least since the adoption of the studio origination rule in 1979, it has been clear that the Commission expects a majority of *non-network* programming to be "originated"[4] from a television station's city of license. *See* 44 Rad. Reg. 69933 (1979).

The only evidence the Commission has of WHYY-TV's non-network programming is that contained in 1978 and 1980 composite week logs submitted by WHYY-TV to the Commission, and both sets of logs suggest that the station is in violation of the studio origination rule. In fact, out of more than 15 hours of non-network programming evident in the 1978 logs, only 2 1;2 hours are readily identifiable as having been broadcast from Wilmington.[5]

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[1] At the same time, the Commission also rejected a petition to reserve the channel for educational use, which proposal was based on a showing that an educational station would "be able to serve the educational and cultural needs of a 20-county area in three states with a population in excess of 6 million." 18 Rad. Reg. (P&F) at 1655. The Commission found that despite this proposed use of the channel, it was clear that under Section 307(b) "Wilmington is a distinct and separate community whose needs and interests are entitled to consideration apart from those of Philadelphia." 18 Rad. Reg. (P&F) at 1661.

[2] 47 C.F.R. § 73.1125 (1982).

[3] 47 C.F.R. § 73.1130 (1982).

[4] I am disturbed that the Bureau apparently does not wish to determine in this case whether "origination" means "produced in" or "transmitted from" or both. We do no service to our licensees or the public or, ultimately, ourselves in perpetuating such a lack of clarity, and I hope this will not compound our efforts to review WHYY-TV's attempts to comply with the studio origination rule.

[5] It has been suggested that WHYY-TV is somehow more deserving of special treatment because it is a non-commercial station and, as such, is dependent in part on increasingly scarce public funds. However, there is no dispensation for non-commercial stations either from the strictures of Section 307(b) or from our studio origination and main studio rules, and in my view the Commission would be hard pressed to justify disparate treatment from commercial stations. It was WHYY-TV's own judgment to apply for a station licensed to Wilmington, just as it was the station's own judgment to create an "auxiliary" studio in Philadelphia, and WHYY-TV should not now be relieved of the consequences of those actions merely because it is a non-commercial station.

The second factor which leads me to support conditional renewal is that the absence of service to and presence in Wilmington borders on a lack of candor with the Commission. After the Commission declined to reassign channel 12 in 1959, WHYY-TV filed an application for the Wilmington channel. The application was mutually exclusive with an application for commercial use of the channel in Wilmington filed by Rollins Broadcasting, Inc., a locally owned, multiple licensee. It is ironic that during the course of the comparative hearing, WHYY alleged that Rollins' broadcast record was one "'of broken promises, deception or near deception of the public and the Commission, violation or near violation of law, shoddy programming, and lack of effective control.'" *Rollins Broadcasting, Inc.*, 34 F.C.C. 1, 88 (Admin. L. J. 1963).

WHYY-TV won the comparative hearing from the commercial applicant and secured the non-commercial use of the channel largely because of its program proposals since, as the administrative law judge found, "Delaware has no television station in operation" and, thus, has "a need for all types of local program service, general or specialized." 34 F.C.C. at 92. Specifically, WHYY-TV proposed approximately 16 hours per week of "live programming to be devoted to local Delaware groups and organizations." 34 F.C.C. at 95–96. In fact, the administrative law judge found that "there is a distinctly greater need for the educational-instructional programs proposed by WHYY than for the additional entertainment programs proposed by Rollins." 34 F.C.C. at 97.

The station is now constrained to admit that it has not lived up to the program proposals with which it won the comparative hearing. In fact, WHYY-TV seeks to be excused from its neglect by saying that it should not be held to proposals made 20 years ago, and the station at least suggests that the proposals were unrealistic since the station claims that it has neither the funds nor the capacity to produce and broadcast 16 hours of Delaware-oriented programming a week.

Times change, of course, and I would not deny the flexibility of a broadcaster to alter its programming to meet those changes. However, what disturbs me about this case is that in order to win the comparative hearing WHYY-TV specifically represented to the Commission that it would implement substantial program service to Wilmington and to Delaware which it now finds inconvenient to do. If at some point WHYY wished to revamp its programming in light of what it contends are substantially changed conditions, then the station would have been well advised to inform the Commission rather than to hope that no one at the Commission would notice.

The measures imposed on WHYY by the Commission seem reasonably calculated to remedy these problems. In essence, WHYY, like other licensees, is required to comply with the Commission's main studio and studio origination rules and to report to the

Commission on the station's compliance. I also understand my colleagues' interest in insuring adequate staffing in Wilmington and hope that WHYY will be responsive to this concern. However, I also hope that this requirement will not devolve into the day-to-day stewardship of WHYY's staffing plans.

In short, I think that WHYY's conduct over the past several years has been unconscionable and believe that the modest conditions we have imposed on WHYY's continued operation will prove adequate. WHYY would be well advised to proceed to put its house in order. If not, of course, the station would appear to be vulnerable at renewal to a group which recognizes that channel 12 is assigned to Wilmington, not Philadelphia.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1983—421-692/03

Common Carrier, Interconnection, Connecting Arrangements
Private Land Mobile Radio Services, Interconnection

Memorandum Opinion and Order adopted on reconsideration of *Second Report and Order* establishing new rules and policies to govern the interconnection of private land mobile radio systems licensed under Part 90 in the 806–821 MHz and 851–866 MHz bands with the public switched telephone network.

–Amendment of Part 90
Docket No. 20846

FCC 83–174

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Radio Systems with the Public Switched Telephone Network in the Bands 806–821 and 851–866 MHz	Docket No. 20846

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 27, 1983)

BY THE COMMISSION: COMMISSIONER SHARP CONCURRING IN THE RESULT; COMMISSIONER JONES ABSENT.

Background

1. On March 18, 1982, the Commission adopted a *Second Report and Order* in this proceeding and established new rules and policies to govern the interconnection of private land mobile communications systems with the public switched telephone network (PSTN) in the 800 MHz bands.[1] This action was the second phase in a proceeding initiated to address the broad subject of the interconnection of private systems with the PSTN. The *First Report and Order* adopted rules to govern the interconnection of private land mobile radio systems with the PSTN in the bands below 800 MHz.[2]

2. The new rules at 800 MHz are substantially more liberal than those governing interconnection below 800 MHz. The new rules

[1] *Second Report and Order*, Docket No. 20846, 89 FCC 2d 741 (1982).
[2] *First Report and Order*, Docket No. 20846, FCC 78–622, August 25, 1978, 69 FCC 2d 1831.

enhance user options and relax certain restrictions which previously pertained to interconnected private land mobile systems. Under the new rules, licensees may use manual or automatic means of interfacing their private radio equipment and associated devices with the public switched telephone network, provided the actual arrangements for the telephone service are made individually by each licensee with the telephone company or collectively by a group of licensees on a non-profit basis.[3] Interconnection at 800 MHz is permitted in all geographic areas of the country and in all private land mobile services, and there are no time limitations on message length.[4] No special co-channel monitoring equipment at the base facility or mobile unit is required. Interconnection also is not restricted to any specific location in the private system. Licensees may use separate interconnection devices or may share the use of the same device at a common site.[5] Mobile operators, as well as base station operators, are permitted to control the system.[6]

3. The Commission's objective in adopting these rules was to recognize the ever increasing role that interconnection with the public switched telephone network plays in enhancing the ability of small and large businesses alike to employ their private land mobile communications systems effectively and efficiently in the futherance of the public interest. To this end, the Commission sought to recognize and to accommodate these needs by adopting rules which removed unnecessary impediments to the implementation of private interconnected systems and which permitted the use of state-of-the-art equipment and system design. We concluded that our objectives and these more liberal interconnection rules were in the public interest and were consistent with our statutory mandate to promote rapid and efficient communications and to encourage the larger and more effective use of radio.[7]

4. The basic objectives of our decision have not been challenged by any party. No one has argued that interconnection should be banned at 800 MHz or that it should be limited to specified geographic areas of the country or to certain radio services. Nor has any party argued that interconnection should be allowed only for

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[3] Licensees were prohibited from engaging in the "resale" of telephone service. *Second Report and Order*, *supra* at p. 753; 47 C.F.R. 90.477.

[4] Although interconnection is secondary to non-interconnected dispatch operations on shared frequencies, there is no requirement that the interconnection be ancillary to the dispatch function at 800 MHz. Interconnected private systems with no dispatch capabilities are permitted. Mobile loading requirements are unaffected. *See* 47 C.F.R. 90.477.

[5] For a discussion of the shared use of private land mobile systems and the joint use of facilities, see *Report and Order*, Docket No. 18921, 89 FCC 2d 766 (April 13, 1982), *Memorandum Opinion and Order*, Docket No. 18921, adopted April 27, 1983.

[6] The new or amended rules are reflected in 47 C.F.R. 90.7, 90.475, 90.477, 90.483 and 90.487, and became effective on May 17, 1982. Other rules were deleted.

[7] 47 U.S.C. 151 and 303.

limited time periods or only if accomplished manually by a base station operator at the licensee's principal place of business.

Reconsiderations

5. Two parties, however, have requested reconsideration or clarification of specific aspects of our *Second Report and Order*. The major points involve the telephone service: (1) who may provide it, (2) who may arrange for it, (3) whether licensees should be able to cost share it, and (4) whether the interconnection device or "patch" should be construed to be a part of it. The petitioners also question whether the Commission has jurisdiction which it asserted in its *Second Report and Order* to address exchange tariffs that unreasonably restrict the rights of private licensees to interconnect with telephone exchange facilities. Lastly, questions have been raised about the control requirements that should apply to interconnected private radio systems.

6. The two petitioning parties are the Telocator Network of America (Telocator) and the National Association of Regulatory Utility Commissioners (NARUC). Telocator, the national representative of the radio common carrier (RCC) industry, argues that the *Second Report and Order* should be clarified or amended in several respects. For instance, in the *Second Report and Order*, we required private licensees to obtain their telephone service directly from "the telephone company." Telocator argues that this language in the decision should be amended to authorize licensees and users in the private land mobile services to obtain telephone service from "any duly authorized carrier" (i.e. any entity authorized to provide telephone service on a primary or resale basis). In the *Second Report and Order*, we also prohibited SMRS base station licensees from making the telephone service arrangements for other licensees using their systems. Telocator argues that third party equipment suppliers, as well as SMRS base station licensees, should be prohibited from making the telephone service arrangements with the carrier on behalf of other private licensees and users. We also allowed private licensees and users, in the *Second Report and Order*, to share the telephone service aspect of their interconnected private systems on a cooperative cost shared basis. Telocator contends that such sharing invites "sham arrangements" and that we should prohibit sharing of the telephone service and instead should require each licensee or user to arrange individually with the carrier for his or her own unshared telephone service. In regard to the interconnection terminal device or "patch," Telocator argues that the Commission should allow only the telephone service supplier to provide it to private licensees and users. Alternatively, Telocator argues that if the Commission allows SMRS base station licensees or third party equipment suppliers to provide the patch, we should require that they provide it on a non-profit cooperative basis. Lastly, Telocator,

along with NARUC, argues that the Commission lacks the authority asserted in the *Second Report and Order* to oversee the offerings of carriers to ensure that exchange tariffs do not restrict unreasonably the rights of private licensees and users to interconnect with the public switched telephone network.[8]

Oppositions

7. Oppositions to Telocator's petition have been filed by the National Association of Business and Educational Radio, Inc. (NABER), a recognized frequency advisory committee and a non-profit association of Business Radio Service licensees and vendors of private land mobile radio products and services; the Special Industrial Radio Service Association (SIRSA), the recognized frequency advisory committee for the Special Industrial Radio Service; Motorola, Inc., a manufacturer of private land mobile radio equipment; and the National Mobile Radio Association (NMRA), a non-profit association of small businesses engaged in sales and maintenance of radio communications equipment and systems. In general, these parties support the conclusions the Commission reached in the *Second Report and Order*. They disagree with the points raised by Telocator, except to the extent they agree that private licensees and users should have the option of obtaining telephone service from any duly authorized carrier. They agree with our decision to permit non-profit sharing of the telephone service and argue that third party equipment suppliers should be allowed to arrange for the telephone service as well as provide the interconnection "patch" on an unregulated basis.[9]

Legislation

8. Shortly after the pleadings in this proceeding were filed, we received legislative endorsement of the general regulatory approach adopted in our *Second Report and Order*. On September 13, 1982, the "Communications Amendments Act of 1982" was signed into law.[10] Section 331 of the Communications Act now provides that:

> (c)(1) [P]rivate land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a non-profit, cooperative station) shall not be interconnected

[8] An additional issue raised by Telocator concerning the requirement for "alerting signals" has been rendered moot by an Erratum (31491) released June 1, 1982. Alerting signals are not required at 800 MHz.

[9] Telocator filed a Reply to the Oppositions to its Petition, reiterating its position.

[10] "The Communications Amendments Act of 1982," P.L. 97-259, 96 STAT 1087, September 13, 1982; see Section 120 (Section 331 of the Communications Act of 1934, as amended, is codified at 47 U.S.C. 332).

with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier, or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.

(2) A person engaged in private land mobile service shall not, insofar as such person is so engaged, be deemed a common carrier for any purpose under this Act. A common carrier shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982.

(3) No State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service.

9. This new legislation affirms our earlier conclusion that interconnection of private radio systems should occur on an unfettered basis, subject only to the requirement that licensees and users obtain their own telephone service either individually or collectively on a non-profit basis.[11] The legislative history makes it clear that Congress' concern in adopting this new legislation was identical to ours in adopting our *Second Report and Order*: private licensees and users should be able to interconnect freely, limited only by the prohibition against "resale" of telephone service or facilities.[12]

Decisions

10. We have reviewed our *Second Report and Order*, the parties' pleadings, and the new legislation. In general, we conclude that our 800 MHz interconnection rules are consistent with the legislation and the public interest. In certain respects, however, the legislation encourages even more flexibility and fewer restrictions than our rules now provide. We affirm our basic decisions in the *Second Report and Order* regarding the telephone service and the provision of interconnection equipment. In consideration of the legislation and the parties' comments, however, we are modifying our rules as they relate to making arrangements for telephone service and to controlling interconnected private land mobile systems.

[11] Non-profit cooperative stations and private stations that are not multiple licensed or otherwise shared by authorized users are exempt from the requirements of the new legislation. P.L. 97-259, *supra*, at § 120(c)(1), 47 U.S.C. 332(c)(1).

[12] *See, Second Report and Order, supra* at p. 753; and *Resale and Shared Use*, 60 FCC 2d 251 (1976), recon. denied 62 FCC 2d 588 (1977), aff'd sub nom. *ATT vs. FCC*, 572 F.2d 17 (2nd Cir. 1978), cert. denied 438 U.S. 875 (1978). In the land mobile services, the new statutory test supersedes the traditional common law test of indifferent service to the public established in *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied 425 U.S. 992 (1976); *See, Conference Report* No. 97-765, 97th Cong., 2nd Sess., August 18, 1982, at 55.

I. *The Telephone Service*

1. *Providing the Telephone Service*

11. The *Second Report and Order* required that private land mobile service licensees and users obtain telephone service directly from "the telephone company." The parties interpreted these rules as requiring that the telephone service be provided exclusively by wireline telephone companies. They note, however, that other entities are authorized to provide telephone service and that private licensees and users should have the additional option of obtaining telephone service from them.

12. It was not our intention in our *Second Report and Order* that "the telephone company" should be construed so narrowly as to include only the wireline carriers. We intended to allow private licensees and users to obtain their telephone service from any entity authorized to provide it. In view of this, the arguments of the parties, and the new legislation which makes no distinctions as to whether private services eligibles arrange for telephone service from wireline or radio common carriers, we are modifying our rules to clarify this point. Any "duly authorized carrier" will be permitted to provide telephone service to private licensees and users.[13]

2. *Arranging for the Telephone Service*

13. Telocator points out that the *Second Report and Order* prohibits the base facility licensee of an 800 MHz private carrier system (SMRS) from making the telephone service arrangements for licensees on the system. Telocator argues that this prohibition should extend to third party equipment suppliers who make radio equipment available on a lease or rental basis to private land mobile licensees. NABER, SIRSA, and Motorola disagree, noting the traditional distinctions between licensees and equipment suppliers and arguing that unlicensed third parties should be able to arrange for telephone service for private licensees if this promotes system implementation and eases burdens on the licensees.[14]

14. We agree with the comments that private licensees and users should be able to utilize the services of ordering agents for the purpose of obtaining telephone service from the carrier on a non-resale basis. As a practical matter, SMRS base station licensees and third party equipment suppliers are often in the best position to make these arrangements. They are often familiar with both the

[13] A "duly authorized carrier" would include any authorized carrier, *e.g.*, radio common carriers, specialized common carriers, miscellaneous common carriers, and resale common carriers. *See*, 47 C.F.R. 90.477(b)(2) and 90.477(d)(2).

[14] See, e.g., *Future Use of 806 MHz, Memorandum Opinion and Order*, 55 FCC 2d 771, 772 (1975) regarding the differences between the rights, duties and responsibilities of licensees and unlicensed equipment suppliers.

sites and the equipment. The new statute indicates that telephone service should be obtained "directly" from a carrier. Had the statute been intended to prohibit SMRS licensees and equipment suppliers from making these practical arrangements, the legislative history surely would have said so. Instead, it indicates that the new statute was intended only to preclude licensees and entrepreneurs in the private land mobile services from engaging in the resale of telephone service or facilities. The interconnection is prohibited only if the private land mobile operator or licensee is reselling for profit common carrier services or facilities. According to the legislative history, no persons otherwise participating in the private land mobile services, including equipment suppliers, should be classified as common carriers with respect to their participation in these services.[15] We are modifying the rules adopted in the *Second Report and Order*, therefore, to allow private licensees and users to obtain telephone service from a carrier on a non-resale basis through ordering agents acting on their behalf. Specifically, we are removing our earlier blanket prohibition against any involvement by the SMRS base station licensee in the telephone service arrangements. This will enable licensees and users to benefit from the services of equipment suppliers, SMRS licensees and others who may be in a better position to make the best arrangements for them. Any joint arrangements must be for telephone service to be provided on a non-profit basis with costs apportioned among the participating user-licensees on a pro rata formula or paid by each participant to the carrier providing the telephone service. We will continue to prohibit the resale of telephone service or facilities in the private land mobile services.

3. *Sharing the Telephone Service*

15. Telocator's argument that we should not permit any sharing of the telephone service is inconsistent with the philosophy we have consistently espoused with respect to both private land mobile systems and resale.[16] Moreover, it has been settled by the new legislation which affirms what we have said before: resale is a common carrier activity, sharing is not. Telocator argues in opposition to this that to allow cooperative sharing of the telephone service is to invite "sham arrangements." However, Telocator offers no evidence in support of this contention and we disagree with it. We will not treat Telocator's unsubstantiated allegations as if they were

[15] *Conference Report* No. 97–765, 97th Cong., 2nd Sess., August 18, 1982, at 54–56.

[16] See *Report and Order*, Docket No. 18921, 89 FCC 2d 766 (April 13, 1982); *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974), reconsidered, *Memorandum Opinion and Order*, 51 FCC 2d 945 (1975), aff'd. sub nom., *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir), cert. denied 425 U.S. 992 (1976); *Second Report and Order*, Docket No. 20846, *supra*; and *Resale and Shared Use*, *supra*.

demonstrated facts. *Telocator Network of America v. FCC*, 691 F.2d 525 (D.C. Cir., 1982). We find no reason to conclude that cooperative or joint use of telephone service will inevitably lead to sham arrangements. Certainly there is no basis in the record before us for drawing such conclusions. The possibility that a few persons may try to mask a resale does not invalidate all bona fide sharing arrangements. We will require that licensees and users sharing telephone service maintain records to demonstrate the cost-sharing nature of the arrangement and we will require that they either distribute their costs at least once a year or pay their share of the costs for joint use directly to the authorized carrier.[17] In the event that any person attempts to circumvent the resale restrictions, we can and will take appropriate remedial action.[18]

4. *The "Patch"*

16. Telocator also argues that the interconnect terminal device or "patch" is part of the telephone service and that it should be provided by the authorized carrier. Telocator contends that we should not allow the SMRS base station licensee or the third party equipment supplier to provide the patch. Telocator further argues that if we do not regard the patch as part of the telephone service, and if we allow sharing of the telephone service and the joint use of the patch by the participants sharing the telephone service, then the use of patch should be subject to our cooperative use requirements.[19]

17. NABER, NMRA, SIRSA, and Motorola generally disagree with Telocator on these points. For instance, NMRA argues that the patch is simply a piece of electronic equipment normally furnished by the provider of the base station equipment. It operates subject to

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[17] The legislation does not require that the costs be charged collectively to the participants and apportioned among them on a cooperative basis. We can envision circumstances in which both the carrier and the participants may prefer that the carrier be paid directly for each participant's share of the joint use rather than aggregate and apportion the costs on a cooperative sharing basis. We find no reason to preclude such a shared approach to telephone service, and we are allowing it.

[18] We will not require all applicants to submit detailed descriptions of how the interconnection of their land stations with the PSTN will be accomplished in each case. It is not necessary for that information to be filed with the Commission on a routine basis. Applicants will only be required to indicate on their applications that their stations will be interconnected. Licensees will be required to maintain detailed descriptions of how the interconnection is accomplished as part of their station records. This will minimize administrative burdens on both applicants and the Commission and will enable the Commission to obtain the information if necessary in particular cases to ensure compliance with the new legislation and the Commission's Rules.

[19] Telocator says that the *Second Report and Order* implied that the patch must be cost-shared. Although we said that licensees or users may cost-share the patch if they wished, we did not require that the patch be provided only on a cost-shared basis.

the control of the control point operator at either a fixed or mobile point within the system and there is no reason to regard it as part of the telephone service. These parties argue that we should not require the patch to be cost-shared. They believe that this would unnecessarily constrain eligibles' abilities to negotiate for requisite equipment while at the same time serving no legitimate regulatory objective.

18. We have considered these arguments carefully. We have also considered the fact that the new legislation does not specify that the interconnection device is to be viewed as part of the basic telephone service offering. We agree with NMRA, NABER and SIRSA: the patch is simply an unlicensed piece of electronic gear furnished by the provider of the base station equipment or any other third party on a competitive basis. As we noted in the *Carterphone* decision:

> [a] customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others.[20]

19. Telocator claims the patch must be considered part of the telephone service because "(i)f a system is not interconnected, (the patch) is not required at all; and if a system is interconnected, the telephone service aspect of it will not work without it." Reply at p.4. However, an interconnected private system also will not function as an interconnected private system without an antenna or a transmitter. This does not render the equipment supplier or the SMRS ineligible to provide the antenna or the transmitter nor does it render the private system a common carrier by virtue of the interconnection. The sale or lease of interconnect terminal equipment is not the resale of local exchange service. We agree with SIRSA: interconnection is the method of effectuating telephone service; it is not synonomous with the telephone service offering. In light of this we conclude not to restrict the types of entities that may provide the patch. Moreover, we will not limit the SMRS or third party equipment suppliers to providing the patch on a non-profit basis. We affirm that there are no restrictions on the manner in which the patch may be made available to users to satisfy their communications needs.[21]

5. *Exchange Tariffs*

20. Telocator and NARUC are concerned that we may have attempted to preempt existing state regulation of exchange tariffs. They ask that we clarify a footnote in the *Second Report and Order*

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[20] *Carterphone Device*, 13 FCC 2d 420, 424 (1968).

[21] *See Interstate and Foreign Message Toll Telephone*, 59 FCC 2d 83 (1976); and 47 C.F.R. Part 68 of the Commission's Rules concerning registration and technical requirements for interconnection of terminal equipment.

which stated that we would retain jurisdiction to ensure that exchange tariffs do not unreasonably restrict private licensees' and users' interconnection rights.[22]

21. NARUC argues that this could be read as our improper assumption of jurisdiction over applicable state exchange tariffs.[23] Telocator contends that the states have an independent regulatory interest in regard to policing intrastate tariff provisions notwithstanding that the entity may be licensed under Part 90. Motorola takes the opposite position, arguing that systems licensed under Part 90 are private and not within the purview of state regulation.

22. The new legislation specifies that "(n)o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service. . . ." P.L. 97-259, *supra*; 47 U.S.C. 332(c)(3). The legislative history accompanying P.L. 97-259 makes it clear that "state and local authority is entirely preempted with respect to the activities of any person operating within the private land mobile services."[24] The interconnection of private land mobile systems with the public switched telephone network is now recognized as a statutory right to be protected by the federal government and honored by the states. In light of the new statute and the legislative history, we emphasize that we will retain jurisdiction, if necessary, to address in the future any exchange tariffs that might unreasonably restrict the right of private radio licensees and users to interconnect as guaranteed in the legislation.[25]

II. *Licensee Control*

23. Under the terms of the new legislation, interconnection is sanctioned as a permissible mode of operation in the private land mobile radio services subject only to restrictions on the manner in which the telephone service may be obtained. Once those restrictions have been satisfied, as described above, the legislation imposes no further limitations on permissible methods of interconnection. We interpret this new legislation as encouraging the Commission to minimize other restrictions burdening interconnection in the private land mobile services and, therefore, we are re-examining and clarifying certain other requirements we have imposed on interconnection.

24. In particular, the legislation imposes no special control requirements upon licensees of interconnected systems. In the *Second Report and Order*, we eliminated the requirement for special monitoring equipment at the base station transmitter site which

[22] *Second Report and Order, supra* at p. 753, footnote 14.
[23] See 47 U.S.C. 152(b) and 221(b).
[24] *Conference Report, supra*, at 56.
[25] *Cf. American Telephone and Telegraph Co.*, 71 FCC 2d 1 (1979).

would prevent the activation of the system when signals of other co-channel stations were present. This requirement was eliminated because interconnected service at 800 MHz is on a secondary basis to co-channel dispatch operations. We also eliminated the requirement at 800 MHz for a preliminary "alerting signal" when initial access to the system was made from a point within the public switched telephone network. Similarly, we eliminated the requirement for automatic timers that would limit interconnected communications to three minutes. This approach is consistent with the new legislation.

25. We permitted interconnection to be accomplished either manually or automatically under the supervision and control of a transmitter control operator at a fixed position in the authorized system of communication or automatically under the supervision and control of mobile operators. However, even though we eliminated the requirement for certain co-channel monitoring equipment, we imposed in our interconnection rules other burdens on licensees of interconnected systems. For manual interconnection, we required the station to be configured so that its communications could be aurally monitored by the control point operator at the fixed control point. (47 C.F.R. 90.483(a)). We required similar aural monitoring capabilities in automatically interconnected systems supervised at the control point. (47 C.F.R. 90.483(b)(1)(i)). Where any licensee's transmitting facilities can be operated from dispatch points, the fixed control point operator must be able to monitor aurally all transmissions originating at the dispatch points. (47 C.F.R. 90.463(d)).

26. In light of the new legislation, however, we have re-examined these aural monitoring requirements. Once private licensees and users have obtained their telephone service in accordance with the statute, they should not be further restricted in implementing their systems. Indeed, the legislation imposes no special control requirements upon any private radio system licensees, regardless of whether their systems are interconnected. Base station licensees should be free to utilize whatever methods they deem appropriate and necessary to ensure that their stations comply with permissible use rules. We see no reason to impose a prior screening duty. The imposition of a requirement for aural monitoring of a station's communications by the control point operator inhibits the use of digital voice and digital data technologies because it would require a "translation" of the station's message by the control operator and his or her prior approval of content before the message could be sent to the recipient. In other proceedings, the Commission has recognized that digital technology clearly serves the public interest and should be encouraged.[26] In light of these considerations, we will no longer

[26] *First Report and Order*, PR Docket 80-41, FCC 81-186, 86 FCC 2d 405; *Second*

require aural monitoring capabilities of a station's communications at its control point. Although licensees may utilize such equipment if they deem it necessary to prevent abuses of the permissible use rules, we will not require it. Instead, we will require only that licensees maintain a capability to terminate the transmission (e.g. by deactivating the transmitter) when they deem it appropriate or when required by the Commission. It is not necessary, in light of the legislation, to impose more stringent control rules.[27]

Miscellaneous

27. Telocator also requests that our rules be amended to make it clear that private land mobile licensees may obtain private radio equipment and ancillary facilities from "any duly authorized carrier." In essence, Telocator argues that RCC's should be permitted to function as third party equipment suppliers to private radio systems or, separately, as SMRS licensees. Motorola opposes this amendment, arguing that it goes beyond the issue of who may provide telephone service.

28. We have already made it clear in this *Order* that any "duly authorized carrier" may provide telephone service to private licensees and our rules do not restrict in any way the types of entities that may function as third parties in providing equipment or related facilities to users. Our rules also do not currently restrict the ability of RCC's to become eligible for licensing separately as SMRS's nor do the rules prevent SMRS licensees from separately being authorized to provide telephone service by the appropriate regulatory bodies. Because the rules do not contain these restrictions, we conclude it is unnecessary to add the additional rule Telocator requests.

Summary and Conclusions

29. We have reviewed our *Second Report and Order*, the parties' comments and the new legislation. We have concluded that the *Second Report and Order* is consistent with the legislation and the public interest but we have modified it in several respects. To summarize, private licensees and users will be permitted to obtain telephone service from any duly authorized carrier either individually or jointly on a non-profit cooperative basis. Additionally, SMRS base station licensees, equipment suppliers and any other third parties may act as ordering agents in arranging for telephone service for licensees and users if their intention is to obtain the service on a

Report and Order, PR Docket 80–416, adopted March 18, 1982; *Second Report and Order*, PR Docket 79–191, 82–338, adopted July 22, 1982; *Report and Order*, PR Docket No. 82–470, Mimeo No. 32640, adopted January 20, 1983.

[27] We stress, however, that licensees must take reasonable precautions to avoid causing harmful interference to the transmissions of other licensees. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for interference. *See*, 47 C.F.R. 90.403(e).

non-profit, non-resale basis. The interconnection device itself is not part of the basic telephone service offering and there are no restrictions as to how licensees and users may secure it. Both SMRS base station licensees and third party equipment suppliers may provide the interconnection patch on an unrestricted basis. The telephone service itself, however, must not be resold in the private land mobile services. Lastly in regard to the telephone service, the Commission will retain jurisdiction to address in the future any exchange tariffs that might unreasonably infringe upon the statutory right of private systems to interconnect with a telephone exchange or interexchange service or facility.

30. Finally, in regard to licensee control requirements, we have amended the rules to eliminate the requirement that licensees maintain a capability to monitor their stations' communications aurally at the control point. However, we emphasize that they must take reasonable precautions to minimize the potential for interference and they must maintain the ability to de-activate the transmitter and to terminate the transmissions in appropriate circumstances.

31. Accordingly, IT IS ORDERED That effective July 5, 1983, Part 90 of the Commission's Rules IS AMENDED as shown in the Appendix, pursuant to the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. IT IS FURTHER ORDERED that the petitions for reconsideration and clarification in this proceeding ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 90.129 is amended by the addition of a new paragraph (l) as follows:

Section 90.129 Supplemental information to be routinely submitted with applications.

* * * * *

(l) Applicants for new land stations to be interconnected with the public switched telephone network must indicate on their applications that their stations will be interconnected.

* * * * *

2. Section 90.135 is amended by the deletion of paragraph (b) in its entirety and the substitution of the following: 90.135 Modification of license.

* * * * *

(b) The following changes do not require an application for modification of license:

(1) Change in mailing address of licensee.

(2) Change in name only of licensee, without changes in the ownership, control, or corporate structure.

(3) Change in the number and location of station control points, or of control stations meeting the requirements of §90.119(a)(2)(ii).

(4) Change in the number of mobile units for stations operating below 470 MHz; or in the number of mobile units operated by Radiolocation Service licensees.

(5) Change enabling interconnection of the land station with the public switched telephone network. See 90.477.

(6) Change from unshared land station to shared land station. See 90.179.

(7) Any other change not listed in paragraph (a) of this section.

(c)(1) In case of a change listed in subparagraph (b) (1) or (2) of this paragraph, the licensee shall promptly notify the Commission of such change. The notice, which may be in letter form, shall contain the name and address of the licensee as they appear in the Commission's records, the new name or address, the call signs and classes of all radio stations authorized to the licensee under this part and the radio service in which each station is authorized. The notice shall be sent to the Federal Communications Commission, Gettysburg, Pennsylvania 17325 and to the Engineer in Charge of the Radio District in which the station is located, and a copy shall be maintained with the license of each station until a new license is issued.

(2) In the case of a change listed in subparagraph (b) (3), (4), (5), (6) or (7) of this paragraph the licensee shall notify the Commission within 30 days of the change. The notice may be filed on FCC Form 574 or may be contained in a letter specifying the nature of the change, the name and address of the licensee as appearing on Commission records, and the call sign, class, and radio service of the station. The notice shall be sent to: Federal Communications Commission, Gettysburg, Pennsylvania 17325.

3. Section 90.429, "Control point and dispatch point requirements," is amended to eliminate the requirement for certain aural monitoring equipment by deleting subparagraph (d)(2) in its entirety, and re-numbering the remaining subparagraphs as (2) and (3), respectively.

4. Section 90.463 is amended to eliminate the requirement for certain aural monitoring equipment by deleting subparagraph (d)(1) and re-numbering the remaining paragraph as (d), to read as follows:

Section 90.463 Transmitter control points.

* * * * *

(c) Where the licensee's transmitting facilities may be operated from dispatch points, the fixed control point shall have equipment to permit the control operator to either disconnect the dispatch point circuits from the transmitter(s) or to render the transmitter(s) inoperative from any dispatch point being supervised.

* * * * *

5. Section 90.443 is amended by the addition of a new paragraph (d) as follows:

Section 90.443 Content of station records.

* * * * *

(d) For private land stations that are interconnected with the public switched telephone network, the licensee must maintain a detailed description of how interconnection is accomplished. When telephone service costs are shared, at least one licensee participating in the cost sharing arrangement must maintain cost sharing records. A report of the cost distribution must be placed in the licensee's

station records and made available to participants in the sharing and the Commission upon request. See 90.477.

6. Section 90.477 is amended as follows:

Section 90.477 Interconnected systems.

(a) Applicants for new land stations to be interconnected with the public switched telephone network must indicate on their applications that their stations will be interconnected. Licensees of land stations that are not interconnected may interconnect their stations with the public switched telephone network and must notify the Commission within 30 days. See 90.135. In all cases a detailed description of how interconnection is accomplished must be maintained by licensees as part of their station records. See 90.443.

(b) In the frequency ranges 806-821 MHz and 851–866 MHz, interconnection with the public switched telephone network is authorized under the following conditions:

(1) Operation in the interconnected mode will be on a secondary basis to dispatch operation. Upon a sufficient showing, the Commission may impose specific or general constraints upon a licensee's interconnection of a particular system. This restriction will not apply to trunked systems or on any channel assigned exclusively to one licensee.

(2) Interconnection may be accomplished at any location through a separate or shared interconnection device. When land stations subject to this part are multiple licensed or shared by authorized users, arrangements for telephone service must be made with a duly authorized carrier by users, licensees, or their authorized agents on a non-profit cost-shared basis. When telephone service costs are shared, at least one licensee participating in the cost sharing arrangement must maintain cost sharing records and the costs must be distributed at least once a year. Licensees, users, or their authorized agents may also make joint use arrangements with a duly authorized carrier and arrange that each licensee or user pay the carrier directly for the licensee's or user's share of the joint use of the shared telephone service. A report of the cost distribution must be placed in the licensee's station records and made available to participants in the sharing and the Commission upon request. In all cases, arrangements with the duly authorized carrier must disclose the number of licensees and users and the nature of the use.

(c) Interconnection of facilities in the Radiolocation Service (Subpart F) will not be permitted.

(d) In the frequency ranges below 800 MHz, interconnection with the public switched telephone network is authorized under the following conditions:

(1) Interconnection may be accomplished at any location. However, there may not be interconnection at a common point when the radio equipment is provided by a third party and telephone service is shared by the participants, except where systems are cost-shared on a non-profit basis with costs prorated among the users and third party involvement is limited to sale or lease of radio equipment and to incidental maintenance.

(2) When land stations subject to this part are multiple licensed or shared by authorized users, arrangements for telephone service must be made with a duly authorized carrier by users, licensees, or their authorized agents on a non-profit cost-shared basis.

Subparagraph (c)(3) is re-numbered (d)(3). Paragraph (d) is re-numbered (e).

* * * * *

7. Section 90.483 is amended to delete the requirement for certain aural monitoring

equipment in interconnected systems, as follows: Section 90.483 Permissible methods and requirements of interconnecting private and public systems of communications.

(a) Where a system is interconnected manually at a fixed control point, the control point operator must maintain the capability to turn the carrier of the transmitter off or to de-activate the system completely when circumstances warrant such action.

(b) * * *

(i) The control point operator must maintain the capability to turn the carrier of the transmitter off or to de-activate the system completely when circumstances warrant such action.

Private Land Mobile Radio Service
Reconsideration, Petition for, Grant of
Rules, Amendment of

Petition for reconsideration of *Report and Order*, 89 FCC 2d 766, granted. Certain rules modified because of concerns expressed in petitions as well as reexamining regulatory policies adopted in this proceeding, and recent amendments to the Communications Act.
-*Amendment of Part 90*
Docket No. 18921

FCC 83-175

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Parts 89, 91 and 93 of the Commission's Rules and Regulations to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services[1]	Docket No. 18921 RM-1197 RM-1218 RM-1330

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION
(PROCEEDING TERMINATED)

(Adopted: April 27, 1983 Released: June 2, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

I. *Preliminary Statement*

1. We have before us petitions for reconsideration and clarification[2] of our *Report and Order* in the above captioned proceeding.[3] After carefully considering the concerns expressed in these petitions

[1] Parts 89, 91 and 93 have been consolidated under new Part 90. *See* 47 C.F.R. §§90.1-90.657.

[2] A Petition for Reconsideration was filed by the General Electric Company (GE), Richardson Communications Company, C&E Service Co., AGS Electronics, Inc., Clark Communications, Inc. and Commercial Communications, Inc. essentially agreed with and supported the GE request. A Petition for Reconsideration And/Or Clarification also was filed by Telocator Network of America (TNA). TNA, however, subsequently filed a Notice of Withdrawal of Petition stating that the issues raised in the petition "are moot" because passage of new Section 331 of the Communications Act of 1934, as amended, "significantly alters the legal test of common carriage in the land mobile radio services." *See* Communications

as well as reexamining the regulatory policies we adopted in this proceeding in light of the record, the NARUC decision (see n. 9) and the recent amendments to the Communications Act[4], we have decided to modify certain of the rules we earlier adopted. Accordingly, we are eliminating the restriction on the securing of packaged services. We are also modifying our sharing requirements to permit both non-profit cost sharing and for-profit private carrier service. Lastly, we are authorizing radio equipment suppliers to be licensed on the same base station facilities that they offer for use by other licensees.

II. *Background*

2. The proceedings in Docket No. 18921 began in 1970 with the release of our *Memorandum Opinion and Order and Notice of Proposed Rule Making*[5]. We had received several petitions for rule making from radio common carriers requesting that we adopt regulations substantially restricting the multiple licensing and cooperative sharing of radio stations in the private land mobile services.[6] The petitioners had argued that authorization of shared and multiple licensed transmitting facilities in the private land mobile radio services contravened Title II of the Communications Act and presented unfair and destructive competition to the radio common carriers. In our *Memorandum Opinion and Order, supra*, we stated we were not persuaded by the arguments made, and we did not view shared or joint use of private communications facilities as common carriage. We pointed out that this had been the Commission's determination for many years, and we concluded both shared and joint use of transmitters promoted the public interest by encouraging the larger and more effective use of radio in the public interest, as mandated by the Communications Act of 1934, as amended.[7][8]

3. We did believe, however, that it was necessary to clarify the types of shared use arrangements we thought appropriate in the private services and we proposed rules with this goal in mind.

4. Concurrently with these deliberations, however, the dynamic state of growth in the land mobile services, both in terms of users

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Amendments Act of 1982, §120(a), 47 U.S.C. §331. Replies to the petitions were filed by the National Association of Business and Educational Radio, Inc. (NABER) and Motorola, Inc.

[3] *See Report and Order*, Docket No. 18921, 89 F.C.C. 2d 766 (1982).

[4] See Appendix A.

[5] *Multiple Licensing —Safety and Special Radio Services*, Docket No. 18921, 24 FCC 2d 510 (1970).

[6] For a description of multiple licensing and cooperative sharing see *Report and Order*, Docket No., 18921, *supra*, and *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making*, FCC 81-263; 46 Fed. Reg. 32039 (June 19, 1981).

[8] These conclusions have now been confirmed by the new legislation as set forth above.

and technologies, caused us, in a separate proceeding, to formulate a licensing approach for 800 MHz systems which permitted licensees to make private land mobile facilities available to multiple eligibles on a for-profit basis.[9] This decision and the appeals attendant thereon substantially delayed resolution of our proceeding in Docket No. 18921. When we again turned our attention to fashioning a regulatory plan for private shared use and multiple licensing arrangements below 800 MHz in our *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making*, we adopted certain interim policies to avoid confusion, but we decided that interested parties should be given the opportunity to submit further comments on our proposals in light of the changes that had occurred and the staleness of the earlier comments. After reviewing the new comments, as well as the entire record in Docket No. 18921, we released our *Report and Order* in March, 1982. There we affirmed our earlier conclusions that shared use and joint licensing of private land stations did not constitute common carriage within the meaning of Title II of the Communications Act, and that authorization of these types of arrangements in the private land mobile services clearly was in the public interest because they "furthered the larger and more effective use of radio." We then adopted regulations clarifying the distinctions between multiple licensing and cooperative use arrangements and specifying how each was to be conducted.

5. However, in 1982 subsequent to our *Report and Order*, the Congress amended the Communications Act. It not only affirmed our earlier conclusions about multiple licensing and non-profit cooperative use, it also determined that for-profit shared use of private land mobile service facilities served the public interest and expressed the view that there should be minimal barriers to the ways licensees, equipment suppliers and other third parties are able to offer facilities and service to eligible users in the private services. While we had considered permitting licensees to profit in the bands below 800 MHz in our *Tentative Decision* and requested public comment thereon[10], we did not adopt final rules authorizing such an an

[9] *Land Mobile Radio Services, Second Report and Order*, Docket No. 18262, 46 F.C.C. 2d 752 (1974); *reconsidered, Memorandum Opinion and Order*, Docket No. 18262, 51 F.C.C. 2d 945 (1975); *aff'd sub nom. NARUC* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976); *cert. denied*, 425 U.S. 992 (1976).

[10] "*Third Party Licensing.* Would direct licensing of any entrepreneurs now providing equipment or services to cooperative and multiply licensed private radio systems be permissible as a matter of law? Is either mandatory or voluntary licensing of such entrepreneurs a policy that would benefit either the users of these systems or the public interest? What would be the advantages and disadvantages of allowing or requiring the provision of radio communications services to current users of cooperative and multiply licensed systems in a manner analogous to the rules applied now to the Specialized Mobile Radio Service above 800 MHz."

approach in the bands below 800 MHz in our *Report and Order*, essentially because we were not persuaded of the need for such a regulatory approach here, and because the bands below 800 MHz were substantially occupied.[11] Thus, we continued, in this portion of the spectrum, to preclude licensees from profiting from the shared use of the facilities authorized to them.

Petitions for Reconsideration

6. In response to our *Report and Order* we received requests from the General Electric Co. and Telocator Network of America (TNA) to reconsider our decision. However on September 16, 1982, Telocator filed a Notice of Withdrawal of [its Reconsideration] Petition.[12]

7. We also received comments on the matters contained in the General Electric and Telocator petitions from the National Mobile Radio Association; Motorola, Inc.; Southeastern Electronics, Inc.; H.V. Church; PE, C&E Service Co.; Richardson Communications Co.; AGS Electronics, Inc.; Clark Communications; Communications Associates, Inc.; and Commercial Communications.

III. *Discussion*

Multiple Licensing - Payments Among Participants

8. While most of these parties endorsed the conclusions reached in the *Report and Order*, they generally felt our decision regarding the restriction on equipment suppliers operating on facilities they made available to others for multiple licensing was wrong.[13]

Tentative Decision and Further Notice of Inquiry and Notice of Proposed Rule Making, para. 82 (footnote omitted).

[11] "We also decline to adopt rules at this time which would license third party providers of equipment and service in the bands below 800 MHz and the record of this proceeding does not definitely support a need for such a service in these bands" (footnote omitted).

Report and Order, para. 9

[12] In withdrawing its petition, TNA stated that new amendments to the Communications Act rendered moot the arguments it made challenging our conclusions with respect to multiple licensing and licensee control when third party equipment suppliers provide radio equipment on a joint use basis.

[13] In our *Report and Order* we stated:

"We also proposed in 1970 to forbid payments between persons sharing common transmitting facilities under multiple licensing. This we thought desirable to distinguish multiple licensed sharing arrangements from cooperative use, thereby drawing an absolute and very definitive line between the two. This approach was opposed by several parties. They argued that in many instances persons furnishing service, *e.g.*, equipment companies, have legitimate communications requirements of their own. In such circumstances, the option would be for such equipment companies

9. Commercial Communications, Inc., for example argued:

"For us to comply with these new restrictions would have a devastating effect on our operation, or put a serious burden on our clients, to whom we sold radio systems and the use of our repeater in good faith."

"If we are forced to vacate our frequency, then we will have to purchase a new repeater at a cost of thousands of dollars, which we simply cannot afford. This incidentally, would also involve our having to use another frequency pair of which there are few enough already. . . . We strongly urge the Commission to reconsider, and to not place this crushing burden on a small business (we are a three man operation) that is already having a hard enough time to survive."

10. Similar arguments were echoed by Clark Communications ("With the new ruling, operators will be forced to install mobile relays physically next to existing mobile relay equipment, even sharing the same frequencies as before. What a senseless duplication of equipment and cost burden.") and AGS Electronics, Inc. ("It will impose a considerable financial burden on any small business, such as ourselves, to have to vacate an existing Community Repeater and invest in expensive equipment purchases simply to have our own communications system, when one already exists and is available for our use").

IV. *Decision*

11. We have considered these arguments and we find them persuasive. Our concern, as expressed in the *Report and Order*, essentially turned on definitional purity (i.e. we thought the rule desirable to distinguish multiple licensed sharing arrangements from cooperative use, thereby drawing an absolute and very definitive line between the two). Cf. n. 13, *supra*. In considering this matter further, however, we find the hardships it imposes, particularly on small business, is not commensurate with the benefits gained. For years there was no prohibition against permitting equipment suppliers to be one of the licensees authorized to operate on a facility which they made available to others for multiple licensing. During this time no regulatory problems arose which necessitated the discontinuance of this practice because of adverse public interest effects. Moreover, the new amendments to the Act and the NARUC case make clear that profit to the licensee of a private system is not the test of common carriage. In light of these things therefore, we are modifying our *Report and Order* to eliminate this restriction. We conclude it unnecessarily burdens licensees, particularly small

to build a second facility for use by their customers. Notwithstanding this effect we feel that licensees of community repeaters should not be permitted to profit from the furnishing of equipment or service to other licensees. Therefore, payments among persons sharing common transmitting facilities under multiple licensing will be prohibited."

89 F.C.C. 2d at 791.

businesses, while not confering a public interest benefit sufficient to justify this burden.

Packaged Service Prohibition

12. Also, on our own motion we have reconsidered our decision to preclude private land mobile services licensees and users of shared and multiple licensed stations from securing from the same third party a "packaged service" for radio equipment and dispatching.

13. Since the inception of this proceeding we have put into issue the question whether or not licensees of private systems of communication should be permitted to obtain both equipment and dispatching service from the same third party when the station they used was shared or multiple licensed. Our concern with the desirability of such a practice has been whether in such instances licensees would maintain proper control of their systems, or would cede control to the equipment supplier/dispatcher. A second consideration was the common carriers' arguments that such arrangements "so closely paralleled common carriage offerings as to be common carriage."[14]

14. In our *Tentative Decision, supra*, we held that packaged service arrangements were not illegal and did not contravene public policy. We noted that licensees of private systems use authorized radio facilities as a tool to carry out their primary activities and functions. We also recognized that they often contract both for the radio equipment they need to enable them to operate on their authorized channels, and for the dispatch service they require, when they cannot operate their control points themselves. We concluded that the fact that they contracted with the same entity for both services did not necessarily mean they would cease to exercise proper control of their stations. We also found there was no underlying regulatory objective that required the retention of the packaged service policy.

15. However, in our *Report and Order* we retained the packaged service prohibition. While we felt the provision of packaged service did not constitute common carriage, we were faced with the comments in the proceeding that argued that the prohibition of the offering of packaged service would aid the "Commission in identifying private shared stations which are functionally equivalent with regulated carriers."[15] We did recognize, however, that throughout the proceeding the private land mobile user community had opposed retention of the packaged service prohibition and had asserted we were being overly restrictive in adopting the rule, since it did not necessarily follow that merely because licensees and users of shared

[14] *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making*, Docket No. 18921, *supra*, at para. 60. *See also, Multiple Licensing-Safety and Special Radio Services*, 24 FCC 2d. 510, 519 (1970).

[15] *Report and Order*, Docket No. 18921, 89 F.C.C. 2d at 785–786. (1982).

stations contracted with a single entity for the services they needed, and for services which the Commission had found were necessary and served the public interest, that they would abdicate system control.

16. Obviously, the question of contracting for both dispatching and radio equipment from a single third party when a private land station is shared or multiple licensed is a matter to which we have devoted considerable thought. On the one hand, we wished to assure that licensees retained control of the systems. On the other hand, we did not want to impose unnecessary restrictions on licensees in the terms and persons with whom they contracted in the public marketplace for goods and services. After considering this entire matter again, we believe that we were overly restrictive in retaining the packaged service prohibition. Abdication of system control is not the natural consequence of securing goods and services from a single entity, though it may occur in isolated instances. What is determinative is not that the land station is shared or multiple licensed or that one or two third parties are involved, but rather that the licensee in fact exercises the supervision the system requires. To the extent that abdication of control occurs, it can be dealt with on a case by case basis, it need not be anticipated in a generic rule prohibition on securing package service for shared or multiple licensed land stations.

17. In reconsidering this matter, therefore, we are eliminating any restrictions on the persons from whom private land mobile service eligibles using shared or multiple licensed stations may secure radio equipment and services.

For Profit Licensing Arrangements

18. In our *Report and Order* we also adopted rules that required sharing of transmitting facilities, as opposed to multiple licensing, to be on a prorated, cost-shared basis. To assure this, we adopted rules which required that all costs associated with the shared service must either be absorbed by the licensee on a no-charge basis to other participants or must be prorated among all participants in the cooperative sharing arrangment. Thus, we determined not to permit the so called "stage two" and "stage three" cooperatives which we had hereto allowed. See generally Docket No. 18921, *supra*. We stated that both in stage two and in stage three cooperatives oftentimes costs and services associated with the shared use of transmitters are not prorated and cost apportioned among participants. This we concluded was not desirable in consideration of our conclusion that costs should be equitably apportioned among eligible users when they sought to operate pursuant to the Commission's cooperative sharing arrangements for the private land mobile services. We have examined this conclusion again, however, both in light of the NARUC case and the Congressional intent for the

private services, as expressed in the new amendments to the Act. Both NARUC and the new amendments affirm that the status of a private system is not affected when the licensee or a third party makes a profit from a system licensed in the private service. Indeed, the new legislation makes the manner of obtaining telephone service the only line of demarcation between private and common carrier land mobile service and encourages allowing maximum flexibility in permitting licensees, equipment suppliers and other third parties to offer their services and facilities to eligible users as marketplace forces may dictate.[16]

19. In light of the fact that as a matter of law, private land mobile licensees may profit from making facilities licensed to them available to other eligibles, there seems to be no reason (1) for limiting in our rules a licensee's ability to charge for shared stations operating in bands below 800 MHz or (2) for limiting the licensee's ability to structure the cost sharing arrangment as the licensee sees fit. This being the case, we are modifying our rules governing the sharing of private land mobile stations to allow all kinds of for profit and non-profit sharing arrangements, including Stage II and Stage III cooperatives.[17]

20. Accordingly, to the extent indicated the General Electric petition IS GRANTED and IT IS ORDERED that the Commission's Rules and Regulations ARE MODIFIED as set forth in Appendix B.

21. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Order to be published in the Federal Register.

22. IT IS FURTHER ORDERED, pursuant to 47 U.S.C. §§154(i), 301, 303(r), That Title 47 of the Code of Federal Regulations is AMENDED as set forth in Appendix B. These amendments shall become EFFECTIVE 30 days after publication of this *Memorandum Opinion and Order* in the Federal Register.

23. IT IS FURTHER ORDERED this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

Private Land Mobile Services

SEC. 120. (a) Part I of Title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) is amended by adding at the end thereof the following new section:

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[16] *Cf.* Explanatory Statement of the Committee of Conference on the subject of the Private Land Mobile Services.

[17] We address here solely profit which may be earned on the offering of shared radio facilities and do not reach issues which may arise if these facilities are interconnected with telephone service.

"PRIVATE LAND MOBILE SERVICES

SEC. 331. (a) In taking actions to manage the spectrum to be made available for use by the private land mobile services, the Commission shall consider, consistent with section 1 of this Act, whether such actions will—

"(1) promote the safety of life and property;

"(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

"(3) encourage competition and provide services to the largest feasible number of users; or

"(4) increase interservice sharing opportunities between private land mobile services and other services.

"(b)(1) The Commission, in coordinating the assignment of frequencies to stations in the private land mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

"(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5, United States Code, or section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)).

"(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

"(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

"(c)(1) For purposes of this section, private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.

"(2) A person engaged in private land mobile service shall not, insofar as such person is so engaged, be deemed a common carrier for any purpose under this Act. A common carrier shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982.

"(3) No State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service".

(b)(1) Section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new paragraph:

"(gg) 'Private land mobile service' means a mobile service which provides a regularly

interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.".

(2) Section 3(n) of the Communications Act of 1934 (47 U.S.C. 153(n)) is amended to read as follows:

"(h) 'Mobile service' means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio communication services."

APPENDIX B

Part 90 of the Commission's Rules and Regulations is amended as follows:

1. Section 90.7 is amended by the addition of the term private carrier to the list of definitions to read as follows:

§ 90.7 Definitions

Person. An individual, partnership, association, joint stock company, trust or corporation.

Private carrier. An entity licensed in the private services and authorized to provide communications service to other private services on a commercial basis.

Radio call box: A transmitter used by the public to request fire, police, medical, road service, or other emergency assistance.

2. Section 90.35 is amended by modifying subparagraph (a)(6) to read as follows:

(a) * * *

* * * * *

(6) Physicians, schools of medicine, oral surgeons, and associations of physicians or oral surgeons.

3. Section 90.179 is deleted in its entirety and new Section 90.179 is added to read as follows:

§ 90.179 Shared use of radio stations.

Licensees of radio stations authorized under this rule Part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station may be on either a non-profit, cost shared basis or on a for-profit private carrier basis. Shared use of an authorized station is subject to the following conditions and limitations:

(a) Persons may share a radio station only on frequencies for which they would be eligible for a separate authorization.

(b) The licensee of the shared radio station is responsible for assuring that the authorized facility is used only by persons and only for purposes consistent with the requirements of this rule Part.

(c) Participants in the sharing arrangement may obtain a license for their own mobile units (including control points and/or control stations for control of the shared facility), or they may use mobile stations, and control stations or control points authorized to the license.

(d) If the licensee shares the land station on a non-profit, cost shared basis to the licensee, this shared use must be pursuant to a written agreement between the licensee and each participant which sets out (1) the method of operation, (2) the components of the system which are covered by the sharing arrangements (3) the method by which costs are to be apportioned, and (4) acknowledgement that all shared transmitter use must be subject to the licensee's control. These agreements must be kept as part of the station records.

(e) The licensee must keep an up-to-date list of persons who are sharing the station and the basis of their eligibility under Part 90 of the rules.

(f) If the land station which is being shared is interconnected with the public switched telephone network, the provisions of § 90.477 *et seq.* apply.

4. Section 90.185 is amended to read as follows:

Two or more persons eligible for licensing under this rule Part may be licensed for the same land station under the following terms and conditions.

(a) Each licensee complies with the general operating requirements set out in § 90.403 of the rules.

(b) Each licensee is eligible for the frequency (ies) on which the land station operates.

(c) If the multiple licensed base station is interconnected with the public switched telephone network, the provisions of 90.477 *et seq.* apply.

5. Section 90.129 is modified by the deletion of subparagraph (d) and the addition of new subparagraph (d) to read as follows:

§ 90.129 Supplemental information routinely to be submitted with application.

* * * * *

(d) Applicants proposing to share their authorized transmitters pursuant to Section 90.179 shall so indicate in their application.

6. Section 90.443 is amended by the addition of new subparagraph (e) to read as follows.

§ 90.443 Content of Station Records

(e) For shared land stations, the records required by Section 90.179

Agreement, Between Applicants
Cellular Communications Systems
Merger and Drop Out Cases
Mobile Radio Service, Cellular Applications
Settlement, Partial

Commission modified Comm Carrier Bureau decision so that mutually exclusive applicants for cellular service who have arrived at a partial settlement are permitted to amend the surviving application to reflect the added participation of the merger partners.
–American Radio-Telephone Service, Inc.

FCC 83-179

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of AMERICAN RADIO-TELEPHONE SERVICE, INC.	File No. 26075-CL-P-(9)-82
and	
POST CELLULAR TELECOMMUNICATIONS, MARYLAND, INC. For construction permits to est blish cellular systems operating on frequency Block A in the Baltimore, Maryland, SMSA	File No. 26144-CL-P-(11)-82
In re Applications of AMERICAN RADIO-TELEPHONE SERVICE, INC.	File No. 26074-CL-P-(12)-82
and	
POST CELLULAR TELECOMMUNICATIONS, D.C., INC. For construction permits to establish cellular systems operating on frequency Block A in the Washington, D.C., SMSA	File No. 26145-CL-P-(11)-82

MEMORANDUM OPINION AND ORDER

(Adopted April 27, 1983; Released May 9, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

1. We have before us for consideration applications for review

filed by American Cellular Communications Corporation (American Cellular) and by Maxicam, Inc. and Cellcom, Inc. (Maxicam/Cellcom), requesting review of the Common Carrier Bureau's decision in *American Radio Telephone Service, Inc. and Post Cellular Telecommunications Maryland, Inc.*, CC Mimeo 812, released November 16, 1982. In that order, the Bureau (1) accepted as minor a change of ownership amendment submitted by American Radio-Telephone Service (ARTS) on behalf of itself and Post Cellular Telecommunications (PCT) as a result of settlement agreements reached between these parties in the Baltimore, Maryland, and Washington, D.C., Standard Metropolitan Statistical Areas (SMSAs); and (2) provided that no comparative credit may be given to mutually exclusive applicants for cellular service as a result of the partial settlement.[1] The petitioners dispute the latter aspect of this decision, arguing that settling applicants should be able to merge their application strengths for comparative purposes into the best possible surviving application.[2] Oppositions were filed by Cellular Mobile Systems of Washington, D.C., Inc., Cellular Mobile Systems of Maryland, Inc. (collectively referred to as CMS), and Millicom, Inc. (Millicom). ARTS/PCT filed joint Comments. For the reasons stated below, we have decided on our own motion to review this matter and modify the Bureau's decision so that settling parties will be permitted to amend the surviving application to reflect the added participation of the merger partners. However, we will not permit further amendments concerning the partnership's basic cellular system proposal.

Background

2. On September 9, 1982, ARTS filed the subject agreement reflecting a proposed merger of the interests of ARTS and PCT. Pursuant to the merger agreement, PCT would withdraw its applications in return for a thirty percent interest in the ARTS applications. Thereafter, the general partnership would prosecute the surviving ARTS applications. ARTS requested the Commission

[1] A "partial settlement" refers to a situation in which some, but not all, of the competing applicants agree to combine interests in one application.

[2] None of these petitioners filed an application to provide service in the Baltimore or Washington, D.C., SMSAs. American Cellular's subsidiaries are participating in applications proposing cellular systems in Los Angeles, Houston, Milwaukee, Indianapolis, Rochester, Nashville, Honolulu, and Gary. Maxicom is an applicant in Atlanta, Tampa and Miami, and companies affiliated with Maxicom are applicants in Birminghan and Memphis. Cellcom is an applicant in Minneapolis. The petitioners attempt to demonstrate standing based on the "chilling effect" that the Bureau's policy statement will have on their negotiations with the other competing applicants in these markets. In view of the important public interest considerations that are raised in the petitions, we will consider this matter on our own motion. Therefore, we do not need to address whether these petitioners are "aggrieved persons" under Section 1.115(a) of the Commission's Rules.

to approve the merger, accept the amendment to its application that reflected this combination, and credit its application with whatever comparative advantages result from PCT's new participation.

3. After carefully examining the issue of whether the proffered ownership amendment was major or minor, and finding it minor, the Bureau addressed the effect of this amendment on the surviving applicant's comparative position. The Bureau concluded that no comparative credit should be given for a partial settlement that was reached after these applications were filed. This conclusion was based on the premise that the Commission, in its cellular *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 59, 89–90 (1982), made a conscious decision to prohibit "one-upsmanship" by establishing a common filing date for applications and by proscribing major amendments. To allow ARTS to improve its comparative posture through ownership changes would be unfair to other applicants in the market and could cause extensive delays, a result which the Commission has tried to avoid. Finally, the Bureau indicated that this decision was intended to establish the general standard to be used in evaluating the effect of ownership changes due to partial settlement.

Summary of Arguments

4. American Cellular argues that the Bureau's decision is inconsistent with the Commission's policies favoring settlements and expedited initiation of cellular service, and may in fact discourage settlement and prolong delays. It further argues that partial settlement is a first step in arriving at complete settlement; and that the "one-upsmanship" doctrine was directed against unilateral actions of an applicant to gain a comparative preference, not settlements between competing applicants. Without proposing specific changes, American Cellular urges the Commission to formulate policies more conducive to achieving cellular settlements.

5. Maxicom/Cellcom argue that partial settlements are in the public interest because they present an improved cellular offering for Commission consideration, reduce the number of applicants, simplify the issues, and define a framework for a complete settlement. They also contend that granting comparative preferences for partial settlements is consistent with past Commission precedent. Finally, they take the position that a comparative evaluation that fails to consider the effect of settlement would be a regulatory fiction. Consequently, Maxicom/Cellcom propose the following approach to partial settlements: competing applicants who reach a partial settlement must select one application for continued prosecution; applicants would be permitted to amend the financial, management, ownership and personnel portions of the surviving application to reflect the settlement; however, the remaining portions of the surviving application, *i.e.* engineering, rates, service offering, and

public demand survey exhibits, would be adopted by the merged entity without further change.

6. Millicom and CMS respond that the petitioners do not have standing because they are not applicants in either Washington or Baltimore and because their claim of injury is speculative and tenuous.[3] They also contend that partial settlements with comparative credit will discourage, rather than encourage, full market settlements, and will provide settling parties with unfair leverage against remaining applicants. CMS also argues that once the Commission permits a comparative preference for one partial settlement in a given market, it must allow remaining applicants equal opportunity to upgrade their applications; but such continuous upgrading will undermine the Commission's objective to avoid one-upsmanship and will contribute to substantial delay.

7. In their comments, ARTS/PCT argues that the preference plan advocated by American Cellular is too general. Specifically, ARTS/PCT proposes that if the Commission allows merging of settling parties' applications, the surviving applicant should not be permitted to propose changes in the basic cellular plan; rather, preferences should be allowed only to the extent that the added participation of the merger partners is recognized. ARTS/PCT argue that modification of the basic cellular plan would present problems of one-upsmanship and delay that are not encountered when only the identity of the applicant is modified.

Discussion

8. In order to place partial settlements and associated amendments in context, we first review our prevailing general policies and rules governing amendments to applications. In the common carrier services (excluding cellular services[4]), an application may be amended as a matter of right any time before the cut-off date for filing mutually exclusive applications or designation of the application for hearing.[5] An application may also be amended as a matter of right after the cut-off date but before designation; however, certain types of amendments are considered "major" and may result in the amended application's being considered newly-filed for purposes of the cut-off rules.[6] In general, a "minor" amendment is accepted after

[3] See note 2, *supra*, for our brief discussion of this procedural issue.

[4] For cellular applications, amendments are permitted only under certain limited circumstances. *See* Memorandum Opinion and Order, FCC 83-161, released April 22, 1983.

[5] 47 C.F.R. §1.744(a) (common carrier services) and §22.23(a) (common carrier mobile services).

[6] 47 C.F.R. §§22.23(c) and 22.31(e).

the cut-off date conditioned on its not improving the applicant's comparative position.[7] An exception is made for amendments which report the culmination of events begun and reported to the Commission before the cut-off date.[8] Finally, an amendment filed after the underlying application is designated for hearing is accepted only when the applicant meets a stringent "good cause" test,[9] and the amendment will not improve the applicant's comparative position.[10] The reason we have these rules and policies is quite simple: to prevent an endless stream of amendments and pleadings and freeze mutually exclusive applications at a point at which they can be evaluated comparatively.

9. In the *Cellular Rulemaking*,[11] we took great pains to develop procedures that will bring cellular service to the American public as rapidly as possible.[12] To achieve this goal, we encouraged cellular applicants that have mutually exclusive applications in a particular market to settle.[13] Settlement of mutually exclusive applications is in the public interest because it eliminates the need for a costly and time consuming hearing and provides for a needed new service without delay. *Cellular Mobile Systems of Indiana, Inc. (Indianapolis and Milwaukee Order)*, FCC 83–70, released March 3, 1983, at para. 7; *Advanced Mobile Phone Service Inc. (Los Angeles Wireline Order)*, FCC 83–124, released April 26, 1983, at paras. 18–19. *See* 47 C.F.R. §22.31(e)(4). *See also Report and Order*, Docket No. 19905, 60 FCC 2d 549, 558–60 (1976). We also adopted streamlined comparative procedures aimed at eliminating one-upmanship in the event that a comparative hearing must be held.[14] As we noted in the *Reconsideration Order*, one-upsmanship creates a risk that applicants would not participate in the development of proposals and that the proposals would not represent the applicant's thoughts on how best to serve an area.[15] Further, one-upsmanship needlessly encumbers our administrative processes and contributes to additional delay.[16] Finally, we found it to be important to ensure that our procedures are as

[7] There is no common carrier case on point; the policy for the broadcast services is stated in Flower City Television Corp., 4 FCC 2d 384 (1966), and Grace Missionary Baptist Church, 80 FCC 2d 330, 337 (1980).

[8] Dover Broadcasting Co., Inc., 4 RR 2d 248 (Rev. Bd. 1965).

[9] 47 C.F.R. §§22.23(b) and 73.3522(b). The test is enunciated in Birmingham Family Television, Inc., 91 FCC 2d 348, 351 (Rev. Bd. 1982).

[10] Post-designation amendments are typically offered to report changed circumstances in compliance with 47 C.F.R. §1.65 or to respond to basic qualifying issues designated against the applicant. *See also* note 4, *supra*.

[11] Report and Order, CC Docket No. 79–318, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982).

[12] *Id.*, 86 FCC 2d at 498; 89 FCC 2d at 86.

[13] *Id.*, 86 FCC 2d at 491; 89 FCC 2d at 110 (statement of Commissioner Fogarty).

[14] *Id.*, 89 FCC 2d at 85–86.

[15] *Id.*, at 89.

[16] *Id. See also* para. 8, *supra*.

efficient as possible without sacrificing due process in our comparative consideration.[17]

10. After examining these factors in the context of partial settlements, we conclude that the public interest will best be served by allowing settling parties to amend the financial,[18] management, ownership and personnel portions of the surviving application. However, settling applicants will not be permitted to modify their basic cellular plan. This policy is intended to apply to partial settlements filed prior to designation for hearing, as well as post-designation. We find that this compromise approach affords the best balance between our policy of encouraging settlements and the prohibition against oneupsmanship. Partial settlement serves the public interest because it reduces the number of parties in a proceeding, simplifies the issues, and presents for Commission consideration an improved cellular offering. *See Sound Radio, Inc.*, 45 FCC 2d 805 (1970). Moreover, a comparative evaluation that fails to consider the effect of a settlement would be a regulatory fiction.[19] We have decided not to allow settling applicants to merge their basic engineering plans, service proposals and associated market studies because these aspects of an applicant's proposal are extremely complex, each part being interrelated with the other.[20] If changes to the basic cellular plan are allowed, many other modifications would be necessary in order for the resultant application to be internally consistent. Further, if settling parties are permitted to modify their basic proposal, the settlement process could be used to correct app'ication weaknesses perceived in hindsight. Overall, we believe that modifications to the basic cellular proposal will lead to extensive delay and more opportunity for oneupsmanship. In contrast, it is a relatively simple matter to amend the surviving application to reflect the benefits of merging the resources, qualifications and technical expertise of the new partner into the merged applicant.

11. Millicom and CMS argue that allowing comparative preferences in partial settlements will discourage, rather than encourage

[17] *Id.*, at 86.

[18] Financial ability is a basic, not a comparative, factor in cellular licensing. *See* 86 FCC 2d at 501-502. Therefore, the partial settlement would receive comparative credit only for its amended management, ownership and personnel showings. The settling parties would be permitted to amend their financial showings to reflect the effect of the partial settlement on the merger partner's financial requirements. Documents which extend a partner's original financial showings to the partnership may be filed. However, documents that provide new sources of funds will not be accepted.

[19] Indeed, to make a fully informed determination of which applicant will best serve the public interest, it is necessary to consider the added participation of the partners in the merged entity.

[20] For example, changes in demand estimates, rates and service proposals affect the cell design and channelization plan that is proposed.

complete settlements, and will result in unfairness to the nonsettling parties. We are not persuaded by these arguments. Given the fact that the needs of each cellular market, as well as the number and identity of the applicants, are different, it is impossible to predict with certainty whether partial settlements will always lead to a full settlement. However, it is clear that, without any legal incentives to facilitate a compromise, a full settlement will be extremely difficult to orchestrate. In addition, as expressed earlier, partial settlement reduces the number of parties in the proceeding end simplifies the issues to be examined. Thus, partial settlement, although not guaranteeing full settlement, may be a first-step toward achieving this goal. This is particularly salient for several markets smaller than the top-30 where there are 20 or more nonwireline applicants. In such situations, partial settlement may serve as a valuable tool to merge individual applicants into applicant subgroups, thereby making settlement negotiations less fragile and complex.

12. We have also decided not to allow nonsettling applicants an opportunity to upgrade their applications. Allowing such opportunity will undermine the Commission's objective to avoid one-upmanship and will contribute to substantial delay. We do not believe that this policy is unfair to nonsettling applicants. First, by permitting only a limited merger of previously filed applications, the nonsettling parties would not be forced to face an entirely new and unknown proposal. The merger proposal will still represent the applicant's best view of how to serve a given area, and not an attempt to upgrade its filing as a result of examining its competitors' applications. Further, since the basic cellular plan is the major comparative factor to be considered in the hearing,[21] the nonsettling applicants will not be significantly disadvantaged by this approach. Finally, any potential inequity in this policy can be ameliorated by allowing the remaining applicants a chance to address the settlement in the rebuttal phase of the hearing.[22]

13. Our review of Commission precedent, while not dispositive, supports our position on this issue. For example, in *Sound Radio, Inc., supra*, the Commission accepted an amendment that was submitted to implement a merger agreement among four of nine competing applicants, even though it was recognized that the amendment would improve the merged applicant's comparative position in the hearing. In approving the partial settlement, the Commission stated:

[21] *See* 86 FCC 2d at 502–503.

[22] As indicated in para. 14, *infra*, we will not accept any pleadings from nonsettling applicants prior to designation of the applications for hearing. Since the rebuttal phase of the hearing is the stage at which competing applicants comment on their competitors' direct cases, this phase is the appropriate time to evaluate the effect of the partial settlement on the comparative aspects of the proceeding.

> A reduction in the number of applicants in this proceeding . . . should, to some degree, simplify the hearing which will be ordered at a later date, and hopefully, will permit an earlier choice of the best qualified applicant . . . .

45 FCC 2d at 809. In *Mobile Radio System of Ventura, Inc., et al.*, 30 FCC 2d 660 (1971), the Commission designated for a comparative hearing five applicants for a common carrier paging frequency even though there was a time-sharing arrangement among four of the five applicants.[23] However, in designating the matter for hearing, the Commission emphasized the public interest benefits of time-sharing settlements and permitted the settling applicants to be *compared as a group* against the lone holdout. Thus, what little past Commission precedent is available reflects a policy favoring partial settlements. *See also Venton Corp.*, 90 FCC 2d 307 (1982); *cf. Beep Communications systems, Inc.*, 69 FCC 2d 9 (1978) (time-sharing applicants designated for a comparative hearing as one proposal, but not given automatic comparative advantage).[24]

14. In view of the foregoing, we have decided to establish the following procedure for partial settlements: (1) within ten days after entering into the agreement, the parties shall jointly notify the Commission in writing of the existence and general terms of the agreement, identifying all of the participants and the applications involved; and (2) within 30 days after entering into the agreement, the parties shall file any proposed amendment together with a copy of the agreement which contains its terms and provisions.[25] This joint filing should specifically list the sections of the dismissed application(s) which the merged entity will be relying upon in the comparative hearing. Parties who wish to comment on the settlement filing should address their concerns in their rebuttal cases filed with the presiding Administrative Law Judge (ALJ). In the event that partial settlement is reached after designation for hearing, the

[23] Time-sharing is a method whereby two or more carriers share the use of a frequency. In most instances, carriers enter into a time-sharing arrangement in order to avoid a comparative hearing.

[24] The authority cited by CMS and Millicon is inapposite. *See, e.g.*, Western-Connecticut Broadcasting Company, *et al.*, 69 FCC 2d 1890 (1978); Webster-Baker Broadcasting Co., 88 FCC 2d 944 (1982); Alexander S. Klein, Jr., 86 FCC 2d 423 (1981). These cases in the broadcast service involve amendments whose direct purpose was to upgrade the basic or comparative positions of the applicants. None of these cases involve mergers of competing applicants, which reduce the number of applicants without introducing new parties. In addition, our processing scheme for cellular service is significantly different than the application procedures for the broadcast service.

[25] This procedure is similar to the procedure generally established for settlements and ownership changes in 47 C.F.R. §22.29. This rule section does not normally apply to minor amendments (*i.e.*, no substantial change in ownership or control) or partial settlements that do not directly lead to a grant of an application without further hearing. However, because we find that the public interest would best be served by applying this procedure in these circumstances, we have modeled the procedures for partial settlements after Section 22.29.

ALJ shall provide an opportunity for nonsettling parties to address the issues raised, for example, by extending the rebuttal date or by specifying a date for supplemental rebuttal exhibits. We will not accept any pleadings from nonsettling applicants prior to designation of the mutually exclusive package for hearing. Since the ARTS/PCT filing does not contain a showing of the PCT exhibits that will be relied upon, ARTS/PCT is directed to file an amendment containing this information within 20 days after the release date of this order.

15. Accordingly, IT IS ORDERED that the Applications for Review filed by American Cellular Communications Corporation and by Maxicom, Inc. and Cellcom, Inc. ARE HEREBY DISMISSED.

16. IT IS FURTHER ORDERED that the *Memorandum Opinion and Order* by Common Carrier Bureau in the captioned proceeding is MODIFIED to the extent indicated above and AFFIRMED IN ALL OTHER RESPECTS.

17. IT IS FURTHER ORDERED That ARTS/PCT are directed to file the amendment specified in this order within 20 days after the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Application for Review
Domestic Public Land Mobile Radio Service
Review by Commission

Application for review granted. Applications for CPs for stations in Domestic Public Land Mobile Radio Service granted. Review Board erred in finding that tax liens and judgments justified denial of applications. Board noticed extra-record material without affording applicant an adequate opportunity to respond. *–Arizona Mobile Telephone Co.*
Docket No. 21431

FCC 83–157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ARIZONA MOBILE TELEPHONE COMPANY Grand Canyon, Arizona	Docket No. 21431 File No. 7323-C2-P-70
CARIBE MOBILE TELEPHONE COMPANY St. Thomas, V.I.	Docket No. 21432 File No. 6959-C2-P-70
COLORADO MOBILE TELEPHONE COMPANY Grand Junction, Colorado	Docket No. 21433 File No. 8598-C2-P-70
GEORGIA MOBILE TELEPHONE COMPANY Waycross, Georgia	Docket No. 21434 File No. 562-C2-P-71
NORTH CAROLINA MOBILE TELEPHONE COMPANY Rocky Mount, North Carolina	Docket No. 21435 File No. 564-C2-P-71
OREGON MOBILE TELEPHONE COMPANY Elko, Nevada	Docket No. 21436 File No. 1875-C2-P-71

TEXAS MOBILE TELEPHONE COMPANY Colby, Kansas	Docket No. 21437 File No. 563-C2-P-(2)-71
TEXAS MOBILE TELEPHONE COMPANY Amarillo, Texas	Docket No. 21438 File No. 7324-C2-P-70
TEXAS MOBILE TELEPHONE COMPANY Pierre, South Dakota	Docket No. 21439 File No. 6957-C2-P-70
TEXAS MOBILE TELEPHONE COMPANY San Antonio, Texas	Docket No. 21440 File No. 4749-C2-P-70
For Construction Permits for new air-ground stations in the Domestic Public Land Mobile Radio Service	
WISCONSIN MOBILE TELEPHONE COMPANY Milwaukee, Wisconsin	Docket No. 21441 File No. 1121-C2-P-(3)-71
For Construction Permits for new Land mobile facilities in the Domestic Public Land Mobile Radio Services	

Appearances

Emory W. Buck, Steven Fishgold and *David Hill* on behalf the applicants; *Lawrence Adler* on behalf of Zip Call Inc.; *Leo I. George, Donald J. Evans, John A. Borsari* and *Robert A. Rich* on behalf of All City Communications Co., Inc.; and *James O. Juntilla* and *Jacob W. Mayer* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

Adopted: April 7, 1983; Released: April 13, 1983

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT.

I. *Background*

1. This proceeding involves eleven applications for authority to establish new air-ground and land mobile (DPLMRS) radio stations. All of the applicants are wholly owned subsidiaries of Mobile Telephone Company and TeleTech Corporation, which are controlled by Robert L. Starer. The applications were designated for hearing on a number of issues, including *de facto* control, Section 1.65 reporting issues, and an issue:

> To determine whether the management and operations of other licensees and companies owned or controlled by Robert L. Starer has been so irresponsible,

careless or inept that the applicants cannot be relied upon to fulfill the responsibilities imposed upon them as licensees of this Commission.[1]

2. In the Initial Decision, the ALJ resolved those issues in the applicants' favor and granted the applications subject to a condition that every 120 days Starer file reports detailing his efforts to satisfy claims and judgments against his companies.[2] The Review Board reversed the Initial Decision and denied the instant applications under the issue concerning Starer's irresponsibility as a licensee. The Board took official notice of earlier DPLMRS transfer applications involving Starer's companies. It denied the instant applications because of Starer's failure, in the noticed applications, to disclose fully various financial arrangements between the parties; because of Starer's "half-truth" representations concerning the net worth of the transferors and his personal liability for an $11,000 judgment against one of the transferors; and because of outstanding tax liens and creditor judgments against Starer's companies.[3] On June 12, 1980, Starer filed an Application for Review.[4] On March 26, 1981, Starer advised the Commission that the federal tax liens against his companies were satisfied and would be released. Subsequently, the Commission granted review and authorized the filing of further pleadings,[5] which are also under consideration here.

II. *The Review Board's Decision*

3. The Board noticed the January, 1972, applications to transfer DPLMRS stations KG1775, Philadelphia, Pennsylvania, and KRS620, Westmont, New Jersey, from a Starer controlled corporation to Starer personally. The Board found that Starer's applications failed to disclose various financial agreements and contracts involved in the transfers, and in particular, that the transferor was still the primary obligor for a $600,000 bank loan. Although there is no candor issue in this proceeding, the Board found that Starer made

[1] 66 FCC 2d 691 (1977).

[2] 80 FCC 2d 51, released August 10, 1979.

[3] 80 FCC 2d 1, released May 13, 1980.

[4] Other pleadings relating to the Board's Decision are: (1) an Opposition filed August 19, 1980, by All City Telephone Answering Service, Inc.; (2) a letter filed August 26, 1980, by DPRS, Inc., and S.M.W., Inc.; and (3) Comments filed June 30, 1980, by the Common Carrier Bureau. On September 10, 1980, the applicants filed an Amended Application for Review. Oppositions were filed on September 25, 1980, by All City Telephone Answering Service, Inc., and jointly by DPRS, Inc., and S.M.W., Inc. Initially, All City, DPRS and S.M.W. filed petitions to deny Starer's applications. When this proceeding was designated for hearing, All City, DPRS and S.M.W. were made parties. S.M.W. merged into DPRS and the new entitly is named Zip Call, Inc. All City Communications Co. is the successor in interest to All City Telephone Answering Service, Inc.

[5] FCC 81-373, released August 5, 1981. Further pleadings are Briefs filed September 21, 1981, by the applicants, the Bureau, and jointly by All City and Zip Call; a Reply filed October 5, 1981, by the applicants; and a Reply filed October 7, 1981, by All City.

"half-truth" representations about the remaining net worth of the transferors and his personal obligation for an $11,000 judgment in opposing a Petition for Reconsideration of the Philadelphia and Westmont transfers.[6] The Board concluded that these "half-truth" representations together with Starer's failure to disclose all of the relevant financial agreements in the Philadelphia and Westmont assignments justify the denial of Starer's applications.

4. The Board also found that Starer's companies were subject to approximately $141,000 in federal tax liens, of which approximately $101,000 was unpaid at the time of the hearing. The companies had other (state and local) tax liens against them in the amount of $8,337, $7,642 of which was unpaid. There were also 41 judgments against Starer's companies totaling over $150,000, 28 of which were by default. The Board concluded that this record established an "almost undeviating pattern of irresponsibility" requiring the denial of Starer's DPLMRS applications. In light of its conclusion that Starer was disqualified, the Board did not reach the *de facto* control and Section 1.65 reporting issues.

III. *The Briefs of the Parties*

5. Starer argues that the Board improperly noticed and relied on extra-record materials which went beyond the designated issues; that the Board's reliance on the outstanding tax liens and creditor judgments is inapposite with Commission precedent; and that the subsequent satisfaction of the tax liens belies the Board's adverse findings of irresponsibility and supports the grant of his applications. The Bureau agrees with Starer that the Board improperly noticed extra-record materials, and that the judgments and tax liens are not a valid basis for Starer's disqualification. The Bureau also argues that the satisfaction of the tax liens is an extra-record post decisional matter which should not be considered. The Bureau recommends that the proceeding be remanded to address the *de facto* control and Section 1.65 reporting issues not reached by the Board. All City and Zip Call support the Board's Decision. They also argue that Starer should be disqualified because of the evidence adduced under the *de facto* control and Section 1.65 reporting issues.

IV. *Discussion*

6. Based on our review of the record and pleadings, we find that the Board erred in finding that the tax liens and judgments justified the denial of Starer's applications and that the Board noticed extra-

[6] Jt. Exh. 9 (Opposition to Petition for Reconsideration at 7; Letter from the Chief, Common Carrier Bureau, dated September 11, 1973). The Chief, Common Carrier Bureau, relying on the opposition, found Starer agreed to honor the judgment. Starer asserts that he never promised to pay the $11,000 judgment but to only "waive immunity" for the judgment. The Board faulted Starer concluding that he failed to correct a material misapprehension on the part of the Bureau.

record materials without affording Starer an adequate opportunity to address the matters noticed. Moreover, while the Board did not reach All City's and Zip Call's exceptions with respect to the *de facto* control and Section 1.65 reporting issues, we have reviewed those issues *de novo*, and we conclude that they were resolved properly by the ALJ in favor of the applicants. Accordingly, for the reasons set forth below, we find that Starer is qualified to be a licensee and we will grant the subject applications.

A. *Issues Addressed by the Board*

7. In designating this proceeding for hearing we expressed our concern with respect to the tax liens and judgments against Starer's companies. We were concerned that the liens and judgments might be indications of Starer's "financial irresponsibility" and a "recalcitrance on Starer's part to assume his proper financial obligations."[7] We were also concerned that Starer's financial dealings reflected on his "competence and responsibility as a licensee."[8] Starer's irresponsibility, carelessness, or ineptitude has public interest ramifications because his subscribers would lose both their service and substantial investments in equipment if Starer is authorized to institute a new service and thereafter is unable to continue rendering that service. In this regard we also questioned whether Starer could be expected to adequately manage numerous additional systems scattered throughout the country when he experienced serious difficulties with respect to his Philadelphia, Pennsylvania, stations.

8. The ALJ concluded that Starer is a risk taker who will start new ventures knowing that some will fail through no fault of his own.[9] The ALJ determined that Starer's financial reversals were brought about by two business decisions that, in retrospect, were mistakes[10] and a "grandiose" attempt to expand his DPLMRS services by seeking eighty-five authorizations.[11] Although the ALJ found that Starer shared the responsibility for the business failures, he also found Starer's culpability was mitigated by his efforts to repay outstanding liabilities.[12] Finally, the ALJ concluded that the financial backing that Starer has secured for his proposals is a "plus of substantial significance in assessing whether the misgivings of the past predictably will affect his ability to fulfill" his responsibility as a licensee.[13]

9. The Board specified three primary reasons for reversing the

[7] 66 FCC 2d at 701.
[8] 66 FCC 2d at 702.
[9] 80 FCC 2d at 80.
[10] 80 FCC 2d at 81.
[11] 80 FCC 2d at 81–82. The instant applications are part of the eighty-five authorizations sought by Starer.
[12] 80 FCC 2d at 82.
[13] 80 FCC 2d at 82.

ALJ and disqualifying Starer. We are reversing the Board because the circumstances underlying two of these reasons were improperly considered and because the third is based on facts which reflect adversely on Starer but do not warrant his disqualification.

10. The Board's strongest disagreement with the ALJ was for his failure to make findings and conclusions concerning the transfer applications filed by Starer in January 1972. The transfer applications were not, however, in the record. The Board took official notice of the applications, examined them, found that certain agreements had not been reported and concluded that Starer had been "remiss and careless."[14] We must reject the Board's conclusions for two reasons. First, although it was an appropriate use of official notice to take cognizance of the fact that the two transfer applications had been filed,[15] the Board improperly drew adverse conclusions based on the failure of Starer to report certain agreements in those applications.[16] Starer was entitled to an opportunity to address the asserted failures to report in order to explain, mitigate or even rebut[17] the conclusions relied upon so heavily by the Board.[18] The second basis for reversing the Board in this area is equally compelling. The issue that was specified concerns the manner in which Starer managed the stations licensed to him and the possible impact on the public of his alleged irresponsibility, carelessness and ineptitude. The Board misconstrued this issue and concluded that Starer had been "remiss and careless" in filing applications with the Commission. Since the Designation Order did not put Starer on notice that his dealings with the Commission were at issue, the Board's adverse conclusions were beyond the scope of the issues and cannot be a basis for disqualification.[19]

11. The second major concern of the Board with Starer's qualifications derived from his failure to correct what he now

[14] 80 FCC 2d at 6.

[15] *WMOZ, Inc.*, 36 FCC 202, *recon. denied*, 36 FCC 1467 (1964), *remanded on other grounds*, 344 F.2d 197 (D.C. Cir. 1965), *aff'd in part*, 3 FCC 2d 637 (1966); *Guy S. Erway*, 40 FCC 2d 1071 (Rev. Bd. 1973).

[16] The Board was particularly critical of Starer's alleged failure to report an agreement with respect to a $600,000 bank loan. 80 FCC 2d at 6. The record, however, indicates that the note is being paid, that the bank is satisfied with the rate of repayment, and that the bank will not foreclose on the note. Applicants Exhs. 23 and 24. Thus, to the extent that there is record evidence concerning the bank note, no permissible conclusion adverse to Starer may be drawn.

[17] *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 88 (1913); *Deep South Broadcasting Co.* v. *F.C.C.*, 347 F.2d 459 (D.C. Cir. 1965); *N.L.R.B.* v. *Johnson*, 310 F.2d 550 (6th Cir. 1962). *See also* Section 1.203 of the Commission's Rules.

[18] The Board indicated that the ALJ's failure to make findings of fact with respect to these applications constitutes "the crux of the Board's most serious disagreement" with the Initial Decision's treatment of the ineptness issue.

[19] *Bendix Corporation v. F.T.C.*, 450 F.2d 534 (6th Cir. 1971); *S.S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225 (6th Cir. 1969); and *Rodale Press, Inc.* v. *F.T.C.*, 407 F.2d 1252, 1256–57 (D.C. Cir. 1968).

characterizes as the Common Carrier Bureau's misinterpretation of statements made in the transfer proceeding. Here again, we find that the Board misinterpreted the designated issues. While the Designation Order expressed our concern about Starer's perceived failure to honor the commitments in the transfer proceeding, and Starer's representations in the transfer proceeding are part of the record,[20] the Designation Order did not question Starer's candor or include a candor issue.[21] Thus, Starer was not on notice that the candor of his statements would be in issue. Starer did not have an opportunity to present evidence or otherwise rebut the Board's candor findings, and the Board's findings exceeded the scope of the designated issues.[22] Consequently, the Board erred in considering Starer's candor in the transfer proceeding, and its adverse conclusions will be rejected.

12. An applicant's candor in earlier proceedings is a matter which can properly be of concern to the Commission. As noted above, however, Starer's candor could be considered only if this proceeding were remanded for further hearings and Starer were afforded an opportunity to respond to the issues raised. We find that there are strong, equitable and practical considerations which militate against remanding this proceeding for further hearings. Starer has prosecuted his application through an extended adversary proceeding, his applications have been pending before the Commission for over 10 years, and a further remand will serve only to further delay an ultimate resolution. In *Cablecom-General, Inc.*,[23] we found that, unlike broadcast stations, CARS carriers are not responsible for message content and that accordingly, character considerations do not carry the same crucial significance as in broadcast proceedings. DPLMRS like CARS is a non-broadcast service and we find that similarly character considerations do not carry the same significance as in broadcast proceedings.

13. The Board was critical of Starer's statements in response to a Petition for Reconsideration of the transfer of the Philadelphia and Westmont DPLMRS stations from Starer controlled corporations to Starer personally, and his failure to alert the Common Carrier

[20] Jt. Exh. 9 (Opposition to Petition for Reconsideration, p. 7).

[21] It is quite another matter when an applicant demonstrates a lack of candor when testifying in a Commission proceeding. The Commission has found that a witness's oath puts him on notice of his obligation to tell the truth. *See BHA Enterprises, Inc.*, 68 FCC 2d 475 (1978), citing *Grenco, Inc.*, 39 FCC 2d 732 (1973). In this proceeding, however, the Board did not find that Starer's testimony was lacking in candor or that he lied to the Commission. The Board was critical of Starer's failure to correct the Bureau's misinterpretation of his statements in the transfer proceeding.

[22] *Bendix Corp. v. F.T.C.*, *supra*; *S.S. Kresge Co. v. N.L.R.B.*, *supra*; and *Rodale Press, Inc. v. F.T.C.*, *supra*.

[23] FCC 81-265, 49 RR 2d 1057 (1981).

Bureau to its misinterpretation of those statements. Starer stated that the transferor retained "a net worth well in excess of $1,000,000 after the subject transfers and still owns 19 subsidiary companies who are applicants before the Commission." He also agreed to waive his immunity for an $11,000 judgment against the transferor. Starer now explains that the transferor had a net worth of over $1,000,000 based on investments in the subsidiaries and pending applications. Starer never promised to pay the judgment, and he did waive his immunity for the judgment as represented. Thus, while these statements and Starer's failure to alert the Common Carrier Bureau to its misreading of the pleading may have been ill-advised, we do not believe that they warrant a remand for further hearings.

14. The third area of the Board's concern involved the tax liens filed against Starer's companies because he failed to remit taxes which he was required to withhold from employee salaries. In designating this proceeding for hearing we expressed our concern about the tax liens.[24] Citing *Country Broadcasting Company* [25] and *Noble Broadcasting Corp.*,[26] Zip Call and All City argue that the liens require Starer's disqualification.

15. We concur that Starer's failure to remit withheld taxes demonstrated a lack of responsibility which reflects adversely on his qualifications. This conduct is more detrimental than any other evidence of record. We note, however, that the Board did not indicate that the tax liens, standing alone, would warrant Starer's disqualification. The record shows that the liens resulted from Starer's economic difficulties and are not indicative of an intent to defraud the government. Subsequent to the release of the Review Board's Decision, Starer satisfied the liens and they were released by the government.[27] The satisfaction of the liens demonstrates sufficient conscientiousness to mitigate any adverse conclusion emanating from the liens. Moreover, in our view, *Country Broadcasting* and

[24] 66 FCC 2d at 701.

[25] 71 FCC 2d 1222 (Rev. Bd. 1979).

[26] 1 FCC 2d 154 (1965).

[27] On March 26, 1981, Starer advised the Commission that the tax liens against his companies had been satisfied. Given the record evidence of Starer's agreement with the I.R.S. to satisfy the liens, this additional evidence is of minimal significance. While the submission is a post hearing upgrading of Starer's qualifications, this is not a comparative proceeding. The satisfaction of the liens can be considered under *Eastern Broadcasting Co.*, 55 FCC 2d 276 (1975), because Starer has prosecuted his application through a long and arduous hearing and the satisfaction of the liens was a legitimate business transaction designed to extricate Starer from his financial difficulties (*Cf. Guy S. Erway*, 40 FCC 2d 1071, 1073 (Rev. Bd. 1973)). On the other hand, we need not consider evidence of the further state tax liens and judgments referred to by Zip Call and All City. There is substantial evidence of numerous unpaid state liens and judgments in the record. As we note in paragraph 16, *infra*, this evidence does not warrant Starer's disqualification. Under these circumstances, evidence of additional state liens and judgments would be cumulative and not of decisional significance.

Noble Broadcasting do not mandate the denial of Starer's applications. In *Noble Broadcasting* we terminated a proceeding without disqualifying the applicant even though there had been a repeated failure to remit withheld taxes. In *Country Broadcasting* the Board designated an issue which could impact on either the basic or the comparative qualifications of the applicant.[28] More significantly, however, the *Country Broadcasting* and *Noble Broadcasting* proceedings involved broadcast applications and as such are distinquishable from the instant DPLMRS proceeding. As we noted in *Cablecom-General*, the fundamental differences between broadcast and DPLMRS proceedings require different standards, and misconduct which could reflect adversely on the character qualifications of broadcast applicants would not have the same impact on the qualifications of a DPLMRS applicant. Thus, the record with respect to the tax liens is sufficient to allow us to conclude that Starer was not so irresponsible, careless or inept that he can not be relied on to fulfill his responsibilities as a DPLMRS licensee.

16. The Review Board indicated that it was also concerned with the pattern of conduct evidenced by the myriad judgments and tax liens entered against Starer commencing in 1973. The Board concluded that Starer had failed to provide reasonable assurance that he would not repeat the pattern if the pending applications were to be granted. In reaching this conclusion the Board erred in rejecting the "conclusory opinions" of three financiers and bankers who are prepared to finance Starer's pending proposals.[29] Starer's prior difficulties were explained adequately. They resulted from the withdrawal of Starer's only backer and the substantial costs involved in prosecuting his applications through an unusually long Commission process.[30] The best assurance the Commission has that Starer will not repeat the pattern of judgments and liens, and jeopardize the continuation of service, is that members of the financial community who are familiar with Starer's financial history and future plans, are ready to invest their capital in his projects. There was no basis for the Board to reject the unrebutted evidence of the intentions of Starer's potential investors. While past performance is one way of assessing future performance, here it must be weighed against independent evidence of the confidence which the business community has in Starer's future performance. This evidence of market place support shows that Starer has successfully dealt with

[28] Citing *Violations by Applicants of Laws of the United States*, 42 FCC 2d 399 (1951), Zip Call and All City assert that the failure to pay withheld taxes is a disqualifying criminal violation. However, it is clear from the holdings in *Country Broadcasting* and *Noble Broadcasting* that a failure to pay taxes is not, *per se*, disqualifying. Instead it is one factor to be considered as part of the entire licensing process.

[29] 80 FCC 2d at 31-32.

[30] *See e.g.*, Tr. 287, 1031-33, 1394.

his past problems. Thus, Starer's past record as a licensee does not lead us to conclude that a grant of the instant applications will result in a continued pattern of judgments and financial irresponsibility.

B. *The Transfer of Control and Section 1.65 Reporting Issues*

17. The Commission designated for hearing an issue concerning a possible unauthorized transfer of control of the applicants to Robert Hedberg, an investor in Starer's operations. An issue was also designated concerning Starer's failure to advise the Commission of the tax liens and judgments against his companies and to keep the Commission apprised of changes in the status of his applications as required by Section 1.65 of the Rules. The ALJ resolved both of these issues favorably to Starer.[31] All City and Zip Call filed exceptions. The Review Board, however, in finding Starer not qualified, did not reach All City's and Zip Call's exceptions. They now reiterate those exceptions, arguing that Starer should be disqualified under the evidence adduced pursuant to the transfer of control and Section 1.65 reporting issues.[32]

18. *The Transfer of Control Issue.* Prior to the 1969 the Pitcairn Group invested in Starer's DPLMRS operations. The Pitcairns purchased a 25% equity interest and $1.5 million in convertible debentures.[33] In December 1970 or January 1971, Robert Hedberg purchased the entire Pitcairn position[34] and became a member of the Board of Directors of TeleTech Corporation, a holding company through which Starer controls the instant applicants. Hedberg also became the sole source of Starer's financing.[35] The transfer of the Pitcairn interests was not reported to the Commission until January 1972.[36] Starer did not advise the Commission of the debentures, reporting only the transfer of the stock held by the Pitcairns. In November, 1973, Hedberg converted the debentures. He immediately, however, contributed his shares of stock to the corporation thereby retaining a minority interest only.[37] All City and Zip Call argue that Hedberg assumed unauthorized *de facto* control of

[31] 80 FCC 2d at 78–79, 84.

[32] Starer argues that these issues are not before the Commission because they were not discussed by the Review Board or raised in the Application for Review. All City and Zip Call preserved their exceptions by filing with the Review Board. The Bureau argues that any unfairness can be cured by remanding this proceeding to the Board for consideration of the exceptions. Having granted review, we will fully consider the merits of the transfer of control and Section 1.65 reporting issues.

[33] Tr. 1359–62. All City and Zip Call argue, that depending on the date of conversion, the debentures would give the Pitcairns (and subsequently Hedberg), at least a 5% interest in TeleTech Corporation.

[34] Tr. 1059, 1359.

[35] Tr. 1036.

[36] Applicants' Exh. 20.

[37] Tr. 1079–80, 1360; All City Exhs. 3 and 4.

Starer's operations through the debentures and financing in violation of Section 310 of the Communications Act.

19. All City and Zip Call also argue that in 1978 Hedberg asserted "a more positive control position" with respect to one of the applicants, Wisconsin Mobile Telephone Company (Wisconsin MTC). Hedberg advanced $47,800 to Wisconsin MTC.[38] All City and Zip Call contend that the financing was secured by a demand note,[39] that all of the stock in Wisconsin MTC was collateral for an additional Hedberg loan,[40] that Hedberg was the sole source of financing for Wisconsin MTC,[41] and that Hedberg will "dictate tough terms" to Wisconsin MTC if his loans are actually expended by the applicants.[42] All City and Zip Call argue that the leverage of the loans and demand notes give Hedberg *de facto* control over Wisconsin MTC.[43] They further assert that the transfer of control over Wisconsin MTC and earlier unauthorized and undisclosed transfer of control of TeleTech fully warrant applicants' disqualification.

20. Hedberg's purchase of the Pitcairn position and his subsequent involvement in the financing of Starer's applications was insufficient to effectuate a transfer of control. We recognize that convertible debentures can effectuate such a transfer under the appropriate circumstances. As All City and Zip Call point out, we found that debentures effectuated transfers in *Medford* and *Channel 31, Inc.*[44] However, the transferees in those proceedings took active roles in the licensees' operations and actively participated in the station management. In this proceeding, Hedberg merely furnished the applicants with capital.

21. Commission precedent is that debentures will not equate to an element of control where the debenture holder is not active in station affairs or has not demonstrated an intent to control the station.[45] The record establishes here that Starer is the majority owner and has never relinquished control over the applicants. As found by the ALJ,[46] Hedberg is primarily a venture capitalist[47]

[38] 80 FCC 2d at 59.
[39] Tr. 1045, 1269.
[40] Tr. 1067.
[41] Tr. 1093.
[42] Tr. 1063.
[43] *Citing Medford Broadcasters, Inc.*, 34 FCC 2d 997, (Hearing Examiner 1969) *mod. on other grounds*, 34 FCC 2d 989 (1972).
[44] FCC 79-164, 45 RR 2d 420 (1979).
[45] *Data Transmission Co.*, 52 FCC 2d 439 (1975). *See also West Michigan Telecasters, Inc.*, 67 FCC 2d 301, 303 (1977) where the Commission held that:

> 64 "Until a debenture is converted into stock, it remains a debt obligation of the corporation not a voting stock right therein, and thus does not invoke the strictures of the duopoly provisions of the multiple ownership rules."

[46] 80 FCC 2d at 59-60.
[47] Tr. 1021.

whose involvement in Starer's companies was limited to the role of investor.[48] The evidence establishes that Hedberg's role was similar to that of a bank or another investor.[49] Unlike the activities of the transferees in *Medford* and *Channel 31*, the controls imposed by Hedberg appeared to be designed to protect his investments. Hedberg, emphatically disavowed any inclination to exercise control over the applicant,[50] and he has never assumed a majority ownership position in Starer's companies. We thus agree with the ALJ that the evidence establishes that Hedberg has not assumed *de facto* control over the applicants.[51]

22. *The Section 1.65 Reporting Issue.* All City and Zip Call assert that Starer violated Section 1.65 of the Rules by failing to advise the Commission of the tax liens and judgments against his companies.[52] There is evidence that Starer was advised by the Commission's staff to limit the scope of his amendments and that some of the transactions he had reported were not of decisional significance. Starer testified that as a result he reviewed the materials he was submitting to the Commission to eliminate matters he did not believe were of decisional significance.[53] Thus, while the record establishes violations of Section 1.65 of the Rules, it appears that there was no intent to conceal facts or mislead the Commission. Under these circumstances the violations are not disqualifying.[54]

V. *Conclusions*

23. We thus conclude that the tax liens and judgments against Starer's companies are not disqualifying. We further find that the Review Board improperly drew adverse conclusions from the Philadelphia and Westmont transfer applications. While we agree with the Board that Starer's representations could be a matter of Commission concern, those representations may only be considered if this proceeding is remanded to afford Starer with an opportunity to reply, and we find that they are not so egregious as to warrant a denial of Starer's applications or a remand for further hearings. Finally, we have considered the *de facto* control and Section 1.65 reporting issues and we agree with the ALJ that the evidence

[48] Tr. 1032.
[49] Tr. 1173.
[50] Tr. 1041–42.
[51] All City and Zip Call also argue that there was an unauthorized *de facto* transfer of control to the Pitcairns. This argument is similarly without merit because the Pitcairns were also venture capitalists who never assumed a majority position in Starer's companies.
[52] They also argue Starer violated Section 1.65 by failing to report unauthorized transfers of control. However, this allegation is without merit in light of our resolution of the transfer of control issue.
[53] Tr. 1368–72, 1558.
[54] *Jack O. Gross*, 41 FCC 2d 729 (1973).

adduced under those issues does not warrant Starer's disqualification.

24. ACCORDINGLY, IT IS ORDERED, That the applications of Arizona Mobile Telephone Company (7323-C2-P-70), Caribe Mobile Telephone Company (6959-C2-P-70), Colorado Mobile Telephone Company (8598-C2-P-70), Georgia Mobile Telephone Company (562-C2-P-71), North Carolina Mobile Telephone Company (564-C2-P-71), Oregon Mobile Telephone (1875-C2-P-71), Texas Mobile Telephone Company (563-C2-P-(2)-71), Texas Mobile Telephone Company (7324-C2-P-70), Texas Mobile Telephone Company (6957-C2-P-70), and Texas Mobile Telephone Company (4749-C2-P-70), for construction permits to establish new air-ground facilities in the Domestic Public Land Mobile Radio Service at their respective locations ARE GRANTED, and the application of Wisconsin Mobile Telephone Company (1121-C2-P-(3)-71) for a construction permit to establish a new land mobile facility in the Domestic Public Land Mobile Radio Service at Milwaukee, Wisconsin, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Settlement

Joint request for approval of agreement granted. Where two of three applicants in comparative proceeding agreed to settlement whereby one would be dismissed, and agreement complied with Section 311(c)(3) of the statute and Section 73.3525(a) of the Rules, public interest would be served by approval of agreement.
–Berkshire Television, Inc.
BC Docket No. 82–419

FCC 83R-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BERKSHIRE TELEVISION, INC. Pittsfield, Massachusetts	BC Docket No. 82–419 File No. BPCT-811026KG
PITTSFIELD COMMUNITY TELEVISION ASSOCIATION Pittsfield, Massachusetts	BC Docket No. 82–420 File No. BPCT-811217KF
HOUSATONIC BROADCASTING CO., INC. Pittsfield, Massachusetts	BC Docket No. 82–421 File No. BPCT-811217KG
For a Construction Permit for a New Television Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 20, 1983; Released: April 21, 1983)

BY THE REVIEW BOARD:

1. Two of the three applicants in this comparative television proceeding have filed a joint request for approval of agreement, on April 13, 1983. In the joint request Housatonic Broadcasting Co., Inc. and Berkshire Television, Inc. request approval of their settlement agreement and dismissal of Berkshire's application. We will approve this joint request which complies with the requirements of Section 311(c)(3) of the Communications Act of 1934, as amended, and Section 73.3525(a) of the Commission's Rules. See *Amendment of*

Part 73 of the Commission's Rules, FCC 83–152, released April 1, 1983.

2. Section 311(c)(3) as amended now provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience, or necessity; and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

In their joint request Housatonic Broadcasting, Co., Inc. and Berkshire Television, Inc. indicate that the public interest would be served by approval of their agreement which would conserve the hearing resources of the Commission and expedite resolution of this comparative proceeding. The public interest will be served by the settlement agreement which simplifies the comparative proceedings and may expedite initiation of new service. *See Oak Television of Everett, Inc.*, FCC 83R-25, released April 7, 1983; *Casey Broadcasting Co.*, 88 FCC 2d 1114, para. 5 (1981).

3. Sections 311(c)(3)(b) and 73.3525(a)(2) also require a showing that no party to the agreement filed its application for the purpose of reaching such an agreement. In their joint request the applicants have certified that Berkshire Television, Inc.'s application was not filed for the purpose of entering into a settlement agreement. In addition, Housatonic Broadcasting Co., Inc. is continuing to prosecute its application against a competing application. Accordingly, the parties have shown compliance with Sections 311(c)(3)(a) and (b) and 73.3525(a) and their joint request is hereby granted.

4. ACCORDINGLY, IT IS ORDERED, That the joint request for approval of agreement, filed April 13, 1983, IS GRANTED; and the application of Berkshire Television, Inc., (BPCT-811026KG) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

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Carelessness
Diversification, of Control of Mass Media
Foreign Language Broadcast
Ownership and Management, Integration of
Programming Specialized

In comparative renewal proceeding, renewal application granted where competing applicant gets moderate demerit for carelessness in prosecuting its application and substantial and moderate preferences for diversification and integration. Renewal applicant gets strong preference for past broadcast record and a substantial preference for specialized format of Spanish language programming.
–Broadcast Communications, Inc.
BC Docket No. 81–157

FCC 83R-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BROADCAST COMMUNICATIONS, INC. Evanston, Illinois	BC Docket No. 81–157 File Nos. BRH-85 BRSCA-206
For Renewal of Main Auxiliary and Sub-Carrier Authorization Licenses of Station WOJO (FM), Evanston, Illinois	
GENESIS BROADCASTING LIMITED Evanston, Illinois	BC Docket No. 81–158 File No. BPH-10386
For Construction Permit	

Appearances

Brian M. Madden and *Stanley B. Cohen* for Broadcast Communications, Inc.; *Aaron Shainis* and *Robert L. Olender* for Genesis Broadcasting Limited; and *Norman Goldstein* and *Charles W. Kelley* for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: March 25, 1983; Released: April 4, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. This comparative renewal case began when Broadcast Communications, Inc., licensee of Station WOJO(FM) in Evanston, Illinois sought renewal after its 1973 to 1976 license term. A competing application for Station WOJO's FM channel was filed by Genesis Broadcasting Limited leading to a trial type comparative hearing in 1981. In his Initial Decision, FCC 82D-61, released August 26, 1982, Administrative Law Judge Kuhlmann selected Station WOJO(FM) as the best comparative applicant. Genesis was awarded a slight to moderate preference for participation of ownership in management, which was overcome by (1) a moderate demerit assessed against Genesis for carelessness in prosecuting its application, (2) Station WOJO's substantial preference for proposing specialized programming utilizing a Spanish language format, and (3) a very slight renewal expectancy preference for WOJO's past performance. I.D., at para. 69. Our review of the Initial Decision is guided by the standards set out by the Commission in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), which was affirmed by the Court in *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503, 51 RR 2d 1405 (D.C. Cir. 1982). *See also Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982); *Simon Geller*, 90 FCC 2d 250 (1982). After considering the record in the light of the briefs and exceptions filed October 22, and November 15, 1982, and the oral argument held January 6, 1983, the Review Board has concluded that the ALJ's findings of fact are substantially complete and accurate. Therefore, except as modified or amplified in this Decision, those findings are adopted. We affirm the ALJ's renewal of Station WOJO(FM)'s license but our reasoning differs somewhat, especially with respect to the station's past performance which we find to be substantial for the reasons set out below, paras. 4–14. Other major points which have been briefed/and which are discussed below concern WOJO's proposed specialized programming, paras. 15–18; diversification of mass media, paras. 19–20; participation of ownership in management, paras. 21–23; and Genesis' demerit for carelessness, paras. 24–25.

2. *Background.* Station WOJO(FM), which began independent operation on February 1, 1947, has carried foreign language and other specialized programs, often on a brokered basis, since 1956. BCI exh. 2, p. 5. From 1953 through 1981, the licensee of Station WOJO(FM) was also the licensee of an AM Station in Evanston. *Id.* English language news and public service offerings were broadcast on both the AM and FM stations although little, if any, of the broadcasting was duplicated. In the early 1970's, Station WOJO(FM) was authorized to provide a city grade signal, the highest quality of service, over all of the Chicago city limits, in addition to Evanston. In

1971 it was granted authority to employ a dual city identification as Evanston-Chicago. *Id.*, at p. 6. At the beginning of the 1973–1976 license term in question, the proportion of foreign language programming on Station WOJO(FM) had increased to 53% of all of its programming, predominately composed of Spanish language presentations. *Id.* While Station WOJO(FM)'s application for renewal was pending, Edward Wheeler, one of the founders of the station and the individual responsible for the station's daily operation through the 1973–1976 license term, died on November 25, 1977. After his death, control of the corporation reverted to the other stockholders in proportion to their ownership interests. These principals substantially increased the time devoted to Spanish programming so that by 1979 all foreign language programming, more than 23 hours per day, was in Spanish. *Id.*, at p. 7. By February 1980, all brokerage arrangements were terminated. *Id.*

3. Subsequent to the filing of the applications in this proceeding, the Commission altered its regulatory policies toward AM and FM radio. *See Report and Order on Deregulation of Radio*, 84 FCC 2d 968 (1981), *recon. denied* 87 FCC 2d 797 (1981), *review pending sub nom. Office of Communications of the United Church of Christ* v. *FCC*, Case No. 81–1032 (D.C. Cir. filed January 14, 1981). These new policies are applicable to all new facilities applications and to those portions of renewal applications which relate to future proposals. 84 FCC 2d at 1012–13. However, Station WOJO's *past performance* record will be evaluated in accordance with pre-radio deregulation policies. *See Simon Geller, supra*, 90 FCC 2d at 252.

4. *Past Programming*: During the 1973–1976 license period, Station WOJO (FM) presented 5.3% news, 0.3% public affairs, and 15.3% all other non-entertainment programming. I.D., para. 34. These percentages do not include additional news, public affairs and informational matters which were broadcast by the station on its brokered non-English programming but not logged separately. I.D. para. 39. In this regard, Enrique S. Lopez, who provided two hours of brokered Spanish programming daily (Tr. 643) and was typical of the Spanish language brokers (Tr. 644–45), testified that 60% of his programming was entertainment and 40% was news, information, and public service announcements. Tr. 650. The ABC Entertainment Network News provided Station WOJO (FM) 5 minutes of news per hour on the half hour except during those hours when the foreign language news was regularly broadcast. I.D. para. 39. Community problems, needs and interests considered by the licensee to be most significant were dealt with on "Shape of Today," a thirty-minute program aired Sunday mornings from 8:30 to 9:00, featuring interviews with local community leaders and on a number of local religious services broadcast on Station WOJO (FM). See I.D., para. 37; BCI Exh. 23, pp. 9–10. Various foreign language programs that were part of its brokered format also contained information that

helped meet the needs of the group being served. I.D., para. 38. Finally, during the composite week of December 7–13, 1975, Station WOJO (FM) broadcast 576 public service announcements responsive to community problems. BCI Exh. 23, p. 10; I.D., at para. 33.

5. Since 1961, Station WOJO (FM) has been continually assisted in providing programming responsive to the needs of the community by an Advisory Board which meets annually. I.D., at para. 40. The Board is composed of community leaders in Evanston and its environs including the mayor, city manager, police chief, librarian, and superintendent of schools of Evanston as well as professors from Northwestern University, located in Evanston, and leaders of the religious, publishing, and business communities. BCI Exh. 23, pp. 25, 100, 140, 172.

6. In his Initial Decision the ALJ concluded that WOJO (FM) fell short of the amount of news and public affairs programming indicated in its 1973 renewal application where it proposed 5% news, 1.49% public affairs, and 15% all other non-entertainment programming. I.D. at para. 41. In fact, WOJO only fell below its 1973 proposal for public affairs programming and exceeded its promises concerning news and all other non-entertainment programming. Prior to the hearings, WOJO responded to a Commission staff inquiry that it had broadcast certain public affairs programs at the beginning of the license term but was forced to discontinue the programs after the local groups providing such programs quit producing them for various reasons. BCI Exh. 23, p. 205. It noted, however, that since it first began operations, it had broadcast public affairs programs substantially exceeding Commission guidelines. *Id.* It also pointed out that certain of its foreign language programming such as "Hellenic Interlude," a Greek program, had received community awards for public service in a dinner attended by leaders honoring the fifteenth anniversary of the airing of the program. *Id.*, at p. 206. The stipulated testimony of six Evanston residents who did not speak or understand Spanish was submitted along with the testimony of a former station employee that was critical of the station's past performance. I.D. at paras. 42, 43. Station WOJO(FM) was awarded a very slight renewal preference by the ALJ because it did little to initiate news or public affairs programming, relying instead on station programming provided by the station brokers, I.D., at paras. 68, 69.

7. Station WOJO contends that it is entitled to a stronger preference for its past performance during the 1973–1976 license term than was awarded by the ALJ. (Br. p. 36) It also argues that the ALJ erred in not allowing it to place into evidence the past performance of Station WOJO(FM) under the direction of its present principals who took over the management of the station on the death of Edward Wheeler subsequent to the 1973–1976 license term.

Genesis, on the other hand, contends in its exceptions that BCI is not entitled to any preference as a renewal applicant.

8. We agree that the broadcast record for Station WOJO(FM) during the 1973–1976 license term was substantial and thus we need not reach the question whether the ALJ erred in refusing to allow WOJO's post 1973–1976 record into evidence. As noted in *Cowles, supra*, and *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 51 RR 2d 1507 (1982) a substantial record, sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal, gives rise to a renewal expectancy which in turn warrants a preference in comparative renewal proceedings. 90 FCC 2d at 839–40, 51 RR 2d at 1525. A substantial performance can be demonstrated by any type of showing reasonably related to demonstrating service over and above what would be considered minimal. Here, we believe such a showing was made. Quantitatively, as reflected by its composite week, Station WOJO(FM) devoted nearly 21% of its broadcast time to non-entertainment programming, which compares favorably with the amount of like time broadcast by the renewal applicant in *Radio Station WABZ, Inc., supra*, where the Commission characterized the licensee's record as superior. 90 FCC 2d at 839–40, 51 RR 2d at 1525. And this total omits the non-entertainment programming included in its non-English programming which would in reality substantially increase the amount of broadcast time Station WOJO(FM) devoted to non-entertainment programming. This record can be contrasted with *Simon Geller*, 90 FCC 2d 250, 51 RR 2d 1019 (1982), where the licensee devoted less than 1% of its broadcast time to non-entertainment programming and no renewal expectancy was awarded. 90 FCC 2d at 264–265, 271, 51 RR 2d 1032, 1038. Moreover, although much of the non-entertainment programming on the brokered programs is not included in the statistics above, the amount still exceeds the average and median percentages of the other commercial FM stations serving the Chicago area. I.D. at para. 36. News and public affairs programs were broadcast in both English and Spanish. BCI Exh. 23, p. 19; Tr. 650. In addition to the half hour program "Shape of Today," produced locally, Station WOJO(FM) broadcast live a number of local religious services. BCI Exh. 23, pp. 9–10. Moreover, Station WOJO(FM) broadcast a substantial number of public service announcements. I.D. at para. 33.

9. The principal ingredient of a licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of its service area for broadcast service. *See WPIX, Inc.*, 68 FCC 2d 381, 400, 43 RR 2d 278, 303 (1978), paraphrasing from the *Programming Policy Statement*, 44 FCC 2303, 2316 (1960). Here, the record evidence reflects that WOJO has diligently and continuously taken steps to ensure that it is responsive to its service area's needs and

tastes. Thus, since 1961, it has met annually with a Community Advisory Board composed of all types of community leaders concerning Station WOJO(FM)'s programming. BCI Exh. 23, pp. 97, 137, 168, 200. The 1973 annual report to the Advisory Board revealed that Station WOJO(FM) was helping the administration and students of Loyola Academy apply for and operate a 10 watt educational FM station at the Academy, and making substantial donations of funds and equipment for this small educational station which had no access to public funds (*id.*, at p. 31); it had successfully solicited funds necessary to bring a small Greek child from Greece to Chicago for needed medical attention to permanently correct a heart defect (*id.*, at p. 32); and it had attempted unsuccessfully with the cooperation of Station WBBM-TV(CBS) to present a Spanish audio to go along with the video of the television station's evening news (*id.*, at p. 33). The experiment with Station WBBM-TV was discontinued after 3 1/2 months because it was too cumbersome and resulted in a slight decrease in the amount of news aired by Station WOJO(FM). *Id.*, at pp. 13, 33. Moreover, the report indicated that Station WOJO(FM) and its sister AM station were the only outlets carrying Big Ten Conference (*i.e.*, Northwestern) football and basketball games in the Chicago area, which has the heaviest concentration of Big Ten alumni (*id.*, at pp. 35, 146). Station WOJO(FM) continued to carry the broadcasts because of the public interest in the games, notwithstanding that the expenses of keeping them on the air exceeded the revenues they brought in (*id.*, at p. 146).

10. During the Community Advisory Board meeting for the year 1973, Board Member Dayton Grafman, vice-president at the National College of Education, praised Station WOJO(FM) for recognizing that there were a large number of Spanish speaking people in the Chicago area who needed radio facilities. *Id.*, at p. 97. And one of the station employees announced that Station WOJO(FM) had been given the top rating in FM Spanish broadcasting by eleven judges of the annual "Spanish-American Radio and TV Festival." *Id.* One of the other Board Members, James C. McLeod, professor emeritus, History and Literature of Religions, Northwestern University, praised the station highly for its participation in community affairs. *Id.*, And Board Member Randolph R. Tomlinson, Editor and Publisher, *The North Shore Examiner*, Evanston's only Black newspaper (*id.*, at p. 205), stated that he was familiar with Spanish and that he listened to the Spanish programming on Station WOJO(FM) and found the quality to be excellent. *Id.*, at p. 97.

11. During the 1974 meeting, Board Member Ruben Cruz, columnist, *Chicago Sun-Times*, stated that the Spanish language programming aired on Station WOJO(FM) was of high quality and it served a necessary purpose. *Id.*, at p. 137. It was expressed at that time that Station WOJO(FM) appeared to be the principal Spanish-language outlet serving the Chicago metropolitan area and that such

programming would therefore probably be increased. *Id.* The 1976 report to the Community Advisory Board revealed that Station WOJO(FM) once again carried the high school football and basketball tournaments and aired a presentation of the Award of Merit Trophy by Sports Illustrated magazine to a local high school athlete. *Id.*, at p. 180. Moreover, Station WOJO(FM) broadcast the Accion Rapida column of the *Chicago Tribune* as a public service to the Spanish-speaking population and supplied broadcast equipment to students of a local high school to use in preparing a weekly public affairs program. *Id.*, at p. 181.

12. Once the Advisory Board was aware that a competing application could be filed against Station WOJO(FM) at renewal time, the Board, without solicitation, demonstrated its support for the station by unanimously passing a motion to prepare a resolution supporting the continuation of the management of Station WOJO(FM). *Id.*, at pp. 200–201. In our view, the above facts reflect a pronounced and abiding public spirited commitment on the part of Station WOJO(FM) to its service area.

13. In awarding only a slight renewal preference for Station WOJO(FM)'s past performance, the ALJ was apparently primarily concerned that the station's broadcast day was limited for initiating its own news and public affairs programming because of the significant amount of broadcast time purchased by brokers who then determined the station's programming. Genesis also disparages Station WOJO(FM)'s past performance on the basis that much of its programming was "brokered" and that its total percentage of public affairs programming was low relative to the other stations in the market. We disagree with both of these assessments. An analysis of a licensee's relative responses to the important needs and tastes of its service area should focus on the licensee's overall program service rather than on isolated aspects of programming such as the source of certain programs or the program format used to treat such needs and tastes. *See WPIX, Inc., supra* at 400, 43 RR 2d at 304. The record as reflected by the evidence concerning the Community Advisory Board meetings establishes that the community leaders believed the non-English programming to be meritorious. Also the record reveals that Station WOJO(FM) exercised adequate controls on the brokers. Bureau Reply Br. 8–10. Thus, it required participating programs to include public service announcements and newscasts (BCI Exh. 23, at pp. 39–40) and limited the amount of advertising that could be broadcast. *Id.*, Tr. 651. We also recognize that the Commission encourages time brokerage since such a source of programming has the potential to notably increase available program alternatives for audience segments whose demands would otherwise be left unmet. *See Policy Statement on Part-Time Programming*, 82 FCC 2d 107, 108, 48 RR 2d 763, 764 (1980). This is particularly true for foreign language audiences whose preferred programming is unlikely to

attract a sizable cross-over audience. *Id.*, at p. 120, 48 RR 2d at 772. The Commission has emphasized that licensees should not be discouraged from exploring programming alternatives that appear to reflect accurately both consumer wants and competitive incentives. *Id.*

14. With respect to the limited amount of public affairs programming reflected by the composite week performance, it appears that a number of locally produced public affairs programs were aired at the beginning of the license term but were discontinued for reasons beyond the control of the licensee. BCI Exh. 23, p. 205. Had these existing programs continued to be broadcast, Station WOJO (FM) would have met or exceeded its public affairs proposals contained in its 1973 renewal application. In any event, statistics for the composite week are not the only means of determining a licensee's performance (*see WPIX, Inc., supra* at 401, 43 RR 2d at 305). Station WOJO(FM) has made pronounced and abiding efforts to be responsive to its service area as shown by its formation of one of the first Community Advisory Boards in the country. Thus, we need not rule on Genesis' exception that the ALJ improperly excluded the AM stations from his computations in comparing BCI's news and public affairs programming. Finally, with respect to the stipulated testimony concerning Station WOJO(FM)'s community reputation, we simply not that while there were very few individuals who understandably were critical of the foreign language programming since they did not speak or understand Spanish, there were other Spanish-speaking individuals who praised the station for providing information in Spanish relating to special needs of the Hispanic community. *See* Stipulated Testimony. Moreover, although one of the station's former employees was critical of its past performance, even he acknowledged that the amount of news broadcast over Station WOJO(FM) was about average with that of other area stations. Tr. 638. On balance, we conclude that Station WOJO's past performance demonstrates a positive and dedicated commitment to serving its service area, which we characterize as sound, favorable, and substantial. Station WOJO(FM) is therefore entitled to a strong preference for its past programming. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1017, 49 RR 2d 1138, 1160, *affirmed sub nom. Central Florida Enterprise, Inc.* v. *F.C.C., supra; WPIX, Inc., supra* at 406, 43 RR 2d at 310.

15. *Specialized Programming Issue.* Because Station WOJO(FM) proposes a specialized format of programming for Hispanics in its service area while Genesis proposes general market programming of jazz and rock music, the issues in this proceeding were enlarged to consider the relative need for these different types of programming throughout Station WOJO(FM)'s service area. Memorandum Opinion and Order, FCC 81M-2120, released July 15, 1981. WOJO proposes to broadcast, and currently broadcasts, in Spanish twenty-

three and one-half hours out of its twenty-four hour day. The findings of the Initial Decision, which are undisputed, reveal that more than 560,000 Hispanics live within Station WOJO (FM)'s service contour, 1,715 of whom reside in Evanston. I.D., at para. 29. Twenty-seven percent speak only Spanish and another fifty-three percent speak primarily Spanish. *Id.*, at para. 27. There are fifty-five commercial radio stations which place a signal over Station WOJO(FM)'s service area, fifteen of which provide some amounts of Spanish language programming. *Id.*, at para. 28. None of the stations, however, provides coverage comparable to that of Station WOJO(FM) either in terms of the total amount of broadcast hours or the size of the service area. *Id.*, at para. 29. While varying amounts of Spanish language programming are available during the day, the ALJ's findings show that during nighttime hours, Station WOJO(FM) provides *the only* Spanish radio service to an area of 833 square miles in which 116,000 Hispanics live. *Id.*, at para. 30. Station WOJO(FM) also provides *a second* nighttime Spanish voice for 753 square miles containing another 370,000 Hispanics. *Id.* Genesis will not broadcast any Spanish programming. *Id.*, at para. 31. A substantial preference was awarded by the ALJ for Station WOJO(FM)'s format, premised on its demonstration that a substantial percentage of the Hispanic population receive and would continue to receive their only Spanish service at night and that many others would received their second nighttime service in Spanish from WOJO. *Id.*, at para. 64.

16. Genesis argues that WOJO is not entitled to any preference for its proposed programming. (Br. 28). It points to the large number of stations in the market which provide Spanish language programming, and urges that there is no special need for more of such programs. It also argues that there is an absence of any need for Hispanic programming in Evanston since only 1,715 Hispanics out of a total population of 80,113 people live there. Finally, it argues that a comparison of proposed programming is repugnant to the public interest, citing *F.C.C.* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981) for the proposition that a programming preference here is of dubious legality.

17. We conclude that the ALJ was correct in awarding a substantial preference under this issue. The purpose of a specialized programming inquiry is to ensure that a proposal which responds to truly unmet needs will be considered in our licensing procedures. *See George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465–466, 45 RR 2d 689, 694 (1979). Where the proposed programming is available in reasonable amounts, a preference will not be given. *See Flint Family Radio, Inc.*, 69 FCC 2d 38, 42–43 (Rev. Bd. 1977) cited with approval in *George E. Cameron Jr. Communications*, *supra*. Here, there is definitely a need within the service area for Station WOJO(FM)'s proposed format since denial of its application would

leave approximately 116,000 Hispanics without any nighttime Spanish language programming and another 370,000 with only one nighttime voice. This would be a significant loss since twenty-seven percent of Hispanics in the Chicago metropolitan area speak only Spanish. Moreover, there is some indication in the record that a substantial percentage of Hispanics did not grow up in the Continental United States and thus have greater informational needs than do the English-speaking population at large, particularly since many of the Hispanics are frequently handicapped by low educational levels. Tr. 522. *See American International Development, Inc.*, 75 FCC 2d 67, 96, 107 (ALJ 1979), *affirmed* 86 FCC 2d 808, 818 (1981), where an applicant received a substantial preference for its proposal to provide the only nighttime Spanish language programming.

18. Genesis' exceptions do not undermine the ALJ's reasons for awarding a substantial preference under this issue. The fact that there are many stations providing daytime Spanish language programming is not relevant here since the preference was awarded for providing a much needed nighttime service. Nor are we persuaded that the relatively low number of Hispanics residing in Evanston should be dispositive in disallowing a preference, as urged by Genesis. Denial of credit on this basis would in effect negate the credit due Station WCJO(FM) for providing the only nighttime Spanish voice to 116,000 individuals as well as deny Hispanics in Evanston a station which served their needs and tastes. We do not believe that such a result would be consistent with the public interest, particularly since there are more than fifty other stations providing a signal over Station WOJO(FM)'s service area. Moreover, the record contains evidence that the Hispanic community in Evanston needs Station WOJO(FM) to provide information in Spanish relating to its special needs. *See* Stipulated Testimony of Yolanda Salgado, a member of the Board of Asociacion Latino de Evanston. In any event, the Commission's new regulatory thrust is to permit licensees in markets where there are a large number of stations to be more specialized in their program offerings. *See Deregulation of Radio, supra* at 988–989; *see also F.C.C.* v. *WNCN Listeners Guild, supra*. Genesis' reliance on *WNCN* is is misplaced since the applicant in this case has selected its own specialized format and made the type of showing entitling WOJO to a substantial comparative preference for its Spanish language programming.

19. *Diversification of Control of the Media of Mass Communications.* Genesis and WOJO's principals no longer own any other media interests. Subsequent to designation and two months prior to the hearing, the owners of Station WOJO(FM) sold their AM station in Evanston. The ALJ declined to attribute the AM station to WOJO's owners for diversification purposes, noting that Genesis was fully aware of the change long before the hearing. Both applicants were

found by the ALJ to be equal under the divesification criterion. Genesis excepts to the Initial Decision's failure to take common ownership of WOJO(FM) and the AM station into account under this criterion.

20. We agree with Genesis that the AM station was attributable to WOJO for comparative diversification purposes. A party to a comparative hearing is not allowed to improve its comparative position after a fixed date beyond which it is no longer permitted to amend as of right. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813, 51 RR 2d 409, 419 (Rev. Bd. 1982). After that point, the competing proposals are generally considered to be fixed to ensure that the hearing proceeds in an orderly and timely fashion. *Id.* Here, there was no unequivocal commitment to divest prior to the fixed date. Thus, recognition of the divestiture of the AM station would be unfair to Genesis which prepared its case premised on the comparative position of the applicants prior to designation for hearing. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 130, 51 RR 2d 46, 52 (Rev. Bd. 1982.) Genesis is therefore entitled to a substantial preference under the diversification criterion. *See Nuance Corp.*, 85 FCC 2d 412, 420, 49 RR 2d 147, 154 (Rev. Bd. 1981). Consistent with the approach set forth in *Cowles Broadcasting, Inc., supra*, the weight to be accorded to Genesis' diversification preference will be determined in the overall comparative evaluation of the applicants.

21. *Participation of Ownership in Management.* Genesis is made up of two stockholders. Both propose to work full time at the station in managerial positions. I.D., paras. 9, 12. Both live or have lived in Evanston and have some broadcast experience. *Id.*, at paras. 10–12. Neither has been active in Evanston community activities. *Id.*, at paras. 52–53. Genesis' 20% stockholder is a minority female. *Id.*, at para. 12. Station WOJO has four stockholders, three of whom, owning voting power over 96.5% of the stock, propose to work at the station in managerial positions. Jane D. Hall, a 55.6% stockholder and a resident of an adjacent community to Evanston, will work full time; her husband, a 4.5% shareholder, will work approximately 30 hours per week; and Letitia Wheeler, the executrix of the estate of Edward A. Wheeler, who votes 35.4% of the shares, proposes to spend 35 hours per week at the station. *Id.*, at paras. 5–8. Mrs. Wheeler is a non-resident of Evanston. *Id.*, at para. 8. All three currently work at the station in managerial positions and both Mrs. Hall and Mrs. Wheeler are active in Evanston community affairs. *Id.*, at paras. 49, 51. Genesis was awarded more quantitative full-time integration credit by the ALJ who remarked that this was somewhat offset by the facts that 91% of WOJO's stock is voted by women, that Genesis' stockholders have no managerial broadcast experience, and that Genesis' 80% stockholder, Henry C. Renken, has been fired several times from broadcast stations. Genesis was

therefore awarded only a slight-to-moderate preference for its participation proposal.

22. Genesis argues in its exceptions that it is entitled to a substantial preference, based primarily on the quantitative full-time proposals of both applicants: 100% v. 55.6%. It argues, too, that Mrs. Wheeler is entitled to only 17.7% part-time integration credit since under her husband's will half of the stock she votes will go to her children. Finally, Genesis claims that it was error to consider the absence of managerial experience and Mr. Renken's broadcast employment history as detractions from its integration proposal. On the other hand, WOJO claims that neither applicant is entitled to a preference under this criterion.

23. We conclude that Genesis is entitled to a moderate preference for its integration proposal. In our view, Genesis is entitled to 100% full-time integration credit to WOJO's 55.6% full time and 22.2% substantial time. *See Van Buren Community Service*, 87 FCC 2d 1018, 1021, 50 RR 2d 115, 118 (Rev. Bd. 1981) (proposal to work 30 hours per week considered substantial time). We will not credit Mrs. Wheeler with the full 35.4% of the stock she now votes since there is no indication in the record that the terms of Mr. Wheeler's will – under which she would get only 17.7% of the stock – will not be performed. In reaching our determination that the preference is a moderate one, we have taken into account that the amounts of time proposed by Mrs. Wheeler and Mr. Hall differ very little from full time and that WOJO's proposal is more qualitatively enhanced because of its principals' managerial broadcast experience and Mrs. Hall and Mrs. Wheeler's involvement in Evanston community affairs. Genesis, of course, has the advantages of its greater quantitative credit, the local residence of its principals and the minority and female status of its 20% principal. We will not fault Mr. Renken for his checkered broadcast employment history as did the ALJ because of the incompleteness of the record. Nor do we hold that the absence of managerial broadcast experience detracts from Genesis' integration proposal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 848, 50 RR 2d 1117, 1131 (Rev. Bd. 1981). As was the case with diversification, the weight to be accorded Genesis for its participation preference will be determined in the overall comparative evaluation of the applicants.

24. *Carelessness and Certification Issues*. Genesis was assessed a moderate demerit under carelessness and certification issues. The carelessness issue related to Genesis' errors in providing accurate information about three matters: the employment experience of Henry Renken; an EEO plan for the station which describes the station's past practices which was inapplicable here since Genesis had no previous station; and the views reported for various community leaders in its ascertainment survey. The certification issue involved the use of a pre-signed certification page in filing an

amendment to Genesis' application. This act was contrary to the representation on the certification page that the signatory has reviewed the submission, *i.e.*, the amendment, before signing the certification page. There was no evidence of concealment or misrepresentation and the omissions concerning the EEO plan and pre-certification matters were not decisionally significant. The ALJ held that these matters resulted from inattention and carelessness. But, the omissions relating to Renken's employment history were decisionally significant since they reflected on his past broadcast employment record, which the ALJ found to be poor. And Renken deliberately chose not to report all of his job changes since he felt that such reporting changes would delay resolution of the proceeding. This behavior was characterized by the ALJ as exhibiting bad judgment. Genesis excepts to the imposition of the demerit.

25. After some reflection we affirm the ALJ on these matters. Omissions may be excused if they are not deliberate or decisionally significant and there is no intent to mislead or conceal. *See Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210, 1220 (Rev. Bd. 1982). Perhaps both we and the ALJs have come to tolerate too much sloppiness in the preparation and prosecution of applications, especially where there is no intent to deceive. *See, e.g., HLD&M Communications, Inc.*, FCC 83R-18, released March 17, 1983, para. 8. Here we concur with the ALJ that the pattern of carelessness, inattentiveness, and poor judgment displayed by the applicant (who sought credit for his broadcast experience) is something that should not be encouraged. *See Radio Station WABZ, Inc., supra*, at 827. Such carelessness engenders protracted litigation and unduly wastes limited hearing resources. As the ALJ pointed out the record evidence is clear that the omissions concerning Renken's employment history were *deliberate* and not inadvertent. Moreover, the information was of potential decisional significance since the parties argued at hearing over Renken's allegedly poor broadcast record. We agree with the ALJ, however, that there is no evidence to establish that Renken intended to deceive the Commission; rather, his actions appear to have been motivated by poor judgment. A moderate demerit will be imposed against Genesis on these matters and will be considered together with all the other relevant comparative factors.

26. *Other Matters.* Genesis excepts to the ALJ's failure to add two issues it sought: (a) whether WOJO exercised sufficient control over its brokered programs; and (b) whether WOJO made good faith efforts to carry out its non-entertainment programming set out in its 1973 renewal application. We will deny Genesis' exceptions. The Board has reviewed the ALJ's Memorandum Opinion and Order denying the requested issues (FCC 81M-2120, released July 15, 1981) and concludes that it adequately and persuasively sets forth sufficient reasons why the requested issues should be denied. *See also* the Bureau's Br. 8–11. Further discussion on this matter is unnecessary.

WOJO also claims that the ALJ erred in not adding a reporting issue, and in not expanding the carelessness issue, against Genesis based on further reporting omissions. These exceptions, too, will be denied as being of no decisional significance since a moderate comparative demerit was assessed against Genesis and the derelictions, even if proven, would merely be cumulative.

27. *Overall Comparative Evaluation*: Several recent comparative renewal cases mentioned above, para. 1, establish that primary significance is accorded a broadcaster's past performance since that factor affords the strongest and most reasonable basis for determining whether the public will be served by license renewal. A broadcaster who renders meritorious service can reasonably be confident of renewal. Thus, an incumbent with substantial past performance is awarded a comparative preference, the weight of which may overbalance the factors of diversification and participation which are usually decisive in comparative proceedings involving only initial licensing. *See Cowles Broadcasting, Inc., supra*, at 1015. In affirming the *Cowles* decision, the Court cautioned that relevant factors "are all to be weighed, all at once, all with an eye toward the public interest. Nothing is removed from the scales until the balance is struck." *Central Florida Enterprises, Inc.* v. *FCC, supra*, 683 F.2d at 507 n.16. Like the ALJ we will now weigh all the relevant factors. Based on our own review of its past performance we have found that Station WOJO is entitled to a strong preference. Moreover, we agree with the ALJ that WOJO is also entitled to a substantial preference for its proposed format of Spanish language programming which appears to have evolved from its past experiences and the wide area coverage of its station. Genesis on the other hand is entitled to a substantial preference for diversification and a moderate preference for participation, which in the present context, are of lesser comparative significance than WOJO's preferences. Its preferences are further diminished by the demerit which the ALJ correctly awarded for carelessness. Together, Genesis' preferences are not sufficient to outweigh WOJO's preferences for past and proposed programming service.

28. ACCORDINGLY, IT IS ORDERED, That the application of Broadcast Communications, Inc. for renewal of the main, auxiliary, and sub-carrier authorization licenses for Station WOJO(FM), Evanston, Illinois (File Nos. BRH-85 & BRSCA-206) ARE GRANTED, and the application of Genesis Broadcasting Limited (File No. BPH-10386) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 82D-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BROADCAST COMMUNICATIONS, INC. Evanston, Illinois	BC Docket No. 81-157 File Nos. BRH-85 BRSCA-206
For Renewal of Main Auxiliary and Sub-Carrier Authorization Licenses of Station WOJO(FM), Evanston, Illinois	
GENESIS BROADCASTING LIMITED Evanston, Illinois	BC Docket No. 81-158 File No. BPH-10386
For Construction Permit	

Appearances

Brian M. Madden, Stanley B. Cohen, and *N. Frank Wiggins* on behalf of Broadcast Communications, Inc.; *Aaron Shainis* and *B. J. Baraff* on behalf of Genesis Broadcasting Limited; and *Norman Goldstein* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

(Issued: August 23, 1982; Released: August 26, 1982)

1. By *Memorandum Opinion and Order*, FCC 81-106, released April 8, 1981,[1] the Commission designated for hearing the application for a construction permit of Genesis Broadcasting Limited and the application for license renewal of Broadcast Communications, Inc. for FM Channel 286, Evanston, Illinois. Broadcast Communications has also applied for renewal of its auxiliary and subcarrier licenses. The following issues were specified for determination at the hearing:

> 1. To determine, on a comparative basis, whether Broadcast Communications, Inc.'s proposed Spanish language format is a specialized service within its service area and, if that is the case, whether a greater need exists throughout the area served by Station WOJO for the specialized program service proposed by Broadcast Communications, Inc. or for the general market program service proposed by Genesis Broadcasting Limited.

[1] 46 Fed. Reg. 22036 (1981)

2. To determine,

(a) Whether Genesis Broadcasting Limited has exhibited the requisite care expected by the Commission of an applicant in completing the EEO section of Form 301, providing existing and current broadcast related employment of its principal, Henry G. Renken, and submitting the survey forms of Bernard Arends, Fred J. Huber, Robert Tracy, David A. Williams, and Betty Jahnke.

(b) Whether the care exhibited in supplying the information listed in 2(a) warrants a comparative demerit in this proceeding.

3. (a) To determine the facts and circumstances about the preparation, certification, and filing of the November 8, 1976 amendment to the application of Genesis Broadcasting Limited.

(b) To determine the effect on the basic and comparative qualifications of Genesis Broadcasting Limited of the information developed in paragraph 3(a).

4. To determine which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should granted.[2]

2. A prehearing conference was held on May 29, 1981. On October 5, 6, 20, 26, 27, and 28, 1981 and December 11, 1981, oral hearing sessions were held in Washington, D. C. and Chicago, Illinois. On December 24, 1981, following the receipt of the written case and oral cross-examination, the applicants submitted stipulated evidence. The record was closed on March 17, 1982. The applicants and the Broadcast Bureau submitted proposed findings of fact and conclusions of law on February 12, 1982, and the applicants submitted replies on March 12, 1982.

Findings of Fact

Diversification of Control of the Media of Mass Communications

3. Broadcast Communications, Inc. (BCI) currently operates on the channel which is under consideration, FM channel 286, Evanston, Illinois, and, until October 1981, it also operated in Evanston standard broadcast station WPRZ, 1330 kHz.[3] In addition, BCI is the parent corporation of Broadcast Service, Inc. which operates antenna tower facilities in fourteen cities throughout the country for other

[2] Issues 4 and 5 were specified by the Commission and issues 1, 2, and 3, were added by the presiding officer after considering petitions to enlarge the issues filed by the parties. See *Order*, FCC 81M-2120 released July 10, 1981; *Order*, FCC 81M-2812 released September 9, 1981.

[3] BCI applied to transfer the license for WPRZ to Forus Communications of Illinois on June 6, 1981. On September 10, 1981, the Commission approved the transfer and it was consummated on September 23, 1981. Appropriate amendments were filed in this proceeding to reflect this change. See *Order*, FCC 81M-2411, released August 5, 1981; *Order*, FCC 82M-0876, released March 18, 1982.

communications licensees. BCI Exh. 2 at 2; BCI Exh. 12 to FCC Form 318 filed August 2, 1976.[4] None of the shareholders of BCI have other ownership interests in the media of mass communications. BCI Exh. 1 at 4; BCI Exh. 3 at 1; BCI Exh. 5 at 1.

4. Neither Genesis Broadcasting Limited nor the owners of Genesis have mass media interests. Genesis Exh. 1 at 1, Genesis Exh. 2 at 1.

Full-time Participation in Station Operation by Owners

5. BCI's issued shares are distributed as follows (BCI Exh. 2 at 2–3): Jane D. Hall, who is BCI's president, treasurer, and one of its directors, votes 55.6% of the shares as co-trustee of the 154 shares held by the Jane Dayton Hall Trust. James L. Hall, who is BCI's executive vice president, secretary and one of its directors, votes 4.5% of the shares. Letitia O. Wheeler, who is BCI's assistant treasurer and one of its directors, votes 35.4% of BCI's shares as executrix of the estate of Edward A. Wheeler, which holds 98 shares.[5]

6. Jane Hall works full-time at the station and exercises day-to-day supervisory responsibility over all aspects of the station, including staff, programming, and financial matters. BCI Exh. 1 at 2. She proposes to continue these jobs. *Id.* Ms. Hall does not live in Evanston, but she does live in an adjacent community, Wilmette, Illinois, during four weekdays. *Id.* at 3. On weekends she lives in Deephaven, Minnesota. *Id.* Ms. Hall served as co-director for soliciting business donations to the Crusade of Mercy in Evanston. Tr. 28. She has also been a one term director of the Evanston Chamber of Commerce and a sponsor of the Latino American Association in Evanston. BCI Exh. 1 at 4.

7. James Hall supervises the accounting, billing and financial departments, negotiating the sale and acquisition of corporate assets, and sharing general management duties, including corporate policy, directing and coordinating staff meetings with his wife, Jane Hall. BCI Exh. 3 at 3. He proposes to continue to perform these duties on the same basis of 3;4 of his current time of 40 to 50 hours per week. Tr. 89. Mr. Hall also lives in Wilmette, Illinois four days a week. He belongs to the Evanston Chamber of Commerce through BCI, which has a corporate membership, and he is in charge of the public relations of the Evanston Rotary Club, an organization that discriminates against women by excluding them from membership. *Id.* at 5.

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[4] BCI, at the time its renewal application was filed, also owned 80.2% of standard broadcast station KMO, Tacoma, Washington. On August 9, 1977, that interest was assigned to James L. Blaine.

[5] While the estate holds the shares, Ms. Wheeler and Mr. Wheeler's two children are the beneficiaries of the stock. Tr. 104. Ms. Wheeler stated that she believed that she would receive half of the shares when the stock held by the estate was distributed. Tr. 105.

Mr. Hall believes that the fact that women are not allowed to join the Rotary must give the appearance to others in the community that its individual members concur in the organization's policy of sexual discrimination. Tr. 94. It is his opinion that if the community looked at BCI's station, WOJO-FM, which employs women in high corporate positions, it would realize that BCI did not concur in that policy despite his membership. Tr. 94.

8. Letitia Wheeler is the English language public affairs director of the station and she produces a public affairs program which is broadcast each weekday. BCI Exh. 5 at 1. Ms. Wheeler spends about 35 hours per week at the station on her responsibilities and she also attends community functions at which she discusses possible public affairs programs. *Id.* at 4. She proposes to continue these activities. *Id.* at 4. Ms. Wheeler lives in Winnetka, Illinois. She has participated in raising funds for the Junior League of Evanston, volunteered at the Evanston Hospital, and has undertaken various civic activities in the area. *Id.* at 2.

9. Henry C. Renken is president, treasurer and 80% shareholder of Genesis. Genesis Exh. 1 at 1. He proposes to be the full-time general manager and chief engineer at the station. *Id.* Mr. Renken has lived in Evanston since 1980 and before that, from 1967, he lived in nearby communities, except when he was a student at Ripon College, Ripon, Wisconsin. *Id.* at 2. Since 1975 Mr. Renken has held a first class radio telephone license. In addition, beginning in 1972, he has worked at various radio stations as a chief engineer, chief operator, announcer and a part-time board operator. *Id.* at 3, 4. Currently, he is a technician at WFLD-TV in Chicago, Illinois. Mr. Renken is a member of the Society of Broadcast Engineers and the National Association of Broadcast Employees and Technicians. *Id.* at 4.

10. Mr. Renken's first job was as an announcer at WRPN-FM, a noncommercial station in Ripon, Wisconsin. Tr. 127. From January to April, 1976, he worked as an announcer and engineer at WVVX-AM/FM, Highland Park, Illinois. Tr. 128. He was fired because his performance was unsatisfactory. Tr. 129. From April to September 1978, Mr. Renken worked as an announcer and engineer at WAPL-AM/FM, Appleton, Wisconsin. Tr. 131–33. Mr. Renken was also fired from this position. Tr. 133–34. In April 1979, he was employed by WAKE and WLJE, Valparaiso, Indiana as a chief operator and chief engineer. Tr. 134–39. In June of 1980, Mr. Renken was notified by WAKE-WLJE that his services were no longer required. Tr. 139. In addition, for about two months in 1980 Mr. Renken worked at WCEV-AM, Cicero, Illinois, where he was a board operator one day per week. Tr. 139. He left this position because full-time employees wanted to work more time. Tr. 140.

11. When Mr. Renken worked at WVVX-AM/FM, numerous people were fired. For example, the station had five or six chief

operators in one year. Tr. 149. WAPL-AM/FM had eight full-time employees. During the five month period Mr. Renken worked at the station, there were two different program directors, the sales manager quit, and so did one or two announcers. Tr. 149. Several other people were also fired at WAKE and WLJE in Valparaiso, Indiana; the stations have 12 or 13 employees. Tr. 150–51. Mr. Renken stated that people frequently are fired or leave small radio stations, like those he worked at, because the pay is low, working conditions are poor, and the hours are irregular. Tr. 152. He further explained that he was fired from WVVX-AM/FM because he "refused to forge some signatures to some program logs for some brokered programs." Tr. 153. Mr. Renken explained that WAPL faced a "good deal of financial trouble" and that he "wasn't getting paid very much." Tr. 153–54. In fact, the station was faced with selling out or receivership. *Id.* Mr. Renken was never reprimanded by the station. Tr. 154.

12. M. Kim Hah is vice president of Genesis and holds 20 percent of its stock. Genesis Exh. 2 at 1. She is a minority female; she is the proposed full-time program director; and she would be engaged in the day-to-day operation of the station. Genesis Exh. 2 at 1. From June 1980 to March 1981, Ms. Hah lived in Evanston, where she was employed. Genesis Exh. 2 at 1. During that period she was a member of the handbell choir at the First Congregational Church of Evanston. *Id.* at 3. She would move to Evanston if a grant is made. Genesis Exh. 2 at 2. In 1976, she worked at WLFM, Appleton, Wisconsin; from 1977 to July 1979 she worked as an announcer at WAPL-AM/FM in Appleton; and from July 1979 to June 1980 she worked at WKAU-AM/FM, Kaukauna, Wisconsin, where she is currently employed. *Id.* at 2–3.

The Comparative Carelessness Issue Against Genesis

13. This issue questions whether Genesis provided up-to-date and accurate information about three matters: the employment experience of Genesis principal, Henry Renken, the EEO plan for the station, and the views reported for various community members in its survey. Genesis submitted in Exhibit 11 to its application for a construction permit an equal employment opportunity program which describes past practices it had undertaken to assure equal employment opportunity in operation of the station it proposed. BCI Exh. 9 at 6–7. Because Genesis is not a renewal applicant, the EEO program submitted appears to have been copied from someone else and inserted in the application without thought to what it said or represented.

14. Mr. Renken stated that he reviewed the entire Genesis application before it was filed and he specifically remembered having looked at the EEO filing. Genesis Exh. 5 at 1; Tr. 276–77. He explained that he obtained the EEO plan from his lawyer and he

used it in Genesis' application because he believed it to be reasonable and easy to carry out. Tr. 278–79.

15. Mr. Renken did not admit that he was careless; instead he urged that the application form was unclear about whether new applicants should answer questions intended for renewal applicants. He believed that Form 301 directed him to explain how he had run the station he was just applying for. Renken was unable to demonstrate what part of the application would lead anyone to think that past practices should be assumed and described. Tr. 280–83.

16. In fact, he first noticed the inapplicability of the "Past Practices" section of the EEO program a few days after November 1, 1976, the date the Genesis application was filed. He wrote to his counsel on November 9, 1976, and asked whether that section should be deleted. Tr. 281, BCI Exh. 7. However, Renken's counsel did not prepare an amendment to delete the section, and Renken did not raise the matter again. The deletion of the "Past Practices" section was finally accomplished by the filing of a petition for leave to amend on May 28, 1981, after BCI had raised the matter in this proceeding. Tr. 284.

17. Mr. Renken did not keep his employment record in the application up-to-date. Tr. 285. From March 1977 until September 1981 he had been a consultant to Series Six in Waukegan, Illinois; from March 8, 1981 until the present he worked as a technician at WFLD-TV in Chicago; and for the last two months in 1980 he worked part-time at radio station WCEV, Cicero, Illinois. None of these jobs were reported until May 28, 1981, after they were raised in a petition to enlarge by BCI. Genesis Exh. 5 at 3, Tr. 285–88. Mr. Renken worked at WAKE and WLJE from May 1979 to June 1980, but he first reported these positions to the Commission on February 5, 1981. *Id.* He worked as a field technician to repair and calibrate meteorological instruments at Dames and Moore from December 1978 to April 1979; this job was not reported until March 28, 1980. *Id.* Also, on March 28, 1980, Mr. Renken reported the broadcast station job he held at WAPL-AM/FM from April to September 1978. *Id.* The parties stipulated to these facts. Tr. 284–85.

18. Mr. Renken stated that he did not report the change in positions because he viewed these positions as short-term, temporary jobs, that would not have any bearing on the proceeding. Tr. 291. He also stated that he intended to report them, but he was unaware that he needed to do so within thirty days and that, furthermore, it is his view that reporting of changes in information called for in the application only serves to delay the proceeding. *Id.*

19. Renken also made differing judgments about which positions were required to be reported to the Commission and which were required to be listed in response to interrogatories. For example, he listed some positions he held in response to interrogatories that he decided he did not need to submit to the Commission when he

amended his application in May 1981. He also submitted a list at the hearing which, he admitted, was inaccurate. BCI Exh. 10, Genesis Exh. 5 at 3, Tr. 286–89.

20. Genesis' community leader survey also was alleged by BCI to have had significant mistakes. For example, Bernard Arends was represented to be the mayor of the Village of Lincolnwood, Illinois, when, in fact, he was only the assistant to the mayor. Genesis Exh. 5 at 7. Ruth Renken, who interviewed Mr. Arends, stated that this mistake occurred when she called the Lincolnwood Village Hall, asked for the mayor and was connected with Mr. Arends. *Id.* Ms. Renken explained, "Having asked for the mayor, I assumed that he was Arends, but I apparently was mistaken." *Id.* BCI in its petition to enlarge filed May 14, 1981 also alleged that Mr. Arends did not recall having been interviewed by Genesis; that the Genesis interview with Betty Jahnke incorrectly attributed to her the view that "Evanston's weekly newspaper is inadequate"; that David A. Williams, formerly Evanston's postmaster, had his remarks attributed to him as postmaster when he specifically asked Genesis not to do so; that Robert Tracey did not state, as Genesis represented, that Evanston's major problems are crime and the need for better information on how to protect home and self; and that Genesis had not, as it had claimed, interviewed Fred J. Huber, Mayor of the Village of Morton Grove, Illinois.

21. Although BCI did not submit any evidence supporting its earlier allegations about Genesis' survey at the hearing, Genesis offered the following explanations: Genesis stated that it could not find the record of its interview with Betty Jahnke but any inaccuracy must have resulted from a misunderstanding. Genesis Exh. 5 at 2. About Mr. Williams, Genesis explained that it listed Mr. Williams as Evanston's postmaster only to identify his views as those of a community leader, not to attribute Williams' statements to the post office. *Id.* Genesis submitted an interview sheet signed by Robert Tracey, which clearly lists in summary form the views attributed to him. *Id.* at 4. Genesis also submitted an affidavit of Ruth Renken stating she did interview Mayor Fred Huber of Morton Grove. *Id.* at 7. Genesis supported Ms. Renken's statement with an undated summary of an interview with Mayor Huber. *Id.* at 10.

Genesis Broadcasting's Submission of the November 8, 1976 Amendment to Its Application

22. After Genesis filed its application on November 1, 1976, its counsel, Robert Olender, discovered that Genesis had indicated in its application that the frequency being applied for was 105 MHz when the proper designation of the frequency was 105.1 MHz. On November 4, 1976, when Mr. Renken talked with Mr. Olender about other matters, Mr. Olender told him about the error. *Id.* Mr. Olender stated that Mr. Renken suggested he use an extra certification page

he had signed when the application was being prepared. *Id.*, Tr. 206–07, 219. Mr. Renken had signed several at that time because he believed that three signed certification sheets were necessary for the original filing. *Id.* In order to correct the error, an amendment was filed, on November 8, 1976, designating the proper frequency and providing a new certification page signed by Genesis principal, Henry Renken. Tr. 171–73.

23. Between November 6 and November 9, 1976, Mr. Renken reviewed the Genesis application and noted several errors: the incorrect statements of the station's frequency and power, an inaccuracy in his employment record, and the inapplicability of the EEO "Past Practices" Section. On November 9, 1976, he wrote Mr. Olender about the errors. BCI Exh. 7; Tr. at 223, 230. Renken's letter made no mention of the already agreed upon amendment to correct the frequency designation, or his two earlier telephone discussions with Mr. Olender concerning it. Tr. 208, 224–25, 241. Mr. Olender received Mr. Renken's letter on November 12, 1976. Tr. 179.

24. Mr. Olender and Mr. Renken regarded their November 4 telephone conversation as Mr. Renken's authorization of the amendment. Tr. 192. During the November 4 telephone conversation, however, Mr. Olender and Mr. Renken did not discuss the propriety of using a pre-signed certification page in connection with the amendment. Tr. 173–74, 207, 222, 243–44. Mr. Olender also did not explain to his client the procedures that are to be followed in amending an application. Tr. 186–87, 242. They did not discuss any alternatives to using the pre-signed certification page, such as a letter from Mr. Olender to the Commission. Tr. 207, 244–45. At the time of the telephone call, Mr. Renken did not recall the contents of the certification in the application or the significance of the certification. Tr. 252–53, 256.

25. Mr. Olender and Mr. Renken stated that they decided to use a pre-signed certification page because they wished to quickly correct the error in the frequency. They felt that the mail would be too slow to permit Mr. Renken to revise the amendment, certify it, and return it to Mr. Olender. Both believed that the telephone authorization was sufficient because the amendment was minor and non-substantive. Tr. 171–73, 209–10, 214, 244–45. Under questioning, Mr. Renken and Mr. Olender stated that "substantive" amendments, such as new financial data or a change in ownership, should be reviewed first and then certified by the client. They finally also acknowledged that, irrespective of the nature of the amendment, the client should review the amendment before signing it. Tr. 211–13, 253–54, 260.

The Specialized Service Proposal of Broadcast Communications, Inc.

26. Broadcast Communications proposes to broadcast in Spanish twenty-three and one-half hours out of its twenty-four hour broad-

cast day. BCI Exh. 2 at 8, BCI Exh. 22. The 1980 U.S. Census data indicates that there are 580, 592 Hispanics in the Chicago metropolitan area. BCI Exh. 19 at 1.[6]

27. The Hispanic population is not concentrated in a single neighborhood or area, but rather is distributed across 98 percent of the census tracts in the Chicago metropolitan area. Only 14 percent of the Hispanic population reside in census tracts where Hispanics constitute more than 60 percent of the population; slightly more than half live in areas where they represent less than one-quarter of the total population. BCI Exh. 19 at 1–2. Twenty-seven percent speak only Spanish, another 53 percent speak primarily Spanish.

28. Broadcast Communications is the current licensee of channel 286, and it now broadcasts the format it proposes. The station, WOJO, operates on 105.1 MHz with an authorized power of 6 kilowatts in Evanston, Illinois. BCI Exh. 2 at 1. There are 55 commercial radio station which place a signal over the area served by Broadcast Communications; the following fifteen stations provide varying amounts of Spanish language programming to portions of the area served by Broadcast Communications:[7]

a. Standard broadcast stations:

(1) WTAQ, La Grange, Illinois, broadasting with 5.0 kilowatts daytime, 0.5 kilowatts nighttime on 1300 kHz, presents a brokered program entitled "Radio Mexicana" from 3:30 to 5:00 p.m. each weekday hosted by Jose Valenzuela.

(2) WMRO, Aurora, Illinois, broadcasting with 1.0 kilowatt daytime, 0.5 kilowatt nighttime on 1280 kHz, presents a Spanish program each Sunday evening from 6:00 to 9:00 p.m.

(3) WRMN, Elgin, Illinois, broadcasting with a power 1.0 kilowatt daytime and 0.5 kilowatt nighttime on 1410 kHz, presents a block of Spanish programming (primarily Mexican music) on both Saturday and Sunday between 1:00 and 6:00 p.m.

(4) WCEV, Chicago, Illinois, broadcasting on a sharetime basis with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on 1450 kHz, presents each weekday afternoon a two hour sustaining program consisting of Mexican music and a Mexican soap opera; news is broadcast hourly in English within this block. An additional hour of Spanish programming is broadcast each weekday and three hours of Spanish is broadcast on Sunday, of which one hour is religious programming.

(5) WOPA, Oak Park, Illinois, broadcasting with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on 1490 kHz, presents a brokered Spanish program entitled "Primera Pagina" between 11:00 p.m. and 6:00 a.m. each day hosted by Elio Montenegro, featuring Cuban music; a brokered program entitled "Radio Club Familiar" each weekday between 6:00 a.m. and noon, hosted by Elias Diaz Perez featuring Puerto Rican music; and a brokered program entitled "Radio Sonido Mexico" hosted by Armando Perez between noon and 4:00 p.m. each weekday and

[6] This represents a 77.3 percent gain in the Chicago SMSA Hispanic population since 1970. The Chicago Hispanic population grew from 4.6 to 8.2 percent of the total population in the SMSA.

[7] The information set forth in the following text has been derived from BCI Exhs. 15, 16, 17, 21 and 24.

from 1:00 to 2:00 p.m. Saturday, featuring Mexican music. In addition, a thirty minute discussion program is broadcast at 10:30 p.m. on Tuesday and Wednesday.

(6) WONX, Evanston, Illinois, broadcasting with a power of 1.0 kilowatt daytime on 1590 kHz features brokered Spanish programming each weekday between 6:00 and 8:00 a.m. and between 11:00 a.m. and 5:00 p.m.; the station also presents nonbrokered Spanish programming each weekday between 8:00 and 11:00 a.m. and from 5:00 to 6:00 p.m. Spanish programming is broadcast between 7:00 a.m. and 6:00 p.m. on Saturday, of which nine hours is brokered.

(7) WEDC, Chicago, Illinois, broadcasting on a sharetime basis with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on 1240 kHz, presents brokered Spanish programming daily between midnight and 5:00 a.m., and each weekday from 5:00 to 6:00 a.m., 3:30 to 5:00 p.m., 7:00 to 8:00 p.m., and 10:00 to 11:00 p.m. An additional 4.5 hours of brokered Spanish programming, primarily of a religious nature, is broadcast on weekends.

(8) WSBC, Chicago, Illinois, broadcasting on a sharetime basis with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on 1240 kHz, presents brokered Spanish programming each weekday between 6:00 and 7:00 a.m., 10:00 and 11:00 a.m., 2:00 and 3:30 p.m., and 11:00 p.m. to midnight (excluding Friday). Additionally, 6.5 hours of brokered Spanish programming, primarily of a religious nature, is broadcast on the weekend.

(9) WCRW, Chicago, Illinois, broadcasting with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on a frequency of 1240 kHz, presents brokered Spanish programming each weekday from 11:00 a.m. to 2:00 p.m. and from 5:00 to 7:00 p.m. Nine hours of brokered Spanish programming is presented on the weekend.

(10) WJOB, Hammond, Indiana, broadcasting with a power of 1.0 kilowatt daytime and 0.25 kilowatt nighttime on 1230 kHz, presents an hour of Spanish programming from 10:00 to 11:00 a.m. each Sunday.

(11) WLTH, Gary, Indiana, broadcasting with a power of 0.5 kilowatt daytime on 1370 kHz, presents Spanish programming between 6:00 and 7:00 a.m. and Spanish religious programming from 1:00 to 2:00 p.m. each Sunday.

(12) WWCA, Gary, Indiana, broadcasting with a power of 1.0 kilowatt day and nighttime on 1270 kHz, presents a brokered Spanish program hosted by Francisco Moya between 9:00 and 11:00 a.m. on Saturday.

(13) WEEF, Highland Park, Illinois, broadcasting with a power of 1.0 kilowatt daytime on 1430 kHz, presents an hour of brokered Spanish religious programming at 8:00 a.m. on Sunday.

b. FM stations:

(14) WVVX-FM, Highland Park, Illinois, broadcasting with a power of 3.0 kilowatts on a frequency of 103.1 MHz presents brokered Spanish programming each weekday between 5:00 and 9:00 p.m., from 9:00 a.m. to noon on Saturday, and from 3:00 to 7:00 p.m. on Sunday.

(15) WLNR-FM, Lansing, Illinois, broadcasting with a power of 3.0 kilowatts on a frequency of 106.3 MHz, presents Spanish programming between 8:00 a.m. and 7:40 p.m. on Saturday.

29. Evidence was introduced at the hearing regarding the technical facilities of the foregoing stations and the type of Spanish programming broadcast by them. None of the stations provided coverage which was comparable to that proposed by Broadcast

Communications, either in terms of the total hours broadcast (BCI Exh. 21 at 24) or the size of the service area. BCI Exh. 17. Broadcast Communications' 1.0 mV/m service contour is essentially circular, with a radius of 30 miles; within this area, interference-free service is provided to an area of 1,660 square miles, inhabited by nearly 6.3 million people, of whom more than 560,000 are Hispanic. BCI Exh. 17, Figure 26. Of the eight other stations which broadcast more than three hours of Spanish weekly,[8] none provides coverage to all of the area served by Broadcast Communications. During the day WTAQ (which only broadcasts Spanish brokered programming for 1.5 hours each weekday) serves essentially the same area, and WCEV, WONX and the 1240 kHz stations serve about 75 percent of the area, but the remaining stations serve less than half of the area served by Broadcast Communications.

30. At night there is no real alternative to Broadcast Communications' signal, which is unchanged from that during the day. Not a single one of the other stations serves as much as one-quarter of the service area of Broadcast Communications at night. BCI Exh. 17 at 5-6. During nighttime hours, Broadcast Communications provides the only Spanish radio service to an area of 833 square miles (50.1 percent of the total area), in which more than 1.3 million people reside, of whom more than 116,000 are Hispanic. An additional area of 753 square miles (45.4 percent of the total Broadcast Communications' service area), containing nearly 4.4 million inhabitants of whom almost 370,000 are Hispanic, receives only one Spanish language signal at night in addition to that of Broadcast Communications. BCI Exh. 17 at 7.

31. Broadcast Communications proposes to broadcast a general format of programming in Spanish. BCI Exhs. 21, 22. Genesis proposes to broadcast a general market offering of jazz and rock music. Genesis Exh. 6 at 1. There is no evidence in the record that Genesis will broadcast any Spanish programming. As indicated by the survey of the formats of commercial radio stations serving the Chicago market, 18 other stations provide a programming format of this type. BCI Exhs. 15, 16.

Past Broadcast Record of Broadcast Communications, Inc.

32. During the last license period, 1973-76, Broadcast Communications operated WOJO-FM, Evanston, Illinois primarily with brokered time programming. Tr. 358. On August 2, 1976, when WOJO submitted its renewal application, the station provided the following

[8] WOPA, WONX, WVVX-FM, WLNR-FM, WCEV, WTAQ, WSBC, WEDC, WCRW, and WRMN each broadcast more than 3 hours weekly in Spanish; for purposes of the analysis set forth in the accompanying text, the three stations which share the 1240 kHz frequency in Chicago (WEDC, WSBC, and WCRW) are considered a single station.

breakdown of its composite week which is contrasted with what it proposed in 1973:

	Composite Week Renewal Form 303 1976		*Promised Week Renewal Form 303 1973*		*Short Fall From Promise*
	Hours/ Minutes	*% of Total Time on Air*	*Hours/ Minutes*	*% of Total Time on Air*	
News	6:57	4.1%	8:36	5.0%	18%
Public Affairs	:26	.3%	2:30	1.49%	80%
All Other Programs (exclusive of entertainment and sports)	23:30	14.0%	25:12	15.0%	7%

33. On October 20, 1976, apparently at the request of the Commission's staff, Broadcast Communications filed the logs for another week, December 7-13, 1975, and provided the following analysis:

	Hours/Minutes	*% of Total Time on Air*
News	7:12	4.3%
Public Affairs	:52	0.5%
All Other Programs (exclusive of entertainment and sports)	24:37	14.7%

BCI Exh. 23 at 204.

Broadcast Communications also stated that during the December 1975 week it carried 576 public service announcements.

34. Then, in August and October 1981, Broadcast Communications twice recomputed the composite week submitted with its application on August 2, 1976 and supplied the following computations:

	August 1981		*October 1981*	
	Hours/Minutes	*%*	*Hours/Minutes*	*%*
News	9:41	6.0%	8:59	5.3%
Public Affairs	:26	0.3%	:26	0.3%
Other	23:08.5	14.0%	25:45	15.3%

35. The initial computation of the composite week filed with the application on August 2, 1976 was computed by Edward A. Wheeler, who was at the time President of Broadcast Communications. He also computed the programming week analysis submitted on October 20, 1976 for the week of December 7-13, 1975. The amended version submitted August 6, 1981 was computed by Athena Sofios, who is WOJO's general manager. The next amended version, submitted October 2, 1981, was also computed by Ms. Sofios.[9]

[9] When Broadcast Communications amended-the original composite week in

36. The following chart is a summary of the composite week of FM stations in the Chicago area that the two applicants submitted as stipulated evidence. The stipulated list of stations has been altered in several respects: The stipulation included Chicago area commercial AM stations in addition to commercial FM stations, and these have not been included.[10] The frequency, power, and antenna height of each station have been officially noticed and included. The stations identified with asterisks were not part of the stipulation.[11] The purpose of the list is to provide some quantitative basis for comparing the non-entertainment performance of WOJO-FM during the renewal period. All of the composite weeks listed below were submitted with the stations' renewal applications in 1976.

Chicago Area FM Stations

STATION	*FREQ.*	*POWER*	*ANTENNA HT.*	*NEWS Hrs./Min.*	*%*	*PUB. AFF. Hrs./Min.*	*%*	*OTHER ** Hrs./Min.*	*%*
WBBM Chicago	96.3 MHz	6.2 kw	1174 ft.	9:19	(5.5)	10:21	(6.2)	:22	(.2)
WBMX Oak Park	102.7 MHz	6 kw	1170 ft.	4:41	(2.81)	4:16	(2.56)	:25	(11.7)
WCLR Skokie	101.9 MHz	3 kw	1520 ft.	8:55	(5.3)	3:38	(2.16)	1:48	(1.07)
WEFM Chicago	99.5 MHz	6 kw	1170 ft.	5:3	(4.2)	:29	(.04)	16:45	(12.7)
WFMT Chicago	98.7 MHz	16 kw	1170 ft.	12:44	(7.58)	9:38	(5.73)	18:47	(11.18)
WFYR Chicago	103.5 MHz	4.3 kw	1552 ft.	11:39.4	(6.9)	6:46	(3.6)	3:17.54	(2.)
WGCI Chicago	107.5 MHz	33 kw	600 ft.	9:35	(5.93)	1:16	(.79)	1:30	(.93)
WJEZ Chicago	104.3 MHz	18 kw	820 ft.	16:18	(10.0)	1:51	(1.1)	7:6	(4.3)
WKQX * Waukeegan	101.1 MHz	6 kw	1170 ft.	10:22	(6.3)	1:33	(.9)	7:47	(4.8)
WLAK Chicago	93.9 MHz	4.6 kw	1530 ft.	5:32	(3.49)	2:48	(1.66)	2:40	(1.58)
WLNR Lansing	106.3 MHz	3 kw	240 ft.	8:26	(6.0)	8:14	(5.8)	17:51	(12.6)
WLOO Chicago	100.3 MHz	6 kw	1170 ft.	2:56	(1.75)	2:10	(1.29)	1:22	(.81)

August, 1981, Genesis did not object (*Order*, FCC 81M-2812, released September 9, 1981) but in October, Genesis objected to the acceptance of the October 2, 1981 amendment revising the composite week, if the change would improve Broadcast Communications' comparative standing; the amendment was accepted with that condition. *Order*, FCC 82M-0876, released March 18, 1982. Genesis has never stated whether it believes the various recomputations of the composite week improve BCI's comparative case.

[10] AM stations in the Chicago area have significantly different power, operating hours, and antenna height. For example, the parties included in the stipulation WGN and WLS which operate at 50 kw day and night and relatively low powered daytime only AM stations. While a list of FM stations may not operate with exactly the same power and antenna height, more often than not they are comparable. BCI has also argued that FM stations during 1973–1976 were at a competitive disadvantage with AM. Whatever merit there is to that argument, limiting the comparison to FM stations removes it from contention. Finally, a large number of FM stations operate in the Chicago market and comparable AM stations are not needed to provide an adequate sample.

[11] The stipulated list of stations does not indicate why the stations now included were excluded. The three additional stations appear to serve the same area.

Chicago Area FM Stations

STATION	*FREQ.*	*POWER*	*ANTENNA HT.*	*NEWS Hrs./Min.*	*%*	*PUB. AFF. Hrs./Min.*	*%*	*OTHER ** Hrs./Min.*	*%*
WLUP * Chicago	97.9 MHz	6 kw	1170 ft.	7:11	(4.7)	2:25	(1.6)	1:30	(1.0)
WMET * Chicago	99.5 MHz	6 kw	1170 ft	8:37	(5.13)	2:34	(1.52)	2:0	(1.19)
WNIB Chicago	97.1 MHz	5.7 kw	1190 ft.	0:0	(0)	7:0	(5.38)	91:30	(70.38)
WTAS Crete	102.3 MHz	3 kw	300 ft.	18:1	(15.01)	2:59	(2.48)	2:8	(1.77)
WVVX Highland Park	103.1 MHz	3 kw	150 ft.	9:30	(7.9)	4:17	(3.5)	6:25	(5.3)
WTCO (WWMM) Arlington Hts.	92.7 MHz	3 kw	300 ft.	9:44	(7.26)	4:0	(2.98)	2:46	(2.06)
WXFM Elmwood Park	105.9 MHz	4.2 kw	1556 ft.	2:44	(1.63)	4:22	(2.61)	10:15	(5.95)
WXRT Chicago	93.1 MHz	6.7 kw	1310 ft.	12:0	(7.0)	3:49	(2.3)	4:13	(2.5)
WYCA Hammond, Ind.	92.3 MHz	30 kw	400 ft.	8:02	(4.8)	8:48	(5.2)	69:03	(41)
WYEN Des Plaines	106.7 MHz	50 kw	328 ft.	16:07	(10)	1:39	(1.02)	:36	(.37)

Official notice was taken of these stations which were not part of the stipulation

** But Not Entertainment and Sports

Stipulated Testimony at pp. 1-52.

37. BCI included the following as areas representative of community problems, needs and interests: Education, Race, Crime, Juvenile concerns, Recreation, Housing, Pollution, Business, Senior Citizen assistance, and Public Health. Genesis Exh. 8 at p. 6. These problems were considered on "Shape of Today," which featured interviews with local community leaders. The program, when broadcast, was carried on Sunday from 8:30 to 9:00 a.m. Genesis Exh. 8 at p. 6. BCI also claimed that the religious programs it carried emphasized moral values, which it believes addresses the problems of crime, race, juvenile concerns and senior citizen assistance. *Id.*

38. BCI also claimed that various foreign language programs that were part of its brokered format contained information which helped meet the needs of the group being served. For example, "Latin Explosion," 6–7 p.m. Monday - Friday, assisted the young Latin; "Radio Pulimet," 8–12 noon Saturday, information for the Chicago area Latin community; and "Hellenic Music in the Night," 7–8 p.m., Saturday, provided information relevant to the Chicago area Greek community. Genesis Exh. 8 at 9.

39. The news carried by WOJO-FM, which was derived from ABC Entertainment Network News, was carried 5 minutes on the half-hour. In addition, UPI's Spanish language news was regularly broadcast and news pertinent to various ethnic groups was carried on the brokered programs. *Id.* at 14; BCI Exh. 22 at ii. The non-English language programs carried by WOJO-FM carried a varying mix of entertainment, public affairs, news and other features. Tr.

646–48. The news and public affairs components were not included in the programming computations, as they were not logged separately. BCI Exh. 23 at 13. Enrique Selgado Lopez who broadcast a brokered program in Spanish, testified that his daily two hour program usually contained 60% entertainment and 40% news, information, public service announcements, and advertising. Tr. 643–51.

40. The station maintained a community advisory board and consulted it annually about programming. BCI Exh. 23 at 97, 137, 200–202.

41. BCI did not perform the news and the public affairs programs it promised because the organizations responsible discontinued them. BCI intended to broadcast the news carried by WBBM-TV in Spanish and the agreement was terminated. BCI Exh. 23 at 13. In the beginning of the license period, BCI carried programs such as "North Shore Examiner" which was produced in cooperation with the editor of the *Examiner* to serve Evanston's black community; "Community Focus" which was produced by the Evanston Junior League; "Lifeline;" and "Northwestern for the People." BCI Exh. 23 at 14. All of these programs were dropped by the time the composite week was prepared and, when they were carried, they were also broadcast on BCI's AM station. *Id.*

42. The stipulated testimony of six Evanston residents was submitted. It was critical of the station's performance because BCI had minimal contact with the black community, apparently carried no news in English, and rarely broadcast information relative to the Evanston city council meetings. At least two other persons, Evanston Alderwoman Dana Gerson and Admiral Alban Weber, were critical of the station because it had no visible presence in Evanston and had not served the needs of the majority of the people of Evanston. Stipulated Testimony.

43. Phillip Raymond was employed at WOJO-FM during the 1973-76 renewal period. Tr. 632. He stated that the station had no news staff and that the news was taken from the wire services and translated for broadcast by the various brokers who purchased time from BCI. Tr. 634. Mr. Raymond said that he was advised that BCI's FM station had so few public affairs programs because the station had other priorities. Tr. 635. The station, he found, did not broadcast public affairs programs for Evanston. Tr. 636.

44. Enrique S. Lopez was a broker at the station during the license period. He stated that he was never directed to provide local Evanston news or public affairs. Tr. 644. He believed this was generally true of other brokers. He also stated that public affairs programs carried by brokers were not specifically directed to Evanston. Tr. 644, 645.

Conclusions of Law

45. *Diversification of the Media of Mass Communications*: Genesis Broadcasting and its owners have no media interests. Broadcast Communications, two months before the hearing, indicated that it would transfer its only broadcast interest, WPRZ, an AM station operating during the daytime in Evanston, Illinois.[12] Genesis argues that, although BCI no longer holds an interest in the station, it should be counted for comparative purposes. To not do so, it urges, would be contrary to the requirement that an applicant's comparative proposal becomes frozen after a certain date. In this case that date was March 28, 1980. See *Western Connecticut Broadcasting Company*, 69 F.C.C. 2d 1890, 1895 (1978).

46. "The factor of diversification must be considered in a comparative renewal hearing," but the weight to be applied to ownership will vary from that assessed where there is no renewal applicant. *Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C. 2d 1046, 1088 (1975). Generally, it is a secondary factor in a comparative renewal case. *Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993, 1015-16 (1981).[13]

47. Thus, it appears that under current Commission policy, even if BCI still had an interest in WPRZ, that ownership would not weigh very heavily in the comparison. Here, there is every reason not to weigh it at all. The policy consideration which argues against consideration of the transfer—to prevent the continual reevaluation of BCI's proposal—is not present. BCI's diversification standing had not been evaluated when the change was made and Genesis was fully aware of the change long before the hearing. Furthermore, without any cost to the comparative process, the transfer permanently enhances the diffusion of control of media in Evanston.

48. When the fact that this is a comparative renewal proceeding where diversification is of secondary importance is coupled with the fact that the station has been transferred, it is evident that no weight should be attributed to BCI's ownership of WPRZ-AM. On diversification of the media criterion, both applicants stand equal.

49. *Integration of Ownership and Management*: Three of the owners of BCI currently work at the station in management positions. Jane Hall works full-time on station business in a supervisory and management role. Although she spends only four days a week in Evanston, she works on station business when she is at her home in Deephaven, Minnesota. Ms. hall votes 55.6% of BCI's stock, is the company's president, and is a director. She lives in a

[12] BCI filed an amendment giving notice of the impending transfer on July 20, 1981 and the transfer was effectuated on September 23, 1981.

[13] It is the Commission's view that the comparative renewal process should not be a vehicle to force divestiture. *Id.*

community adjacent to Evanston and she has participated in Evanston community activities.

50. Her husband, James Hall, votes 4.5% of BCI's shares and he also participates in the management of the station. He spends only four days per week at the station, but he devotes nearly full-time to station affairs. Mr. Hall is also an officer of BCI. Mr. Hall's community involvement has been limited to the Evanston Rotary Club which discriminates against women. This activity, therefore, could not be said to exhibit an "interest in the welfare of the community." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396 (1965).

51. Letitia Wheeler votes, as executrix of her husband's estate, 35.4% of BCI's shares. She believes that, ultimately, when the proceeds of the estate are distributed, she will own half of the shares. She is currently assistant treasurer and a director of BCI. Ms. Wheeler, who lives in Winnetka, a nearby community, proposes to continue working 35 hours per week at the station where she directs a public affairs program in English. She is active in local civic activities.

52. Henry Renken is the president of Genesis and he holds 80 percent of its shares. He proposes to be the full-time general manager and chief engineer. He lives in Evanston and currently works in a non-management technical position at a Chicago television station. He has no record of community involvement in Evanston. For a number of years, he has worked at radio broadcast stations in staff positions; his broadcast employment has always been short term and sometimes he has been fired.

53. M. Kim Hah holds the remaining 20 percent of Genesis stock. She is vice-president of Genesis and is its proposed full-time program director. She too has worked, and works, at radio broadcast stations, also in non-managerial positions. She lived in Evanston, briefly.

54. Ninety-one percent of BCI's stock is voted by women who will spend all or nearly all of their time at the station. Ms. Hall proposes full-time integration in management activities. In addition to the fact that she is a woman, she lives most of the time in a nearby community, and she has broadcast experience. Ms. Wheeler works only part-time, but the time spent amounts to nearly enough hours to receive full-time credit. Her participation qualitatively enhances the application because she has had broadcast experience and exhibited a significant interest in community affairs. Mr. Hall's participation is nearly full-time and he, too, has had significant broadcast experience. Overall BCI should be credited with 55.5% full-time integration and 39.9% nearly full-time integration, all of which is qualitatively enhanced.

55. Genesis, on the other hand, proposes 100% full-time integration of owners into managerial positions. Moreover, its quantitative proposal is qualitatively improved by the broadcast experience of Ms.

Hah and Mr. Renken, and Mr. Renken's residence. Ms. Hah would also bring to the operation the participation of a woman and a minority.

56. While Genesis has proposed more full-time integration than BCI, the difference is small because the actual time proposed by Mr. Hall and Ms. Wheeler is almost full-time. Nevertheless, it is a quantitative difference which warrants recognition. But when BCI's superior qualitative credit and its nearly total control by women is considered, and Genesis' qualitative drawbacks are measured, Genesis should receive only a slight to moderate preference for its integration proposal.[14]

57. *Genesis Broadcasting's Provision of Up-to-date and Accurate Information*: The record reflects that Genesis' application did not always contain up-to-date and accurate information about Henry Renken's broadcast and media experience, its community survey was inaccurately described, and its EEO proposal was carelessly and inaccurately prepared. There is no evidence of concealment or misrepresentation in these matters, but it was shown that the information provided by Genesis was not wholly reliable. For example, Genesis did not keep Mr. Renken's broadcast employment record up-to-date and, while normally it might be thought to be in Genesis' interest to do so, that was not entirely the case here. Mr. Renken's poor broadcast employment record detracted from his qualitative integration credit. Genesis' community survey, submitted with its application, was slightly inaccurate and its EEO plan, which described non-existent past EEO practices, can only be described as thoughtlessly and carelessly done, although the inaccurate EEO information, unlike Mr. Renken's employment history, was not decisionally significant.

58. The Genesis application exhibits a repeated inattention to the questions on the Form 301 and to the Commission's reporting requirements. There is little doubt that the Commission is "concern[ed] that applicants furnish accurate and complete information." *Radio Station WABZ, Inc.*, 90 F.C.C. 2d 818, 827 [¶ 16] (1982). For this reason, Genesis' "violations necessarily have an impact on the comparative violations of the applicants." *Id.*

59. Moreover, one other incident warrants consideration with these matters. In order to correct an error in the frequency

[14] Although both applicants have qualitative drawback—for example, the Halls live in Minnesota for three days of the week and Mr. Hall is active in the Evanston Rotary which discriminates against women—Genesis' qualitative problems are greater: Mr. Renken and Ms. Hah have had no managerial experience in broadcasting. Moreover, Mr. Renken's experience detracts from his proposal because he has been fired several times and he has not held any broadcast position for any period of time. In addition, neither Mr. Renken nor Ms. Hah have exhibited any long time residence in Evanston or any significant involvement in the community.

designation listed on the first page of its application, Genesis corrected the frequency and accompanied the change with a new certification page. The new certification page had been previously signed by Mr. Renken and contrary to the representation on the sheet that he had reviewed the change before signing, he had not. Although there is no evidence of any intention to deceive or misrepresent, there is evidence of carelessness on Genesis' part. The record also demonstrates that Genesis did not always think about what it was saying to the Commission.[15] The foregoing incidents make Genesis comparatively less reliable as a potential licensee and a moderate demerit will be assessed.

60. *BCI's Proposed Spanish Format as a Specialized Service in the Chicago SMSA*: BCI proposes to broadcast in Spanish 23 1/2 hours per day. The Chicago metropolitan area, which BCI covers, has seen a rapid and large growth rate in the Hispanic population. In 1980 there were 580,592 Hispanics, which is a 77.3 percent gain from 1970. It is undoubtedly the fastest growing population group in the Chicago area. Hispanics are 8.2 percent of the SMSA population and they live in 98 percent of the SMSA census tracts. Twenty-seven percent speak only Spanish, 53 percent speak primarily Spanish.

61. During the day Spanish language programming is available for some part of the day on fifteen area stations, although only eight stations broadcast more than three hours in Spanish weekly. None of the existing stations provide as much Spanish programming as that proposed by BCI and none provide interference free coverage to as large an area.

62. Only two of the fifteen stations even approach BCI's service area during the day: WCEV and WONX cover 75 percent of the area; WCEV broadcasts in Spanish three hours per day and WONX broadcasts from Evanston in Spanish from 6:00 a.m. to 6:00 p.m. during weekdays. At night Broadcast Communications would continue to provide a first Spanish language radio service to an area of 833 square miles (50.1 percent of the total SMSA) with 1.3 million people, of whom 116,000 are Hispanic, and a second Spanish language service to 753 square miles with 4.4 million people, of whom 370,00 are Hispanic.

63. Genesis proposes a format of jazz and rock which is currently available in the market from 18 other stations.

64. BCI has demonstrated that a substantial percentage of the Hispanic population receive and would continue to receive their only Spanish service at night from BCI. *George E. Cameron, Jr. Communications*, 71 F.C.C. 2d 460, 465 (1979); See *American International*

[15] Mr. Renken did say that he decided not to report all of his job changes because he thought a full reporting of his employment changes would delay resolution of the proceeding. While this indicates he may have deliberately withheld information, it does not establish that his motive was to deceive the Commission or the other parties. It does, however, exhibit bad judgment.

Development, Inc., 75 F.C.C. 2d 67, 94-96, 107 (ALJ 1979) *aff'd*, 86 F.C.C. 2d 808, 818 (1981). In addition, many other listeners would receive their second nighttime service in Spanish. This record demonstrates that Spanish programming is not available in a reasonable amount in the Chicago SMSA at night but that rock and jazz are. BCI deserves a substantial comparative preference for its Spanish language format proposal.[16]

65. *BCI's Performance During the Renewal Period*: During the 1973-76 license renewal period BCI operated two Evanston stations, WOJO-FM and WPRZ-AM. On WOJO-FM, it broadcast primarily brokered foreign language programming. The station fell short of the amount of news and public affairs programs that it stated it would broadcast at the beginning of the license period. Nevertheless, a comparison of its performance during its composite week with other FM stations in the Chicago SMSA demonstrates that it did an average amount of news. However, its broadcast of public affairs programming was nearly the poorest of any station in the market.

66. At various times BCI submitted different readings of its composite week. (It also selected an additional composite week to give a better picture because it believed that the composite week designated by the Commission was atypical.) Its readings for news ranged from 4.1 to 6 percent. Of the twenty-two FM stations in the market, ten of the stations fall within the range met by WOJO. Seven stations carried 7 percent or more news and five carried less than 4 percent. The range of estimates provided by BCI for its public affairs was .3 to .5 percent. Every station but one did significantly better.[17]

[16] BCI introduced a significant amount of evidence about the general informational needs of Hispanics. It also analyzed Hispanic listening, viewing and reading habits in the Chicago market. See BCI Exh. 21. In addition, it tested the signal quality of existing stations that carry Hispanic programming and reviewed the quality of existing Spanish programming. *Id.* At the time this evidence was presented, it appeared that conclusions might be reached about the availability and need for Hispanic programming in the Evanston or Chicago SMSA. However, after a careful review of BCI's proposed findings in this area, many must be rejected. Generally, the Commission has assumed that Hispanics have specific listening needs because of their cultural, economic and language differences. *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979, 980–81 (1978). The statistics on how many people speak Spanish, mentioned above, sufficiently demonstrate a special need. But BCI's analysis of the differences between its Spanish format and the Spanish format presented by other stations is too incomplete to measure with regard to the performance of the other stations. This is also true of its signal measurements: BCI measured the signals of some Spanish format stations by spot listening, but it did not measure all of them. Finally, these factors are unnecessary to the determination of the issue and, even if considered in their best light, they establish very little beyond what has been concluded.

[17] WOJO-FM carried programming other than entertainment and sports which was not news or public affairs, but it did not identify what the other programming

67. WOJO-FM did, however, carry numerous public service announcements, and it did occasionally carry public affairs discussion programs that reflected the issues identified in its survey. BCI also claims that the brokered programs were in part public affairs and news programs but, because news and public affairs on brokered programs were not logged separately, that news and public affairs was not reflected in its composite week analysis. In addition, the station maintained a citizens' advisory board which BCI consulted annually about the station's programming.

68. Overall, the testimony and exhibits indicate that BCI did little to initiate news or public affairs programming. In large part, this appears to have occurred because the station's broadcast day was purchased by brokers who determined the station's programming. BCI did not demonstrate that the quality of its programming was superior or even substantial. On a quantitative basis, it is evident that the station generally performed in the just acceptable range. On its record there is some reason, although slight, for BCI to expect that it has earned a renewal preference.

Summary

69. The applicants stand equal on diversification of media. Genesis warrants a slight to moderate preference for its integration proposal. However, the weight that is attributed to this criterion, because it foretells the likelihood of good service, is undermined by the moderate demerit assessed Genesis for the carelessness it exhibited in its filings and by the substantial preference given to BCI for its proposed Spanish language format. In addition, BCI is entitled to a very slight preference as a renewal applicant.

ACCORDINGLY, IT IS ORDERED that the applications of Broadcast Communications, Inc. for renewal of the main, auxiliary, and sub-carrier authorization licenses for station WOJO-FM, Evanston, Illinois, (File Nos. BRH-85 & BRSCA-206) ARE GRANTED. and the application of Genesis Broadcasting Limited (File No. BPH-10386) IS DENIED.[18]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD J. KUHLMANN *Administrative Law Judge*

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was. The time spent on the other programming was between 14-15 percent of its composite week. All but two FM stations in the market did less.

[18] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Comparative Criteria
Misrepresentation, Character Qualifications

Board awards grant to applicant with substantial diversification and moderate integration preference and rejects misrepresentation charge based on two small application errors. Ownership by losing applicant of station in community of license was decisive comparative difference.
–*Brownfield Broadcasting Corp.*
BC Docket No. 81-164

FCC 83R-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BROWNFIELD BROADCASTING CORP. Brownfield, Texas	BC Docket No. 81–164 File No. BPH-800527AC
BROWNFIELD RADIO, INC. Brownfield, Texas	BC Docket No. 81–165 File No. BPH-800708AB
For Construction Permit for a new FM Station	

Appearances

B. Jay Baraff, Esq. and *Aaron Shainis*, Esq. on behalf of Brownfield Radio Inc.; *Morton L. Berfield*, Esq. and *Roy W. Boyce*, Esq., on behalf of Brownfield Broadcasting Corp.; and *Charles Dziedzic*, Esq. and *Robert A. Zauner*. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: April 20, 1983; Released: April 28, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL CONCURRING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Brownfield Broadcasting Corp. (BBC) and Brownfield Radio, Inc.

(BRI) for authority to construct a new FM broadcast station to operate on Channel 280A at Brownfield, Texas. By Hearing Designation Order, Mimeo No. 08036, released March 18, 1981, the applications were designated for consolidated hearing on limited financial qualifications issues against both applicants and the standard comparative issue.

2. In an Initial Decision (I.D.), FCC 82D-66, released September 22, 1982, Administrative Law Judge Edward Luton (ALJ) granted the BBC application. After awarding summary decision in favor of both applicants under the specified financial issues,[1] the ALJ concluded that BBC's proposal was to be preferred under the comparative issue because it was superior in terms of both diversification and integration.[2] The proceeding is now before the Review Board on exceptions filed by BRI. The Board has reviewed the I.D. in light of the exceptions and reply briefs and our examination of the record.[3] We adopt the ALJ's findings of fact, except as modified herein, and agree with his ultimate conclusion that a grant to BBC will better serve the public interest.

3. *Diversification of Control.* Neither BBC nor any of its principals own interests in any other media of mass communications. On the other hand, BRI is the licensee of KKUB, a daytime-only AM station which is the only broadcast station licensed to Brownfield, Texas. Based on these facts, the ALJ awarded a substantial preference to BBC under the diversification comparative criterion. I.D., paras. 2, 3, 25. In its exceptions, BRI concedes, as it must, that BBC warrants a preference but argues that since KKUB is a daytime-only station, the preference is not substantial, but slight. We disagree. It is well-established that an applicant with no media holdings will be awarded a substantial preference where its opponent owns the only broadcast station in the proposed community of license, albeit the station operates only during daytime hours. *Hassayampa Broadcasting*, 92 FCC 2d472. 52 RR 2d 1059 (Rev. Bd. 1982); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 35 RR 2d 1637 (Rev. Bd. 1976). A preference of this magnitude is warranted because the preferred applicant will provide a new media voice to the community and avoid the creation of a media monopoly there. *See Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev. Bd.), *review denied*,

[1] *See* Memorandum Opinion and Order, FCC 81M-2806, released July 8, 1981, and Tr. 33–34. Neither party has excepted to these rulings.

[2] Although the Hearing Designation Order specified that area and population coverage differences could be considered under the comparative issue, the parties stipulated that they would present no evidence regarding comparative coverage. *See* Tr. 34–35.

[3] Oral argument was requested by BRI and this request was opposed by BBC. We will deny BRI's request because we believe the parties' arguments are adequately presented in their briefs and that oral argument would not materially aid in resolution of this case. *See Midwest St. Louis, Inc.*, 79 FCC 2d 519, 48 RR 2d 95 (1980); *WJPD, Inc.*, 79 FCC 2d 115, 47 RR 2d 1423 (1980).

FCC 81–473, released October 7, 1981. Accordingly, we affirm the ALJ on diversification.

4. *Integration of Ownership and Management.* The ALJ credited BBC with 52% full-time integration based on the proposals of two 26% stockholders, Billy B. Reynolds and Curcy H. Andrews, Jr., to work full-time at the station, Reynolds as general manager and news director and Andrews as assistant manager and program director. I.D., paras. 4, 5, 12. Each has broadcast experience and will move to Brownfield if the BBC application is granted. I.D., para. 31. On the other hand, the ALJ disparaged the proposal of BRI's sole stockholder, James D. Farr, to serve full-time as general manager. Farr is a local resident with a history of civic activities and broadcast experience. I.D., paras. 16, 18, 20. The ALJ noted, however, that Farr is general manager of co-owned Station KKUB, where he now works 60–70 hours per week, and that while Farr plans to combine the operation of the existing and proposed stations, his proposal is too vague to provide reasonable assurance that he could devote to the new station the requisite 40 hours per week which is synonymous with a full-time commitment. The ALJ therefore credited BRI with 100% part-time integration and held that this proposal was decidedly inferior to BBC's 52% full-time proposal. I.D., paras. 16, 21, 27, 28, 30. BRI excepts to this result and argues that it is entitled to credit for 100% full-time integration based on Mr. Farr's testimony that he will work full-time at the new station and that many of his duties at the proposed station would be shared with his duties at KKUB.

5. We agree with BRI that the ALJ understated the credit to which it is entitled for Mr. Farr's future role at the FM station. Farr testified that if BRI's application is granted he will continue to work upwards of 70 hours per week in order to manage both the new station and KKUB. Tr. 94. As BRI notes, he plans to combine his operation of both stations, which should produce economies in time management normally associated with joint operations. Although he could not estimate with precision how many hours would be devoted exclusively to the new station, Farr made clear on the record that he intended to make a full-time commitment, that he would work whatever hours were required in order to see that the station "complies with all of the rules and regulations of the Commission, that it is operated in the public interest," and that he would stay on the job "until the work is done." Tr. 97–100. We do not believe, as the ALJ did, that this is too vague a commitment. It is apparent from the evidence that Farr is totally involved in the operation and management of KKUB and that he fully intends to continue this level of commitment in the combined operation of both stations. In our view, these facts distinguish this case from precedents relied on by the ALJ, such as *Radio Laredo, Inc.*, 87 FCC 2d 353, 49 RR 2d 1489 (Rev. Bd. 1981), and *RAM Enterprises*, 57 FCC 2d 844, 35 RR 2d 1507 (Rev. Bd. 1976), where simple expressions of intent to spend "whatever

time is necessary" at the station were deemed too indefinite to warrant credit. Farr has specifically described his commitment as full-time, reasonably plans to economize his time by combining the existing and proposed operations, and obviously intends to devote "substantial amounts of time on a daily basis" at the FM station. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965).[4] Therefore, we find that BRI is entitled to 100% full-time integration credit for Farr's proposal but that this credit is somewhat diminished because Farr will divide his time between the existing and proposed stations. *See Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982), and cases cited therein. Even though diminished, BRI's proposed 100% integration, which is enhanced by Farr's local residence, civic activities, and broadcast experience, warrants a moderate preference over the 52% full-time proposal offered by BBC, which is enhanced to a lesser degree by the proposed future local residence of its integrated stockholders and their broadcast experience. *Compare Family Broadcasting Group*, FCC 83R-15, released March 4, 1983 (substantial preference awarded for 100% full-time vs. 46% full-time and 8% part-time) *with WHW, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982) (moderate preference for 100% full-time vs. 66–2/3% full-time) *and Communications Properties, Inc., supra* (moderate preference awarded for 50% full-time vs. 0%, where credit was diminished because of division of time between two stations and less than majority stock integration).

6. *BBC's Petition for Leave to Amend.* BRI excepts to the ALJ's grant of BBC's June 24, 1981 petition for leave to amend, which it claims allowed BBC to effect a change in its transmitter site. In its petition, BBC stated that its application incorrectly identified its transmitter site location by relying on the same erroneous coordinates specified by other applicants proposing the same site in the past, and that its amendment was intended to correct this error. In Memorandum Opinion and Order, FCC 81M-2229, released July 21, 1981, the ALJ accepted BBC's claim that it was not seeking to change its site and ruled that it had satisfied all of the good cause criteria for engineering amendments required by Section 73.3522(b)(1)(i) the Rules. He therefore accepted BBC's amendment. By Memorandum Opinion and Order, FCC 81M-2919, released September 15, 1981, BRI was granted permission to appeal this ruling to the Commission. On appeal, the Commission held that although it agreed with the ALJ that BBC had satisfied the foreseeability, due diligence, and involuntariness requirements of the good cause showing, it would remand for reconsideration in light

[4] The cases cited by the ALJ are further distinguished by the facts that in *Radio Laredo*, the applicant conceded that it did not intend to integrate its principals into the station's operation and in *RAM*, the owner testified that he hoped not to spend too many hours a month at the station after it was on the air.

of new information presented to it. Specifically, it noted that the engineering affidavit accompanying the appeal asserted that the amended coordinates depicted a new site location at a different street address from that specified in BBC's application. Memorandum Opinion and Order, 88 FCC 2d 1054, 50 RR 1259 (1980). On remand, the ALJ affirmed his earlier ruling. Relying on the affidavit of Charles Wilson, the BBC principal who prepared its engineering exhibit in the application, the ALJ accepted BBC's explanation that in addition to relying on erroneous geographical coordinates used by other applicants in the past, Wilson also inadvertently specified the wrong street location because he confused BBC's tower with another tower on a site located 0.88 miles away. The ALJ concluded that BBC's intention had always been to specify the same site and that its amendment did not change the site originally proposed. Memorandum Opinion and Order, FCC 82M-2169, released July 15, 1982.

7. In challenging these rulings, BRI argues that BBC's amendment specified a new site. It claims that the ALJ, in ruling otherwise, should not have relied on the self-serving affidavit of a BBC principal and notes that BBC did not support Wilson's statements with an affidavit from the owner of the site. It argues that BBC's misplaced reliance on incorrect information is not sufficient grounds for acceptance of the amendment. BRI also contends that an ALJ is not qualified to pass on an engineering amendment such as the one at issue, at least without assistance from Commission engineers, because the amendment could cause short spacing or other problems of a technical nature.

8. We affirm the ALJ's rulings. In his first Order, FCC 81M-2229, the ALJ carefully evaluated BBC's amendment in light of the good cause criteria for postdesignation engineering amendments and properly concluded that BBC's correction of the error in specification of site coordinates was not reflective of an intention to specify a new site. The Commission's holding in 88 FCC 2d 1054 rejecting BRI's attack on the sufficiency of BBC's good cause showing in effect moots BRI's contentions insofar as it seeks review of this portion of the ALJ's actions. The second ruling, FCC 82M-2169, is also sound. As the Bureau correctly points out, BBC's explanation for its second mistake—specification of an erroneous street location for its tower—is credible. Contrary to BRI's contention, it was entirely reasonable for BBC to rely on the affidavit of the principal who was both responsible for preparing its engineering exhibit and for making the errors in question. Furthermore, we believe it was BRI's burden, not BBC's, to supply a statement from the controller of the proposed site if it wished to challenge Mr. Wilson's statements. It is purely speculative for BRI to claim that the absence of such a statement raises doubts as to Wilson's otherwise unrebutted affidavit. Finally, BRI's allegations regarding the ability of the ALJ to handle without assistance these questions, which we consider groundless, were

raised on appeal before the Commission and rejected. See 88 FCC 2d at 1057 and 1059. The ALJ's rulings were correct and are affirmed.

9. *Misrepresentation Issue.* In a petition to reopen the record filed September 25, 1981, BRI sought a misrepresentation issue against BBC based on the statement in BBC's June 24, 1981 amendment that it was not seeking to change its transmitter site. The ALJ denied BRI's request as being procedurally infirm and substantively unsupported. Memorandum Opinion and Order, FCC 81M-3903, released December 11, 1981. In excepting to this ruling, BRI argues that BBC's statement that it was not moving its site was false and misleading, that BBC did not substantiate the explanation in the Wilson affidavit, which was relied on by the ALJ, with documentation from the site owner, and that BBC had a motive to mislead the Commission because it knew that it would be more difficult to get its amendment accepted if it admitted to having moved its site. We reject these arguments and affirm the ALJ's ruling.

10. The Board has repeatedly reminded litigants that misrepresentation allegations are not to be lightly made, that a petitioner raising such an issue must make a *prima facie* showing of a substantial question of deception, that motive must be demonstrated, and that application errors or omissions are not synonymous with deceit. *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982); *Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 49 RR 2d 1001 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (1981). Unfortunately, BRI's request meets none of these standards. Thus, it has not undermined BBC's entirely credible explanation, supported by the affidavit of Mr. Wilson, that its amendment was intended to correct two small errors made in its engineering exhibit with any specific evidence of its own tending to show that BBC actually intended to change sites. Furthermore, as indicated in paragraph 8, *supra*, BRI, not BBC, had the burden of submitting material from the site owner or others in a position to know tending to establish that BBC's claims were false. Finally, BRI's attribution of an improper motive to BBC is entirely speculative and without support since it is not apparent why BBC would wish to conceal from the Commission an actual site change of less than one mile. No issue is called for.

11. *Final Comparative Evaluation.* We have awarded BBC a substantial preference for diversification and BRI a moderate preference for integration. No other comparative differences have been established. On these facts, BBC, which has the larger and more important preference, is the clear comparative choice. Although BRI contends that diversification is of little significance in this case because of its integration superiority, this bare argument flies in the face of the long-held Commission policy that the diversification criterion is to be afforded greater comparative weight than integra-

tion. *Colorado West Broadcasting, Inc., supra*. Thus, even if BRI's integration preference were substantial, which it is not, it would not prevail in view of BBC's substantial diversification preference. *See KBBS, Inc.*, 91 FCC 2d 115, 52 RR 2d 185 (Rev. Bd. 1982). Accordingly, we conclude that a grant of BBC's application would better serve the public interest, convenience and necessity.

12. ACCORDINGLY, IT IS ORDERED, That the application of Brownfield Broadcasting Corp. (File No. BPH-800527AC) for a construction permit to establish a new FM station at Brownfield, Texas IS GRANTED, and that the application of Brownfield Radio, Inc. (File No. BPH-800708AB) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

In its decision, the majority reverses the ALJ and restores 100% full-time integration credit to an FM applicant who proposes to continue to manage his co-owned, co-located AM station, *Decision*, para. 5 *ante*, whereas the ALJ had granted the applicant only part-time credit for the new FM station in view of the applicant's candid testimony that he will maintain his general role at the AM. *See I.D.*, paras. 26–29.

I write separately, and in concurrence rather than dissent, for several reasons. First, the alteration by the majority is not decisional and the collateral operation of other legal principles may activate the self-correctional impetus necessary to render academic the issue here taken. Second, the majority's action is sufficiently congruent with recent precedent so as to blunt any complaint that it is acting capriciously.

Nonetheless, the grant of full-time integration credit in the instant case does, again, cheapen the currency of the *Policy Statement's* [1] high reward for such integration, so much so that the currency in this case is embarrassingly counterfeit.

The *Policy Statement* specifies that full-time participation in station management by an owner is of "substantial importance," *id.*, at 395, and this translates to a valuable preference for that applicant.[2] The applicant here contends that he now works "60–70 hours per week" at the extant station, *I.D.*, para. 21, and that if he

[1] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

[2] *See, e.g., Central Texas Broadcasting Co., infra* note 4, 90 FCC 2d at 596. It is because full-time integration credit is so frequently decisional—and even relatively slight differences in the level of such credit, *see, e.g., Peoples Broadcasting Corp.*, FCC 83R-5, released January 25, 1983 (Rev. Bd.) (applicant with 58% full-time credit (enhanced) preferred over one with 51% full-time credit (enhanced)) - that it is important to allow such credit only where clearly due. At least, for as long as the concept of comparative integration credit remains on the books.

receives the FM grant, he would divide his time (in an unspecified amount) between the two stations, *id.*, at para. 22. Even accepting the applicant's claim of a current 60–70 hour work week, if an applicant asserts that he will divide full-time between two stations, he cannot logically be said to be devoting full-time to either one. He is, in that situation, devoting his full-time to his several broadcast stations, divided, of course, by the number of stations. It matters not whether that number of co-owned stations is 2, 3, or 6: the principle remains constant.

To grant full-time integration credit where the applicant stipulates that he is dividing his "full-time" between two or more stations not only cancers the concept of full-time integration at a given station, it is antithetical to the *Policy Statement's* assumption that full-time integration "complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of diversification." *Id.*, at 395. To effect the Commission's intent in that respect, we have stated that "full-time integration connotes total immersion" in a particular station.[3]

The majority attempts to soften the paradox of granting full-time credit where an applicant separates his time between two stations by "diminishing" such credit for the new station. *Decision*, para. 5 *ante*, *citing Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982).[4] I suppose this "diminution" mechanism does no practical harm, recognizing as it does that the "full-time" integration credit nominally granted the applicant is really less. Moreover, in situations where an applicant proposes to devote full-time to more than one co-located station, the harm of any integration credit is more than offset by the "diversification" demerit that same applicant receives by necessary implication. Ergo, any damage done by granting full-time credit to a "twofer" may be *damnum sine injuria*.

Still, the very act of granting so-called full-time integration credit to an applicant proposing to apportion an unspecified amount of his time between two stations[5] is *prima facie* illogical; and it is just such actions that have helped reduce our integration credit to a point

[3] *Greater Wichita Telecasting, Inc.*, FCC 82R-75, 92 FCC 2d 780 (Rev. Bd.), *denying reconsideration* of 90 FCC 2d 1046 (only slight, part-time integration credit where applicant principal's other interests preclude greater credit).

[4] Inasmuch as I raised no exception to the "diminution" mechanism in *Communications Properties*, my concurrence here is based, in part, on previously sootied hands. *But see Central Texas Broadcasting Co.*, 90 FCC 2d 583, 599 (Rev. Bd. 1982) (dissenting statement of Bd. Mb'r. Blumenthal) (full-time integration credit inappropriate where other business interests are substantial), *recon. denied*. FCC 82R-77, 92 FCC 2d 914 (separate statement of Bd. Mb'r. Blumenthal).

[5] *See I.D.*, paras. 27–28. Because the applicant here refused to predict what amount of time he could devote to the new station, the ALJ found the applicant's integration proposal "too vague" to grace with a full-time credit; he reduced the credit to part-time. In so doing, the ALJ appears more correct than our majority, *see Radio Laredo, Inc.*, 44 RR 2d 1489 (1981); *RAM Enterprises*, 57 FCC 2d 844

close to smirkable. Wishing to negotiate myself closer to the smirkers than the smirkees, I voice this little protest.

(1976); *Lorenzo W. Milam*, 6 FCC 2d 198 (1966), and well-enough should be left undisturbed.

FCC 82D-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of BROWNFIELD BROADCASTING CORP. Brownfield, Texas	BC Docket No. 81-164 File No. BPH-800527AC
BROWNFIELD RADIO, INC. Brownfield, Texas	BC Docket No. 81-165 File No. BPH-800708AB
For Construction Permit for a new FM Station	

Appearances

Roy W. Boyce, Esq. and *Lewis I. Cohen, Esq.*, on behalf of Cohen & Berfield; *B. Jay Baraff, Esq.* and *Aaron Shainis, Esq.*, on behalf of Baraff, Koerner and Olender; and *Y. Paulette Freeman, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

(Issued: September 14, 1982; Released: September 22, 1982)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Brownfield Broadcasting Corp. (hereinafter BBC) and Brownfield Radio, Inc. (hereinafter BRI) for a construction permit for a new FM radio station to be operated on 103 mHz, at Brownfield, Texas. These applications were designated for hearing by *Hearing Designation Order* (Mimeo. No. 08036), released March 18, 1981, on the following issues:

1. To determine with respect to Brownfield Broadcasting Corp.:

(a) the cost of operation of the proposed station for the first three months;

(b) the source and availability of funds to meet its expected costs; and

(c) in light of the evidence adduced pursuant to (a) and (b) above, whether the applicant is financially qualified to construct and operate the proposed station.

2. To determine with respect to Brownfield Radio, Inc.:

(a) the source and availability of funds to meet its expected costs; and

(b) in light of the evidence adduced pursuant to (a) above, whether the applicant is financially qualified to construct and operate the proposed station.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

2. On May 28, 1981, BBC filed a motion seeking summary decision on the financial issue designated against its application. By *Memorandum Opinion and Order*, FCC 81M-2806, released July 8, 1981, the Presiding Judge granted BBC's motion. Similarly, on June 30, BRI filed a motion seeking summary decision on the financial issue designated against its application. That motion was granted orally at the hearing session held on July 20, 1981.

3. Prehearing conferences were held on May 20, 1981 and July 17, 1981. The case was heard on July 20, 1981, and the record was closed on September 15, 1981.

Findings of Fact

Brownfield Broadcasting Corp

4. BBC's officers, directors and stockholders, are the following:

Individual	*Relationship to BBC*
Billy B. Reynolds	President, 26 percent stockholder
Curcy H. Andrews, Jr.	Director and Vice President, 26 percent stockholder
Charles E. Wilson, Jr.	Director, 24 percent stockholder
DRA, Inc.	Twenty-four percent stockholder[1]

5. Billy B. Reynolds will serve full-time as BBC's General Manager. He will also act as the station's News Director. Mr. Reynolds resides in Lubbock, Texas, 40 miles from Brownfield, Texas (BBC Ex. 2, p. 1).

6. Mr. Reynolds was born on March 15, 1930, in Sweetwater, Texas. He attended elementary and high schools in Trent, Texas. In August, 1972, he graduated from Texas Tech University in Lubbock, Texas, with a degree in secondary education (BBC Ex. 2, p. 1).

7. Mr. Reynolds' radio career commenced in March, 1956, at station KMIL, Cameron, Texas, where he served as an announcer and copy writer. In December, 1956, he became Assistant Manager of station KPIN Casa Grande, Arizona. In August, 1957, he became Program Director for station KMOP Tucson, Arizona.

[1] DRA, Inc. is a corporation organized for the purpose of participating in BBC's application. It has three stockholders, each owning 33-1;3 percent of DRA, Inc.'s stock. They are: William A. Dyess, Jim D. Rudd and Ray D. Anderson (BBC Ex. 1, p. 1, Tr. 36)

8. In 1959, Mr. Reynolds became News Director for station KCUL in Fort Worth, Texas. (BBC Ex. 2, p. 1).

9. From mid-1963 to 1966, Reynolds was employed at station KRBC Abilene, Texas, as an announcer and as the station's Program Director. (BBC Ex. 2, p. 2).

10. In June, 1968, Reynolds was employed at station KFYO in Lubbock, Texas as an announcer and news broadcaster (Tr. 40). In January, 1981, he went into partnership with his brother in a retail liquor store business (Tr. 49–50).

11. Mr. Reynolds is currently a vice president of Agriculture Research and Development Incorporated (ARD), a gasohol manufacturing company. He devotes 5–10 hours per week to ARD as its public relations consultant. (Tr. 43, 50). If BCC's application is granted, Reynolds will devote 2–3 hours per week, on a regular basis, to ARD (Tr. 55–56). Also, in that event, Mr. Reynolds will turn the day-to-day operation of the liquor store over to his brother. (Tr. 55). Reynolds will move with his family from Lubbock to Brownfield if BBC is the successful applicant (Tr. 56).

12. Mr. Curcy H. Andrews, Jr. is a 26 percent stockholder, Vice President and director of BBC. He plans to serve fulltime as BBC's Assistant Manager and Program Director. He will also serve as Staff Announcer and Time Salesman. Mr. Andrews currently resides in Lubbock, Texas, 40 miles from Brownfield (BBC Ex. 3, p. 1).

13. Mr. Andrews was born on July 5, 1940 in Lubbock County, Texas. He graduated from Monterey High School in Lubbock and attended Texas Tech University in Lubbock (BBC Ex. 3, p. 1). Mr. Andrews' radio career began in 1958 when he became employed part-time at station KFYO Lubbock, Texas. In 1960, he became a staff announcer for station KLVT Levelland, Texas (BBC Ex. 3, p. 1). In 1960, he joined the staff of station KSEL Lubbock, Texas as an announcer and remained at the station until it was sold in February, 1961 (BBC Ex. 3, p. 1).

14. Upon the sale of KSEL, Mr. Andrews moved to station KZZN, Littefield, Texas, as a staff announcer. There, he was involved in copy writing, production of commercials, and news gathering. He remained at KZZN until June, 1961 (BBC Ex. 3, p. 1). In January, 1962, Andrews became a staff announcer for station KCBD in Lubbock, Texas. In May, 1962, he became a staff announcer for station KLLL in Lubbock, Texas (BBC Ex. 3, p. 2). Then, in October, 1962, Mr. Andrews returned to Levelland, Texas, where he became a staff announcer for station KLVT (BBC Ex. 3, p. 2). In August, 1963, Andrews was employed at radio station KCBD Lubbock, Texas, where he was involved in announcing, commercial production, news reporting and in certain facets of programming (BBC Ex. 3, p. 2). In January, 1970, Mr. Andrews was employed at radio station KFYO Lubbock, Texas, which is where he is now

working. He serves as Program Director and Music Director (BBC Ex. 3, p. 2).

15. Mr. Andrews plans to leave his present job at KFYO and move to Brownfield to run the new station in the event BBC's FM application is granted (Tr. 72–73).

Brownfield Radio, Inc. (BRI)

16. BRI's President and sole stockholder is James D. Farr, Jr. (BRI Ex. 1, p. 1). Mr. Farr is proposed to be the General Manager of the FM facility if BRI's application is granted (BRI Ex. 1, p. 1). He will be solely responsible for the day-to-day decisions and operation of the station. Mr. Farr is a local resident of Brownfield, Texas, having lived there since 1969 (BRI Ex. 1, p. 4).

17. Mr. Farr was born in Fort Worth, Texas, on September 10, 1926 (BRI Ex. 1, p. 1). In 1944, he graduated from Paschal High School in Fort Worth. Upon his graduation, he enlisted in the United States Navy Reserve and was assigned to the V-12 Program, and was honorably discharged in December, 1946.

18. Mr. Farr began his radio career in 1950 at KCLE, Cleburne, Texas, as an announcer, local newsman, and salesman. From 1952 until 1955, he was employed as an announcer, newsman, and salesman at KSTV, Stephenville, Texas (BRI Ex. 1, p. 3). In 1959 he was the General Manager of KSTB, Breckenridge, Texas. In 1956, he was employed for three months with the Breckenridge-American Newspaper in Breckenridge, Texas, as a newsman and salesman (BRI Ex. 1, p. 3). From 1956 to 1962, he was employed as a salesman at KNOW, Austin, Texas. In 1962, he became an owner of KCFH, Cuero, Texas. He was General Manager of the station and in charge of the day-to-day operations. From January to July, 1969, Mr. Farr was employed as General Manager of Radio Station KKUB-AM, Brownfield, Texas. In 1974, he acquired 20 percent of the stock of KKUB. In March, 1976, he purchased the remaining 80 percent of the stock (BRI Ex. 1, pp. 3–4). Station KKUB is the only broadcast station operating in Brownfield, Texas, and the only broadcast station of any kind operating in Terry County, Texas, the county in which Brownfield is located (Tr. 90).

19. Mr. Farr has held a First Class Radiotelephone Operator License since 1962. He is presently a member of the Society of Broadcast Engineers and holds a Senior Broadcast Engineer Certificate with that organization. From 1977 to 1980, he served on the board of directors of the Texas Association of Broadcasters (BRI Ex. 1, p. 4).

20. Mr. Farr has been active in civic affairs in Brownfield. Specifically, he has been a member of the Rotary Club since 1970 and has served on its Board of Directors for two years. He has also served as Chairman of the Rotary Defensive Driving Project. Mr. Farr is a member of the Terry County Program Building Committee and was

vice-chairman for one year. He has served on the High School Marketing and Distributive Education Advisory Board since 1971, and on the Texas Education Agency State Marketing and Distributive Education Advisory Board since 1976. Mr. Farr is a member of the Accreditation Study Committee of the Brownfield Public Schools. He is also a member of the American Legion. He has coached Little League Baseball and Little Dribbler Basketball. In 1980, he helped found the Crime Information Program (BRI Ex. 1, p. 5).

21. Mr. Farr is the owner and the General Manager of Station KKUB, and devotes approximately 60–70 hours per week to the duties associated with that position. Mr. Farr plans to combine his operation of KKUB and the proposed FM station. He testified that if BRI's application is granted, he would divide those 60–70 hours per week between operation of the new station and KKUB (Tr. 94). Mr. Farr was unable to estimate the number of hours that he would devote solely to the operation of the FM station (Tr. 97). He nevertheless maintained that he proposes to be the "full-time" General Manager of the new station (Tr. 97–98).

22. To Mr. Farr, "full-time" does not mean a forty-hour work-week; instead, it means "whatever hours are necessary to the management of the station, making sure that it complies with all of the rules and regulations of the Commission, that it is operated in the public interest" (Tr. 98). Mr. Farr is sure that more than 40 hours per week will be required to operate both stations (Tr. 100), and he will work them both "until the work is done" (Tr. 99).[2]

Other Media Interests

23. Neither BBC nor DRA, nor any officer, director, or stockholder in either of them, has any ownership interest in any newspaper, radio or television station, CATV system, or any other medium of mass communication (Tr. 38). BRI is the licensee of KKUB, Brownfield, Texas, a daytime only station. Other than KKUB, Mr. Farr has no ownership in, or control of, any other medium of mass communication (BRI Ex. 1, p. 1).

Conclusions

24. In its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the Commission set forth two primary objectives to be considered in comparing competing applicants: "they are, first, the best practicable service to the public, and second, a maximum diffusion of control of the media of mass communications."

25. Here, BRI is the licensee of an AM station licensed to Brownfield, the city of license of the proposed FM station, whereas BBC has no other media interests. Station KKUB, although a

[2] Mr. Farr gave the following testimony: "I have never run an AM-FM station before. I am not really sure of what hours are necessary" (Tr. 98).

daytime only station, is the only station operating in Brownfield, Texas. BBC's preference under the diversification criterion of the standard comparative issue is clear and substantial.

26. BRI cannot receive credit for full-time participation of its principal, Mr. Farr, in the operation of the proposed station. "Full-time" participation, both in its general acceptation and in its meaning for purposes of the Commission's comparative policies, consists of participation of at least 40 hours per week. *Flint Family Radio, Inc.*, 69 FCC 2d 38, 41 RR 2d 1489 (1977); *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1, 7 (1977), (where the Commission's Review Board characterized 20 hours per week as "approximately one-half of a full-time work week").

27. In his testimony, Mr. Farr made it clear that he could make no specific time commitment to the proposed station. While he proposes some kind of combined operation of KKUB and the new station, Mr. Farr admitted that since he had had no experience with that kind of combined operation, he was "not sure of what hours are necessary" to carry it off. Mr. Farr never promised to devote "full-time," within the intendment of the *Policy Statement*, *supra*, to the operation of the proposed station. His proposal to devote "whatever hours are necessary" is simply too vague to constitute a promise to participate on a full-time basis. *Radio Laredo, Inc.*, FCC 81R-51, 49 RR 2d 1489 (1981); *RAM Enterprises*, 57 FCC 2d 844, 35 RR 2d 1507 (1976). *Larenzo W. Milan*, 6 FCC 2d 198 (1966).

28. Apart from the lack of a specific commitment by Mr. Farr to participate full-time at the proposed station, other evidence points to something less than full-time participation: Farr presently devotes 60–70 hours per week to the operation of KKUB. While he proposes some kind of combined operation of the two stations, he does not know what amounts of time may be necessary to carry on such an operation. This record is devoid of any evidence which indicates that Mr. Farr can and will accommodate both of these stations while devoting 40 hours per week to the new station.

29. There is no doubt that Mr. Farr intends to devote *some* time to the operation of the proposed station; however, the available evidence does not permit a conclusion with respect to how much time that will be.

30. BBC proposes the full-time integration of two of its principals who hold 52 percent of its stock. These persons are Billy B. Reynolds, BBC's proposed General Manager, and Curcy H. Andrews, its proposed Assistant Manager and Program Director. BRI can only be credited with the part-time integration of its principal Mr. Farr. The *Policy Statement*, *supra*, states that:

> "We are primarily interested in full-time participation. To the extent that time spent moves away from full-time, the credit will drop sharply. . . ."

An applicant that proposes no full-time integration cannot be found

quantitatively superior to an applicant proposing 52 percent full-time integration. BRI's integration proposal is decidedly inferior to that of BBC.

31. All integrated principals have broadcast experience, and there is no basis for distinguishing between the proposals on this account. BRI's proposals on this account. BRI's proposal is enhanced by the current local residence and civic participation of its principal; BBC's integrated principals propose to locate in Brownfield, Texas, if BBC is the successful applicant. The qualitative enhancement of BRI's integration proposal cannot overcome the qualitative superiority of BBC's proposal. *Van Buren Community Service Broadcasters, Inc.*, FCC 81 R-73, released September 1, 1981. Because of its superior showing with respect to diversification of control of the media of mass communications, and because of its quantitatively superior proposal for integration of ownership into the management of the proposed station, BBC's application should be granted.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision IS TAKEN by a party, or the Commission reviews this decision on its own motion, in accordance with Section 1.276 of the Commission's Rules,[3] the application of Brownfield Broadcasting Corporation IS GRANTED and the application of Brownfield Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
EDWARD LUTON *Administrative Law Judge*

[3] In the event exceptions are not filed within 30 days after release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Application, Amendment of, After Designation
Application, Amendment of, Change of Ownership
Application, Amendment of, Substantial Changes
Application, Dismissal of, See Also Dismissal
Remand
Transfer of Control, See Control, Transfer of

Review Board remands proceeding to ALJ to allow applicant to amend its application to reflect actual ownership. Applicant at hearing had attempted unsuccessfully to amend its application to report the substitution of new stockholders owning 75% of stock, albeit possessing only 49% voting control. Board found that primary basis (*i.e.*, transfer of control) for ALJ's rejection of amendment and subsequent dismissal) of application was erroneous.

–Chudy B/cing Corporation
BC Docket No. 82–633

FCC 83R-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CHUDY BROADCASTING CORPORATION Stuttgart, Arkansas	BC Docket No. 82–633 File No. BPH-810605AF
RICELAND COMMUNICATIONS, INC. Stuttgart, Arkansas	BC Docket No. 82–634 File No. BPH-811026AL
For Construction Permits for New FM Stations	

MEMORANDUM OPINION AND ORDER

(Adopted: April 14, 1983; Released: April 26, 1983)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Chudy Broadcasting Corporation (Chudy) and Riceland Communications, Inc. (Riceland) for authority to construct a new FM broadcast station at Stuttgart, Arkansas. By *Designation Order*, 47 Fed. Reg. 41624, published September 21, 1982, the applications were

designated for consolidated hearing. During a prehearing conference held on December 22, 1982, presided over by Assistant Chief Administrative Law Judge (ALJ) Thomas B. Fitzpatrick, the ALJ denied a petition for leave to amend filed December 10, 1982 by Riceland, which sought to amend its application to report the substitution of two new stock subscribers for three former stock subscribers. *Order*, FCC 82M-4117, released December 28, 1982. On rejecting the amendment, the ALJ held that Riceland would not be permitted to prosecute its application unless its former ownership was restored and afforded the applicant two weeks to represent to him that its application was again being prosecuted by its original stockholders. Upon subsequent notification by Riceland that it would not revert to its former ownership, the ALJ issued a second order dismissing Riceland's application, granting Chudy's application, and terminating the proceeding. *Order*, FCC 82M-4170, released January 3, 1983. The proceeding is now before the Review Board on appeal filed February 2, 1983 by Riceland to the order dismissing its application and terminating the proceeding. For the reasons stated herein, the Board will grant Riceland's appeal, vacate the orders dismissing Riceland's application and denying its December 10, 1982 petition for leave to amend, and remand the proceeding to the ALJ for further action in accordance with this opinion.

2. In the action below, Riceland attempted on December 10, 1982 to amend its application (originally filed on October 26, 1981[1] and amended once previously on the "B" cut-off deadline of June 1, 1982[2]) to reflect that three of its proposed principals had withdrawn from the application; it tendered to substitute, in lieu thereof, two

[1] Riceland Br., at pp. 1-2. As originally filed, Riceland proposed the following ownership structure:

Name and Residence	*Office*	*Director*	*Stock Held*	*Stock Subscribed*	*% of Ownership*
Mrs. Jeane Wallace Stuttgart, Ark.	President	Yes	3	17	100%
James L. Reinhart Monticello, Ark.	Vice Pres.	Yes	–	–	–
Dr. James D. Lewis Dumas, Ark.	Sec./Treas.	Yes	–	–	–

Chudy Br., at p. 3.

[2] The "B" cut-off date is the procedural deadline for filing (non-"major") amendments to applications previously accepted for filing (as established by the "A" cut-off date). *See* 47 CFR §73.3522(a)(2). Although applications "may be amended as a matter of right" prior to the expiration of the "B" cut-off period, *id.*, such amendments may not include a "major change" to the application or a "transfer of control" of ownership lest the application be removed from the proceeding and returned to the processing line for the assignment of a new file number. 47 CFR §73.3573. *See also Clay Television*, *infra*; para. 7, *infra*.

principals never before associated with the application. Accordingly, the ownership structure of Riceland would be amended:

FROM (as of June 1, 1982)

Name and Residence	*Office*	*Director*	*Shares of Stock Held*	*Shares of Stock Subscribed*
Jeane Wallace Stuttgart, Ark.	Pres.	Yes	0	20
James L. Reinhart Monticello, Ark.	Vice Pres.	Yes	0	20
James D. Lewis Dumas, Ark.	Sec./ Treas.	Yes	0	20
William Lawrence Wheatly, Ark.	–	–	0	20

[Chudy Br., at p. 4]

TO (as of December 10, 1982)

Jeane Wallace Stuttgart, Ark.	Pres.	Yes	0	40
James W. Yancey, DDS Stuttgart, Ark.	Treas.	Yes	0	60
Carl J. Madsen Stuttgart, Ark.	Sec.	Yes	0	60

[Id., at p. 5]

3. Although, under the June 1, 1982 ownership structure, Jeane Wallace would have owned only a 25% stock interest in Riceland (*i.e.*, 20 of 80 subscribed shares), its "B" cut-off amendment was conjoined with certain "Irrevocable Proxies" from the three co-subscribers (Messrs. Reinhart, Lewis, and Lawrence), each giving Wallace the right to vote 7 of their respective shares until 1996. Riceland Br., at p. 4. Thus, the proxies would have allegedly accorded Wallace "voting control" over 41 of the 80 (51%) subscribed shares. Under the amendment tendered on December 10, 1982, Wallace would subscribe to 40 shares of a total of 160 subscribed; however, Riceland's petition for leave to amend indicated that the two proposed new subscribers (Messrs. Yancey and Madsen) would execute "Irrevocable Proxies" identical to the previous proxies, each giving Wallace the right to vote 21 of their respective shares until 1989. *Id.*, at p.5. Thus, the substitute proxies would have allegedly accorded Wallace "voting control" over 82 of the 160 (51%) subscribed shares.

4. Incorporating by reference his oral rulings at an initial prehearing conference held on December 22, 1982[3], the ALJ held that the latest Riceland amendment was impermissible for two reasons: (1) the amendment would have resulted in a transfer of control of ownership within the ambit of 47 CFR §73.3573(b), thus requiring that the application be removed from the instant proceeding and assigned a new file number[4]; and (2) the amendment was not acceptable under 47 CFR §73.3522(b) (formerly §1.522(b)) as not meeting the "good cause" test of the rule as articulated in *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978). Thus, in the *Order* under appeal (FCC 82M-4170), the ALJ dismissed Riceland's application for its failure to restore its prior ownership and to prosecute its application in accordance with the *status quo ante* (*viz.*, as per the actual "B" cut-off deadline ownership structure).[5]

5. Confronting the Board are several questions: First, whether the ALJ was correct in ruling that Riceland's December amendment substituting two (of three) stockholders for three (of four) withdrawing stockholders representing (in both cases) 75% of the stock ownership of the applicant corporation represents a "transfer of control" within the meaning of §73.3573(b), thus necessitating a

[3] *See* Transcript of Initial Prehearing Conference in BC Docket Nos. 82-633, 634 (December 22, 1982) (hereinafter "Tr."). Because the ALJ was ruling on an interlocutory petition (to amend an application), such an oral ruling is permitted under 47 CFR §1.298(b). The ALJ's oral ruling rejecting the December amendment was later incorporated by reference in a written *Order* (FCC 82M-4117, *supra*); his *Order* (FCC 82M-4170) dismissing the application for failure to prosecute under an unamended ownership structure (as noted in para. 1, *supra*) was released on January 3, 1983.

[4] Section 73.3573(b) provides, in pertinent part, that: "A new file number will be assigned to an application for a new station . . . when it is amended . . . so as to result in an assignment or transfer of control." The practical effect of assigning a new file number, of course, would be to preclude Riceland from competing for the instant frequency since its application would no longer be mutually exclusive with Chudy, the cut-off dates for the instant contest having expired. *See* 47 CFR §73.3573(d).

[5] The ALJ's "dismissal" of the Riceland application for failure to restore its prior ownership was a procedural accommodation believed to be necessary, from a technical standpoint, in order to afford appeal rights to Riceland. *See* Tr. 22-23. Had the ALJ not structured his rulings and *Order* in the present fashion and had he merely rejected the tendered December amendment, Riceland—punctiliously speaking—would have had no immediate appeal rights because the ruling on the tendered amendment is interlocutory, hence affording no contemporary right of appeal (47 CFR §1.301).

In this posture, then, Riceland technically appeals only the January 3, 1983 "dismissal" and not the ALJ's December 28, 1982 ruling rejecting its amendment. Riceland Reply at pp. 1-2. Indeed, Riceland asserts that if the Board finds that the ALJ erred with respect to his finding of a transfer of control within the contemplation of 47 CFR §73.3573(b), it would prosecute its application "under the 'fiction' that its stockholders had not changed. . . ." *Id.*, at p. 2 & n.3. Riceland's gesture to prosecute under a fictional ownership is discussed more fully at paras. 10-16, *infra*.

complete refiling by Riceland. Second, and assuming *arguendo* that §73.3573(b) is inapposite, whether Riceland may be permitted to prosecute its application "under the 'fiction' that its stockholders had not changed"[6] or must meet the "good cause" showing for amendments under §73.3522(b) before it may proceed.[7]

6. As to Riceland's appeal that the ALJ erred in finding that its December amendment constituted a transfer of control within the purport of §73.3573(b), the applicant argues that inasmuch as Jeane Wallace retained (by voting proxy) the same 51% voting control (and 25% stock ownership) under both the June 1, 1982 and December 10, 1982 corporate structures, no transfer of control has occurred. The ALJ, relying chiefly on *Press-Union Publishing Co., Inc.*, 7 RR 83 (1951)[8], refused to recognize the voting proxies for §73.3573(b) purposes. Riceland, with considerable force of logic, rejoins that if its June 1, 1982 amendment transferring 75% of its stock from Jeane Wallace (who owned 100% of Riceland as of the acceptance of its application for filing[9]) to Messrs. Reinhart, Lewis, and Lawrence did not constitute an actionable transfer of control—presumably because of the associated voting proxies allegedly giving Mrs. Wallace 51% voting control—then, *pari causa*, its December amendment could have constituted no greater a transfer of control. Riceland further theorizes that inasmuch as its June amendment apparently raised no transfer of control issue (only the standard comparative issue was designated), the ALJ's refusal to recognize its latest voting proxy control arrangement amounts to a rearguing of the *Designation Order* in contravention of *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (1981).[10] From our reading of the transcript of the ALJ's oral ruling, it appears that he believed that even Riceland's June amendment would not now be countenanced under *Clay Television*, *supra*, which was decided after this case was designated for hearing. Tr. 14.

7. After much reflection, and for the reasons which follow, we believe that the ALJ erred in determining that Riceland's December amendment constituted a transfer of control from the ownership structure designated for hearing, a structure based on the amendment of June 1, 1982. As of the June amendment, Jeane Wallace's ownership was reduced from 100% to 25% of Riceland's stock, accompanied by "Irrevocable Proxies" to vote 51% of the total stock;

[6] Riceland Reply, at n. 3.

[7] *See* note 5, *supra* and paras. 10–16, *infra*.

[8] *See* Tr. 12–13. The ALJ also relied upon *Clay Television, Inc.*, 52 RR 2d 406 (1982) for his ruling that an applicant's ownership structure is frozen as to transfers of control (within the meaning of §73.3573(b)) at the time an application is accepted for filing. However, Riceland is correct that, although *Clay* involved a transfer of 50% of Clay's stock, no voting proxies were there at issue.

[9] *See* note 1, *supra*.

[10] Riceland Br., at p. 8.

per the December amendment, Mrs. Wallace would have identical amounts of stock and alleged proxy voting power.[11] Section 73.3573, by its terms, applies only to major changes and transfers of control. The term "major change" is one of art and denotes an alteration of a core condition in an application. Thus:

> A major change for FM stations authorized under this Part is any change in frequency, station location or class of station, or any change in power, antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour.

47 CFR §73.3573(a)(1). A change in ownership, short of a change in "control," cannot be considered on a par with the aforecited "major change" criteria. Moreover, while the Commission's 1951 decision in *Press-Union*, *supra*, refused to accept the proxies there at issue for purposes of forefending a transgression of (then) 47 U.S.C. §310(b) (now §310(d), Pub. L. 93–505, 88 Stat. 1576 (1974))[12], the more recent curve of law would seem to focus on voting control as the condition most critical to our administrative licensing concerns.

8. A most fundamental manifestation of this focus is found in the

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[11] Although the proxies from the three withdrawn stockholders ran until 1996 and the proxies from the two substitute principals would run until only 1989, both contingent on Mrs. Wallace's continued employment, these differences are not significant for current purposes.

[12] In *Press-Union*, the licensee of record had transferred all of its corporate stock to another party (Bethlehems' Globe Publishing Co., Inc.) without prior approval in contravention of §310(b) of the Communications Act. That statute held then (as now, *see* 47 U.S.C. §310(d)) that no station license shall be transferred by virtue of the "transfer of control of any corporation" holding such a license without prior Commission approval. While the transferee in that case, Bethlehems' Globe, executed proxies purporting to revest its rights in the corporate licensee of record, *Press-Union*, until such time as the Commission approved the transfer, the Commission brushed aside the proxies. It did so, in part, apparently, because under the *lex loci* (New Jersey) "the person to whom a proxy runs is merely the agent for the giver thereof and must vote in accordance with instructions given either openly or tacitly by the real owners of the shares." 7 RR at 87 (citations omitted). While the Commission commented that the New Jersey law anent proxies was "true under general law," *id.*, there is no indication in this record as to the current position of the laws of Arkansas; nor does *Press-Union* seem to hold that appropriate voting proxies may *never* be recognized as control mechanisms satisfactory for our licensing purposes. The proxies in the instant case appoint Jeane Wallace to vote the shares of the other stockholders "on any matter, including, without limitation, the call of annual or special meetings of stockholders, the election of directors and upon such other matters as may be presented for action at all annual and special meetings of the shareholders of Riceland Communications, Inc. and at any and all adjournments thereof." *See* Exhibit A to Riceland Amendment to Application.

Commission's seminal multiple ownership rules which inhibit concentration of the media[13]; thereunder, voting control is generally pivotal.[14] Recent case law echoes this perspective. *See, e.g., Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324 (1978) ("ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights"); *accord, Cleveland Television Corporation*, 52 RR 2d 581, 584 (Rev. Bd. 1982); *cf. Grace Missionary Baptist Church*, 80 FCC 2d 330 (1980) (predesignation, post cut-off amendment increasing "voting control" *only* from 24.6% to 100% is a transfer of control). Similarly, in the instance of partnerships rather than corporations, the agency's modern emphasis is on "general" partners, not "limited" partners, the former "exercis[ing] complete managerial control over the business affairs." *Minority Ownership In Broadcasting*, 52 RR 2d 1301, 1306 (1982) (*citing Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981)). It would thus appear that the Commission's current concentration on voting rights and legal control devices transcending simple equity ownership might portend a different result with respect to "irrevocable proxies" than that expressed in *Press-Union*.[15]

9. Because of the ultimate result reached in this appeal, we need not decide definitively whether the latest generation of Commission decisions focusing on voting control as central to our licensing processes has effectively eroded the "rather rigid standard" of *Press-Union*. Suffice it unto this case to say that, in view of the fact the Commission (per the Mass Media Bureau) and Chudy appear to have accepted Riceland's June 1, 1982 amendment without raising a transfer of control roadblock, we believe that the ALJ was too stringent in not accepting the December amendment on a comparable basis. As noted, the June amendment plainly evinced a shift of 75% of Riceland's stock, as did the subsequent December amendment; both were accompanied, *mutatis mutandis*, with proxies purporting to retain a majority voting control in Jeane Wallace. Were we to hold otherwise, we would find ourselves in the delicate position of the ALJ who is charged by Riceland with challenging the

[13] 47 CFR §§73.35, 73.240, 73.636 (rules governing ownership of AM, FM, and TV stations, respectively).

[14] *Id.*, at NOTE[S] 2 & 3.

[15] *But see Long-Pride Broadcasting Co.*, 48 RR 2d 1243 (1980) (*cited at Minority Ownership In Broadcasting, supra*, 52 RR 2d at 1305 n.20) where the Commission denied an IRS Tax Certificate (*see* 26 U.S.C. §1071) to a station purchaser where the acquiring minority entrepreneur owned 45% of the equity coupled with a voting trust over another 10%. The *Long-Pride* Commission perceived voting trusts as having a too "tenuous nature" (48 RR 2d at 1245) to consider the resultant minority interest to be in excess of the requisite 50% minority ownership necessary to justify a tax certificate.

However, *Long-Pride* itself was described in the 1982 *Minority Ownership* statement as erecting "a rather rigid standard." 52 RR 2d at 1305.

Commission's *Designation Order*, *supra*, in contravention of the principle of *Anax Broadcasting Co.*, 87 FCC 2d 483, 486 (1981).[16] Additionally, when, as here, any confusion arises over the emendability of an application and that confusion is, in part, attributable to the action of agency staff, the Commission has declined to dismiss the application. *See, e.g., Clay Television*, *supra*; *Grace Missionary Baptist Church*, *supra*.[17] In view of the foregoing, we believe that it was inappropriate in this particular case to find that Riceland's latest amendment represented a transfer of control from its previous ownership alignment. We therefore vacate the ALJ's January 3, 1983 dismissal and termination.

10. The foregoing disposition, however, does not quell the underlying imbroglio. It will be recalled that the ALJ has also ruled that Riceland had not shown "good cause" under §73.3522(b) for permitting its December amendment.[18] Albeit, Riceland, as noted (*see* note 5, *supra*), does not directly contest the ALJ's rejection of its tendered amendment and states that it is content to prosecute under the "fiction" of its June 1, 1982 ownership structure (*see id.*). In other words, notwithstanding that Riceland represents categorically that its withdrawn stockholders (Messrs. Reinhart, Lewis, and Lawrence) "have no intention of prosecuting the application and that any prosecution that would take place would take place by Ms. Wallace and the two other subscribers to the stock [Messrs. Yancey and Madsen]"[19], it proposes to continue to prosecute the application as though Wallace, Reinhart, Lewis and Lawrence remain Riceland's principals.[20] The ALJ counters that allowing Riceland to proceed

[16] In *Anax*, the Commission reproved an ALJ for dismissing an "application on grounds that were considered by an operating bureau in designating the application for hearing under delegated authority." 87 FCC 2d at 486. Because Chudy did not raise a transfer of control objection to Riceland's June 1, 1982 amendment transferring 75% of its stock, and because no discussion of the stock transfer appears in the *Designation Order* (BC mimeo 006260, released September 13, 1982), it is not certain that the Bureau affirmatively "considered" the question of the efficacy of the proxies and any relationship to 47 CFR §73.3573(b). Hence, it is not clear whether the Bureau's failure to flag the June amendment as a transfer of control reflects a conscious deviation from the *Press-Union* attitude toward voting proxies or is, as the ALJ implies, an inadvertence.

[17] In fairness, it must be noted that the ALJ's January 3, 1983 *Order* under appeal dismissing Riceland's application was preceded by Riceland's refusal to withdraw its December 10, 1982 amendment and to prosecute its application in true conformity with its unamended ownership structure. The ALJ's prior relief allowing Riceland to withdraw its amendment and to proceed *status quo ante* is identical to the relief granted by the Commission in *Clay Television* (*see* 52 RR 2d at 409–10) and *Grace Missionary Baptist Church* (*see* 80 FCC 2d at 337–38).

[18] *See, e.g.*, Tr. 6–15.

[19] Tr. 17.

[20] Riceland Reply, at n.3. Riceland justifies its proceeding under a fictitious ownership structure on the postulate that there would be no "upgrading" over the prior structure(s) since none of the principals other than Ms. Wallace has ever been proposed for management integration credit. *See id.*

into hearing on the basis of a predominately "fictional" ownership structure would decimate the Commission's ruling in *Clay Television, supra*.[21]

11. Despite Riceland's parlous contention that it does not appeal the ALJ's rejection of its December amendment on §73.3522(b) grounds, only his dismissal under §73.3573(b)[22], resolution of the latter issue advances this case not a whit because the ALJ concomitantly ruled that Riceland may not proceed with its application unless it formally amends to reflect its actual ownership structure.[23] Coterminously, the ALJ ruled that Riceland *may not* amend, not having shown "good cause." In order, therefore, to obviate another unavoidable cycle of pleadings, we believe that a Board determination on the ALJ's refusal to permit Riceland to prosecute without formally amending in accordance with §73.3522(b) is inextricable from a decision on Riceland's appeal of the dismissal of its application. We have, in our discussion above, afforded Riceland permission to seek to amend in the manner tendered without triggering §73.3573(b). If, on remand, Riceland refused to amend its application to reflect its new ownership, the ALJ would merely dismiss the application again for failure to prosecute and we would retreat to square one.

12. We wholeheartedly agree with the ALJ that Riceland may not proceed into comparative hearing unless and until it can amend its application pursuant to §73.3522(b) to reflect its new and actual ownership. There have been situations, it is true, where applicants have been permitted to delete withdrawing principals and to amend their applications solely as for notification purposes.[24] Illustrative are *New Continental Broadcasting Co.*, 88 FCC 2d 830, 842–44 (Rev. Bd. 1981) and *Nuance Corporation*, 85 FCC 2d 412, 418 (Rev. Bd. 1981), *review denied*, FCC 81–473, released October 7, 1981. The Board permitted "reporting" amendments reflecting the withdrawal of principals under the circumstances of those cases despite the absence of §73.3522(b) "good cause" showings on the condition that no comparative "upgrading" be registered. *See id.*[25] Riceland pur-

[21] Tr. 15–16.

[22] Riceland Reply, at pp. 1–2; *see also* note 5, *supra*.

[23] Tr. 15–16.

[24] *See* 47 CFR §1.65 requiring the reporting of any decisionally significant change in an applicant's status.

[25] Indeed, in *New Continental*, the applicant's integration credit, which was based, in part, on the proposed participation of the withdrawing principal, was "downgraded" from 100% to 65%. 88 FCC 2d at 843–44. In *Nuance*, the applicant's integration credit was "downgraded" from 12.6% to zero. 85 FCC 2d at 418–19.

The Board's action in those cases, permitting applicants to continue to prosecute their applications only upon a §1.65 notice of withdrawal of a certain principal, was predicated upon its reading of *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Under the *TV 9* model, an applicant may delete a

ports that it would proceed under the same condition since, in its view, the substitution of its two non-integrated principals for the three (withdrawing) non-integrated principals would effect no comparative change.[26]

13. Riceland's reliance on New *Continental* (and/or *Nuance*) is wrong. Although, as explained in note 25, *supra*, applicants there were permitted to delete withdrawing principals, no actual substitution of new principals was involved.[27] Nor did the withdrawing principals therein own a majority of the stock, as do Riceland's. Those decisions merely embrace a realistic accommodation to the fact that, over the years it may take to prosecute an application, various proposed principals may drop out; and the applicant may under circumstances such as those obtaining in those cases, proceed under the "fiction" that the withdrawing principal remains. *See, e.g., TV 9, supra*.

14. We know of no case, however, and Riceland cites none, where an applicant has been permitted to substitute 75% of its stockholders after the application has been processed and designated for hearing, but before the hearing has commenced, and has then proceeded under the "fiction" that its withdrawn majority stockholders are to be compared with the competing applicants'. Moreover, if Messrs. Reinhart, Lewis, and Lawrence are to be "fictionally" considered the 75% stockholders of Riceland, then who are Messrs. Yancey and Madsen? (*See* note 27, *supra*.) Hence, Riceland's offer to proceed on

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withdrawing principal (without a §73.3522(b) showing) upon the twin conditions that: (1) no comparative "upgrading" occur; and (2) any deficiencies of the withdrawn principal continue to be counted against the applicant just as if the principal remained.

Consequently, were we to take Riceland's lead and apply the *New Continental/Nuance* model to the instant case, there would need to be an examination of the withdrawn principals (Messrs. Reinhart, Lewis, and Lawrence) despite the fact that it is stipulated even before the hearing has begun that the latter three absolutely will not be associated with the applicant. Tr. 17.

[26] Chudy disputes Riceland's claim that the withdrawal of Messrs. Reinhart, Lewis, and Lawrence would effect no comparative change. It asserts that these three, in addition to previously guaranteeing Riceland's $150,000 bank loan (a guarantee rescinded upon their withdrawal), are principals in an application for a new FM station in Mountain Home, Arkansas. Chudy Opposition, at pp. 3–6.

[27] Only extraordinary circumstances permit the substitution of new principals. *Compare, e.g., Mid-Florida Television Corp.*, 76 FCC 2d 158, 163 (1980); *Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248–50 (1978); *Azalea Corp.*, 38 FCC 2d 95 (Rev. Bd. 1972) (applicants in those cases permitted to substitute new principal for deceased principals so long as no "upgrading" occurs), *with Birmingham Family TV, Inc.*, 91 FCC 2d 348 (Rev. Bd. 1982) (substitution of voluntarily withdrawn principal impermissible). Thus, we are flummoxed by Riceland's offer to proceed under the "fiction" that it is owned by its three withdrawn principals: does this concomitantly mean that the Commission is to *ignore* its new and true principals? Or, does Riceland intend that it be compared on the basis of both its substitute *and* its withdrawn princpals representing 150% of the stock?

the "fiction" of its withdrawn ownership in the manner of *New Continental* is sophistic. To countenance Riceland's proposal would, as Chudy maintains, "wreak havoc on the administrative process"[28] and competely eviscerate §73.3522(b) and the cardinal purpose of that rule. Moreover, although *Clay Television, supra*, involved a change of ownership structure constituting a transfer of control—a premise we have found not to be equitable under the circumstances of this case—the Commission's *ratio decidendi* therein for disallowing the late substitution of ownership interests is relevant here. There, the Commission noted that all applicants are required to give public notice of their applications and their ownership interests (*see* 47 CFR §73.3580) so that the public or prospective competing applicants can comment, *inter alia*, on the applicant's qualifications; it said[29]:

> The Commission has often stated that ownership interests in an applicant or significant changes thereof may be indicative of the type and quality of service provided and should, therefore, be accompanied by an opportunity for persons in the affected community to react, either by filing competing applications or petitions to deny . . . .

To allow Riceland to substitute two new principals (holding a 75% stock share) at this point, and to proceed on a predominately "fictional" ownership structure, would similarly undermine §73.3580 and the public notice safeguards inherent therein.

15. For these reasons, we affirm that Riceland may not proceed to prosecute its application without amending in conformance with the requirements of §73.3522(b), the very purpose of which "is to secure the most expeditious disposition of hearing cases by freezing proposals of the applicants, thereby delineating the scope of hearing and permitting adequate preparation and presentation by all the parties." *Belo Broadcasting Corp., supra*, 68 FCC 2d at 1320.[30] In *Belo*, the Commission required a §73.3522(b) "good cause" showing for a prehearing amendment and declared:

> This theme of orderliness was recently repeated in our *Report and Order on Adjudicatory Re-Regulation Proposals*, 58 FCC 2d 865, 871 (1976), wherein we stated that applications should be fixed prior to designation to the extent possible. *A fortiori*, the application should be finalized in advance of the start of the actual hearing.

Id. It reiterated that applicants compelled to amend under §73.3522(b) must meet the test specified in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). *Cf. Birmingham Family TV, Inc., supra*, 91 FCC 2d at 351–52. Here too, Riceland

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[28] Chudy Opposition, at p. 9.

[29] 52 RR 2d at 409.

[30] As Chudy observes (Chudy Opposition, at p. 10), the discovery phase of the instant proceeding has expired; discovery is, obviously, important in assuring "adequate preparation and presentation."

must comply with the rules and established legal standards and amend its application to reflect its actual ownership or it may not go on.

16. In that connection, we recognize that the ALJ has already ruled that Riceland has not made a "good cause" showing under §73.3522(b) and has rejected its amendment therefor.[31] Upon reviewing the prehearing conference transcript, we are inclined to agree with the ALJ in that respect and might safely affirm that ruling, *sua sponte*. Nonetheless, the entire conference discourse is suffused with the premise that Riceland's December amendment constituted a transfer of control. And, while we have held that Riceland must submit to §73.3522(b) in the absence of a transfer of control (which transfers are governed by §73.3573(b)), it is somewhat unclear from the record that Riceland did not recede from its "good cause" burden on its theory that, if a transfer of control had not taken place, it could proceed to (and through) hearing based on its "fictional" ownership schema. For this and other reasons[32], we will also vacate the *Order* of December 28, 1982 rejecting Riceland's amendment and remand this proceeding to the ALJ to permit Riceland ten (10) days from the release of our *Order* to attempt to amend under the test of §73.3522(b). Should Riceland be found unable to meet the "good cause" test for amending to reflect its new and true ownership, its application should be dismissed forthwith for failure to prosecute in accordance with its application. *Cf. Clay Television*, *supra*.

17. ACCORDINGLY, IT IS ORDERED, That the Riceland Communications, Inc. Appeal from Order Dismissing Application and Terminating Proceeding, filed February 2, 1983, IS GRANTED, and FCC 82M-4170, released January 3, 1983, IS VACATED, and that on the Board's own motion, Order FCC 82M-4117, released December 28, 1982, denying Riceland's December 10, 1982 petition for leave to amend IS VACATED; and

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[31] *Order* (FCC 82M-4117), *supra*.

[32] Acknowledging that Riceland, on this record thus far, has not demonstrated the requisite "good cause" for amending, we may not be entirely in agreement with the ALJ's oral bases for rejection. For example, while "due diligence" is a prerequisite for permitting a postdesignation amendment, *Belo Broadcasting*, *supra*, 68 FCC 2d at 1320, the ALJ may have been overly hasty here in finding a lack of "due diligence" (*see* Tr. 8). According to the transcript, the parties had been engaged in settlement negotiations after the September 13, 1982 designation (*id.*, at 2); if it turns out that Riceland tendered its amendment shortly after the negotiations broke down, then the question of diligence may become rather relative.

Without intimating that the "due diligence" test has, in fact, been met, we suggest a possible reappraisal of that element so long as we are permitting Riceland the opportunity of an unalloyed §73.3522(b) showing.

18. IT IS FURTHER ORDERED, That this matter IS REMANDED for further proceedings in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL *Member, Review Board*

Anti-Competitive Practice, Common Carrier
Common Carrier Interconnection
Competition, Unfair
Deregulation
Equipment, Customer Owned
Information

Petition for declaratory ruling granted to an extent and otherwise denied. Section 64.702(d)(2) of the Commission's rules is construed to require AT&T to publicly disclose information about the basic network which could be useful in the provision of customer premises equipment or enhanced services at the same time it discloses that information to, or for the benefit of, American Bell Inc.
–Computer/Business Manufacturers Assn.

FCC 83-182

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Computer and Business Equipment Manufacturers Association Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and the Policies of the Second Computer Inquiry	ENF-82-5

REPORT AND ORDER

(Adopted April 27, 1983; Released May 9, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

I. *Introduction*

1. In the Second Computer Inquiry,[1] the Commission limited

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petitions for cert. filed* (Nos. 82-1331 and 82-1352), 51 U.S.L.W. 3676 (U.S. February 9 and 10, 1983).

common carrier offerings to provision of basic transmission capacity. Only basic communications services are subject to traditional common carrier regulation. Enhanced services and customer premises equipment (CPE) are not common carrier offerings and are not regulated under Title II of the Communications Act. CPE and enhanced service providers may, however, utilize common carrier facilities as essential components in their service offerings. Common carrier facilities must, therefore, be available on a nondiscriminatory basis to carriers and non-carriers alike to support the competitive provision of enhanced services and CPE.

2. In the *Final Decision* the Commission required that the American Telephone and Telegraph Company (AT&T) establish a separate subsidiary to participate in the unregulated enhanced services and customer premises equipment (CPE) markets. In order to prevent AT&T from using its position in the regulated basic services market to gain an anticompetitive advantage in unregulated markets, the Commission adopted rules imposing certain restraints on the relationship between AT&T and its separate subsidiary, American Bell Inc. Among others, in the *Final Decision* the Commission adopted a rule requiring public disclosure of " . . . all information relating to network design and technical standards and information affecting changes to the telecommunications network which would affect either intercarrier interconnection or the manner in which customer-premises equipment is attached to the interstate network. . . . " 47 C.F.R. §64.702(d)(2) (1981) (hereinafter "disclosure rule"). Specifically, AT&T must disclose this information at the same time and under the same terms and conditions that it is disclosed to AT&T's separate subsidiary. The purpose of the disclosure requirement is to ensure that AT&T does not confer an anticompetitive advantage on its subsidiary's provision of enhanced services or CPE through the parent carrier's control of common carrier facilities.

3. As AT&T prepared to establish its new subsidiary and to begin offering unregulated services and products, questions arose as to what the disclosure rule actually requires. On April 16, 1982, the Computer and Business Equipment Manufacturers Association (CBEMA) filed a Petition for Declaratory Ruling asking the Commission "to remove existing uncertainty with regard to the obligations imposed on the American Telephone and Telegraph Company (AT&T) under the 'information flow' proscriptions adopted in the Commission's *Second Computer Inquiry*, as they are embodied in §64.702(d)(2) of the rules."

4. In an order rejecting AT&T's proposed Bell Packet Switching Service (BPSS) tariff,[2] the Commission requested comments on the

[2] The Bell Packet Switching Service was intended by AT&T to aid in providing basic network support for its new Advanced Communications Service (ACS), now called

requirements of the disclosure rule and directed the Common Carrier Bureau staff to review the rule and report to it on any clarifications which might be necessary. *American Telephone and Telegraph Company*, 91 FCC 2d 1, paras. 35–37 (1982) (*BPSS Tariff Order*). Comments and reply comments have been filed pursuant to that order. In addition, the staff has met with representatives of the industry to discuss their needs for access to network information on the one hand and, on the other hand, their needs for confidentiality regarding their business planning processes.[3]

5. Based on the information thus developed, the Commission endeavors in this order to clarify the requirements of the disclosure rule in several respects. First, what type of information must be disclosed? Second, under what circumstances and when is a public disclosure of network information required? Third, in what manner should the required disclosures be made?

6. The primary focus of this order is the specific obligation imposed by §64.702(d)(2) of the Commission's rules on carriers subject to the Computer II separate subsidiary requirement—at present only AT&T.[4] In focusing on AT&T in this order, however, we do not intend to minimize the importance of the general disclosure obligations which apply to all carriers. All carriers, the Commission found, have the ability to hinder competition by withholding information regarding their basic networks. *Reconsideration*, para. 95. All carriers, therefore, have certain obligations reasonably to disclose information regarding their basic transmission facilities and services to all on an equal basis. This general obligation is independent of whether the carrier has made any disclosures to a separate subsidiary formed to provide enhanced services or CPE or, indeed, whether a carrier is subject to the Computer II separate subsidiary requirement. All carriers are obligated to make information necessary to intercarrier interconnection as well as interconnection and operation of CPE and enhanced services available in a timely manner and on a reasonable basis. *See* 84 FCC 2d at 82.

7. Furthermore we note that the Computer II information disclosure requirements are not the only disclosure requirements which apply to carriers. First, all telephone companies, including AT&T, are bound by the requirements of §68.110(b) of our rules with

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Advanced Information Service/Net 1000, an enhanced service presently being offered by American Bell Inc. The BPSS tariff was rejected on the grounds that prior approval of the proposed facilities under §214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, was required before a tariff could be considered.

[3] All parties commenting in this proceeding were made aware that these meetings were taking place and were invited to participate. Notes summarizing the discussions held are available for public inspection at the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

[4] The Commission is presently considering whether the divested operating companies' CPE operations should be subject to any structural separation requirements. Notice of Proposed Rulemaking, FCC 83-71, released March 4, 1983.

respect to disclosure of changes in telephone network interface specifications. That rule requires notice sufficient to enable subscribers to maintain service uninterrupted in the event of network design changes, a requirement which obviously includes advance notice to equipment manufacturers to ensure that they will be able to produce on a timely basis new equipment which will conform to specification changes, appropriate modifications to existing equipment, or additional equipment which might be used with existing deployed equipment.

8. Second, upon implementation of the Modification of Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Co.*, Civ. Nos. 74–1698 and 82–0192, 47 Fed. Reg. 40,392 (D.D.C. 1982), *aff'd sub nom. Maryland et al. v. United States*, Nos. 82–952, 82-953, 82–992 and 82–1001, 51 U.S.L.W. 3628 (U.S. March 1, 1983), the divested Bell Operating Companies (BOCs) will be required not to discriminate in: the establishment and dissemination of technical information and procurement and interconnection standards; interconnection and use of the BOCs' telecommunications service and facilities; and provision of new services and the planning for and implementation of the construction and modification of facilities used to provide exchange access and information access. MFJ, §II.B. In many circumstances, changes which AT&T might wish to make, or new services which it might wish to offer, will require correlative changes or new offerings by the BOCs. If AT&T and the BOCs engage in any discussions of this nature, it would appear that the BOCs will be required to disclose to the public information related thereto as a consequence of the requirements of the MFJ. Thus, wholly apart from disclosure obligations which we might impose, disclosure is required pursuant to the MFJ.

II. *The Disclosure Rule as Presently Articulated*

9. In the *Final Decision* the Commission stated:

> Another area of significant concern involves the exchange of information between the separate subsidiary and other affiliated entities. There is little doubt that AT&T and GTE would able to confer a significant competitive advantage on their separate subsidiaries and further extend their market power, if the subsidiaries are provided access to certain information that is not equally available to other vendors of enhanced services or CPE.
>
> In this regard there are three areas of information flow which deserve attention. The first type of information is that which AT&T and GTE possess by virtue of their control over communication facilities essential to the nationwide transmission of information. Within this category falls information relating to network design and technical standards, including interface specifications, information affecting changes which are being contemplated to the telecommunciations network that would affect either intercarrier interconnection or the manner in which CPE is connected to the interstate network, and information concerning construction plans. This type of information must be disclosed to the public by AT&T and GTE. Moreover, when it is disclosed to an enhanced services or CPE

separate subsidiary, such information must be disclosed to competitors of the subsidiary at the same time and under the same terms and conditions.[5]

10. The Commission formalized this policy in §64.702(d)(2) of its rules which states:

> (d) A carrier subject to the proscriptions set forth in paragraph (c) above [the separate subsidiary requirement]:
>
> • • •
>
> (2) shall disclose to the public all information relating to network design and technical standards and information affecting changes to the telecommunications network which would affect either intercarrier interconnection or the manner in which customer premises equipment is attached to the interstate network prior to implementation and with reasonable advance notification. When such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions;. . . .

11. On reconsideration, the Commission extended the disclosure requirement to all carriers owning basic transmission facilities. The Commission stated:

> [I]t is clear that carriers providing basic network service, whether they must enter a competitive market through a separate subsidiary or not, have the incentive and ability to withhold information to the detriment of competition and the communications ratepayer in that competitive market. Therefore we will extend to all carriers owning basic transmission facilities the requirement that all information relating to network design be released to all interested parties on the same terms and conditions, insofar as such information affects either inter carrier interconnection or the manner in which interconnected CPE operates.

Reconsideration, para. 95.

III. *CBEMA's Petition for Declaratory Ruling, Comments and Pleadings*

12. On April 16, 1982, CBEMA filed its Petition for Declaratory Ruling "to remove existing uncertainty" regarding the Commission's disclosure rule. CBEMA stated that AT&T's capitalization plan for its new subsidiary being formed pursuant to Computer II to offer enhanced services (American Bell Inc.) and its Bell Packet Switching Service tariff (Transmittal No. 13966) clearly presented the question of the extent of AT&T's obligations under §64.702(d)(2).

13. AT&T has construed its disclosure obligations regarding BPSS very narrowly.[6] AT&T claims that §64.702(d)(2) applies only to disclosures made to the fully separated subsidiary formed pursuant

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[5] Final Decision, paras. 245 and 246. The second and third information flow areas mentioned by the Commission were information flowing from joint research and development and customer proprietary information. Final Decision, paras. 247–49. On reconsideration, the Commission excused GTE from the separate subsidiary requirement. Reconsideration, para. 71.

[6] AT&T's arguments, summarized in this paragraph, are found in its "Opposition" and "Responses", both filed February 19, 1982, and in its "Reply Comments," filed March 25, 1982, all filed in connection with the Commission's consideration of

to Computer II. Since it had not yet established that subsidiary, AT&T argues, no disclosures regarding BPSS were actually required. In any case, AT&T continues, it in fact made all disclosures which §64.702(d)(2) required by releasing in September 1981 a Bell System Technical Reference titled "Preliminary Bell System Data Communications Protocol Standards—Technical Reference, X.25 Interface Specification" (the Preliminary Technical Reference). AT&T maintains that this document contains all information necessary to interconnect with BPSS and all information contemplated by the disclosure rule.[7] In addition, AT&T argues, had any of its competitors inquired, they would have been given "the same limited information given to ACS business planners." AT&T Reply, p. 52. This information, AT&T states, was given to ACS planners in the course of "preliminary developmental discussions" which are conducted with all customers interested in obtaining a service not currently offered by AT&T.

14. CBEMA argues in its Petition that the Commission's *Reconsideration* of Computer II clearly extended the disclosure obligation to all carriers owning basic transmission facilities, regardless of whether they are subject to the separate subsidiary requirement. In CBEMA's view, AT&T has been subject to the rule since the *Reconsideration*, and the rule is not limited to disclosures made to AT&T's affiliate. Furthermore, CBEMA states, the publicly-released Preliminary Technical Reference does not include all information which must be disclosed under the rule. It does not include several critical elements regarding the rate and service structure of BPSS. Information regarding rates and the nature of the offering, CBEMA states, is particularly important in the BPSS case since the service is not a "network service" offering with low threshold entry levels, but an expensive packet switch dedicated to the individual subscriber. The Preliminary Technical Reference alone, CBEMA adds, might have led small enhanced service providers and other interested parties to believe that a more widely useable shared network service with a rate structure based on usage was to be offered. AT&T's planners for ACS, CBEMA continues, had a general knowledge of the BPSS pricing structure before March 1, 1982, the date the BPSS tariff was filed; indeed, such information was essential to preparation of AT&T's November 30, 1981 Capitalization Plan for American Bell.

15. Furthermore, CBEMA states, not all network interface information was disclosed in the Preliminary Technical Reference. It claims that the size and capacity of the switches, the transmission speeds for access to BPSS ports, the distinct call set-up capabilities of

AT&T's capitalization plan (filed November 30, 1981) for its subsidiary being formed to offer enhanced services.

[7] Opposition, p. 18; Responses pp. 3–4; Reply, pp. 49–50.

the two switch types, and the various software functions offered with each type of switch were not described. Much of this information and possibly more, CBEMA alleges, was available to AT&T's ACS service planners.

16. In addition, the Technical Reference was clearly labelled "PRELIMINARY". CBEMA argues that no independent manufacturer would invest resources on the basis of a seemingly tentative commitment by AT&T; AT&T was obligated under §64.702(d)(2) to disclose its commitment to use of the interface promptly after that commitment was disclosed to AT&T's ACS service developers. CBEMA concludes that it is necessary for the Commission to clarify which types of information are subject to the disclosure rule, when disclosure is required and how it will deal with violations.

17. AT&T filed an Opposition to CBEMA's Petition on April 29, 1982. CBEMA responded on May 14, 1982. In addition, the Association of Data Processing Service Organizations, Inc. (ADAPSO) and the Independent Data Communications Manufacturers Association, Inc. (IDCMA) filed comments supporting CBEMA's request for a declaratory ruling.[8]

18. In the *BPSS Tariff Order*, the Commission responded to CBEMA's Petition and again considered the disclosure rule. The Commission rejected AT&T's very narrow interpretation of its disclosure obligations, stating:

> In our judgment, the language in the rule, "all information relating to network design," should clearly be given a broader interpretation than AT&T has given it. For example, technical interconnection information can be interpreted to include all information necessary to build equipment or systems which can be interconnected. Furthermore, "information relating to network design" can be interpreted to include performance data, including such factors as the capacity of the system, data speeds and the number of circuits available. Finally, information regarding deployment—the geographic availability, of the system, when it will be available, and how much it will cost—could also be included in the disclosure requirement.
>
> This issue has significance beyond this BPSS tariff proceeding. Full compliance with our disclosure requirement is essential to our regulatory goal expressed in the Computer II decisions of encouraging maximum utilization of the basic network. The disclosure obligation applies to all carriers owning basic transmission facilities, not just AT&T. It applies, and has applied since the *Reconsideration Order*, regardless of whether any separate subsidiary requirement is also imposed. The clear target of the rule is any incentive which carriers owning basic transmission facilities might have to hamper competitors and thereby impede full utilization of the network by withholding information about the network. Our intent is to encourage full utilization by ensuring that all potential users have, on an equal basis, sufficient information to enable them to plan to use the network.

BPSS Tariff Order, paras. 35–36 (footnote omitted).

19. The Commission instructed the Common Carrier Bureau

[8] AT&T moved to strike these latter pleadings as not permitted by the Commission's rules. This motion has been rendered moot, however, by the Commission's later actions requesting comments from anyone interested in the issues.

staff to review industry practices (including AT&T's practices) regarding service development, to determine whether modifications of AT&T's disclosure procedures are necessary in order to comply with the Computer II disclosure rule, and to report to it on the results of that review and any clarifications to the disclosure rule which the review suggests are necessary. Interested parties were invited to comment on these issues.

20. AT&T, CBEMA, ADAPSO, IDCMA and GTE Telenet Communications Corporation (Telenet) responded to the Commission's request with comments filed September 23, 1982. AT&T states that, at present, it releases network information "in a timely manner" through Technical Reference documents, tariff filings, technical journals and in presentations at trade conferences. AT&T states that network information relates both to network interfaces and to price and availability of network services. It includes "network design, interfaces and standards; construction plans; and descriptions of new network services and their capabilities, operations, prices, features, performance characteristics, and objectives." AT&T Comments, 7. Bell System Technical References such as the Preliminary Technical Reference regarding the X.25 standard, AT&T states, contain all information necessary to produce equipment and services compatible with any new network capability. AT&T's timing of release of Technical References is based on three factors: (1) the developmental stage of the new interface described—a Preliminary Technical Reference will be published after the design of the new interface is relatively stable; (2) the complexity of the interface—the greater the complexity (or newness) of the interface the more lead time is necessary for CPE or enhanced service development; and (3) business considerations—since CPE manufacturers and enhanced service vendors might spend considerable resources in response to the publication of a Technical Reference, the references are not released until "there is a high probability that the capability will be deployed in the network." *Id.*, 10–12. Each timing situation is different, AT&T states, and, therefore, each carrier must remain solely responsible for determining when network information is released to the public.

21. AT&T goes on to list potential anticompetitive effects of "premature release" of network information. Furthermore, AT&T states, growth of competition in telecommunications as well as the divestiture of the Bell Operating Companies (BOCs) will operate to motivate all carriers to release information as early and as fully as possible. This motivation will be balanced by a competing desire to avoid signalling plans earlier than necessary. As a result, AT&T states, natural market forces will assure that disclosures are made at the appropriate time.

22. In its comments, CBEMA outlines the typical practices of common carriers in developing new basic transmission services, beginning with discussions as to feasibility and market need and

ending with offering of a new service. The pattern CBEMA describes is based on AT&T's past practices. The pattern varies from company to company and from case to case within a company. Manufacturers and vendors will not usually commit significant resources to development of equipment or services to be used with a new network capability, CBEMA states, until the carrier has made a commitment to move forward with that capability. CBEMA describes the development of AT&T's X.25 interface specification for BPSS as an example of the uncertainty which can result from a carrier's lack of public commitment to a service specification. CBEMA also expresses concern with American Bell's ability to gain an informational advantage under the "guise" of engaging in "preliminary" or "developmental" discussions with AT&T.

23. Telenet notes the natural tension between a carrier's desire to apprise potential customers of new services early and its desire for secrecy to forestall competitors from rushing to market cheaper or superior equivalent services. Telenet expresses concern about the competitive problem which might be created by premature publicity concerning future service offerings: one company's potential customers may be deterred from purchasing products or services in anticipation of another company's announced future offerings. Telenet proposes supplementing the existing disclosure rule with a requirement that American Bell be precluded from using a new AT&T service for a certain period of time, substantially longer than the 90-day tariff filing period, following the required public disclosure.

24. IDCMA comments that the Commission should interpret the disclosure rule so that independent CPE suppliers have the same information at the same time as affiliated CPE suppliers. IDCMA points out that AT&T might evade the disclosure rule by making disclosures to its affiliates (Bell Telephone Laboratories (BTL) and Western Electric Company (WECo)) who then develop equipment which will later be sold by American Bell, but without any disclosures ever having been made to American Bell. IDCMA seeks an interpretation of the rule which would prevent this sort of tactic. ADAPSO notes the same problem in its comments.

25. AT&T, CBEMA, IDCMA, MCI Telecommunications, Inc. (MCI) and Tymnet, Inc. filed reply comments on October 7, 1982. AT&T repeated its view that with divestiture of the BOCs and development of competition in the industry, natural incentives for timely disclosures would develop. "Forced premature disclosure" could discourage innovation, put carriers at risk of violating the antitrust laws by "preannouncing" services, and inhibit carriers in responding to their customers' needs.

26. CBEMA disputes AT&T's argument that timing of disclosures should be left to the discretion of the carrier, and that the natural incentives arising out of the balance between the need to

inform potential customers of network developments and the countervailing interest in concealing new service developments from competitors would compel disclosure at the proper time. CBEMA agrees with Telenet that where a carrier has as a customer for any new product or service a wholly-owned subsidiary, those incentives will be distorted. In that case, concealment from competitors, including competitors of the subsidiary, will be the dominant incentive. CBEMA points out that this perverse incentive applies not only to AT&T but to all basic service carriers which also participate in competitive markets. CBEMA concludes that §64.702(d)(2) should be construed to require concurrent public disclosure of *any* network-related information, no matter how preliminary or seemingly trivial, which is disclosed by the carrier to, or for the benefit of, its enhanced services or CPE provider.

27. IDCMA suggests that the Commission clarify that the disclosure rules apply not only to *interconnection* information, but also to information necessary to the *interoperation* of CPE with the network. Tymnet proposes that ABI be barred from using a new or expanded AT&T service for a period of eighteen months following public disclosure or until a competitor of ABI in the provision of enhanced services actually offers a service to the public based on the new or expanded network service, whichever is shorter.

28. MCI argues that application of the disclosure rule to "non-dominant" carriers could have anticompetitive results. It argues that although additional controls regarding disclosure of network information should be devised and applied to AT&T and American Bell, they should not be extended to MCI or other carriers without market power. Those "non-dominant" carriers, MCI argues, have no incentive to disclose information on an anticompetitive, selective basis. If they are forced to disclose potential offerings "before the time which would be dictated by the forces of the marketplace, the dominant competitors could use that information to ensure that the new offering would not be successful."

IV. *Discussion*

29. Our examination of the record leads us to conclude that further clarification of §64.702(d)(2) of our rules is desirable. We do not agree with AT&T that divestiture of the Bell Operating Companies (BOCs), expected in early 1984, will solve all problems in the operation of the disclosure rule. The former BOCs, AT&T claims, will have every incentive to provide CPE manufacturers and enhanced service providers all of the information necessary to interconnect with the AT&T intercity network since BOC facilities must be used, too. Upon divestiture, however, although the BOCs may control the point of access to the network for providers of CPE or enhanced services, in many cases the characteristics of the intercity network rather than those of the local loop will determine

whether a given enhanced service or CPE product will operate properly. In addition, AT&T itself may be able to provide local distribution facilities for use in conjunction with its interstate and interexchange services. Public disclosure of information regarding the intercity network by AT&T will continue to be necessary even after divestiture of the BOCs.

30. Accordingly, we shall interpret and clarify our network information disclosure requirements with respect to: (a) What kinds of information must be disclosed? (b) When is a disclosure required? (c) In what manner should the disclosure be made?

A. *Information subject to disclosure.*

31. As part of this clarification it is helpful to review at the outset the rationale underlying our adoption of the Computer II disclosure rule for network information. In Computer II the Commission required that enhanced services and CPE be provided on a competitive basis. The Commission proceeded on the premise that the common carrier transmission pipeline would be a ubiquitous common element in enhanced services. Competition among enhanced services would occur through the computer processing applications offered to customers through equipment attached to the basic network. It was apparent that a primary factor in the development of enhanced services on a competitive basis would be the ability of all enhanced service vendors to obtain and utilize common carrier transmission facilities on a non-discriminatory basis. With respect to CPE the Commission recognized that innovations in computer technology were rapidly bringing new types of CPE into the marketplace, and that future CPE might involve interaction with new or different network capabilities resident in carriers' basic transmission facilities.

32. As a result of Computer II we expected greater carrier participation in new, nontraditional enhanced service and CPE markets. Even though our policy was to deregulate these activities, even when engaged in by carriers, it was evident that nondiscriminatory access to and use of common carrier transmission facilities was essential to the competitive provision of enhanced services and CPE. It was incumbent upon us, therefore, to ensure that carriers would not distort the continued competitive provision of enhanced services and CPE by virtue of their control over the underlying basic transmission facilities. We therefore adopted the requirement that carriers disclose information with respect to their transmission networks to promote equal access to these networks by all enhanced service and CPE vendors.

33. The disclosure rule seeks to ensure the compatibility and utility of enhanced service and CPE offerings with a carrier's network. It seeks to ensure that all CPE and enhanced service vendors have the opportunity to utilize network services and

network capabilities for their enhanced services and CPE offerings in the same way.[9]

34. The purpose of the disclosure rule is to assure American Bell and its competitors equal access to the capabilities of AT&T's common carrier network. At a minimum, therefore, AT&T must disclose any network information which is necessary to enable all enhanced service and CPE vendors to gain access to and utilize and to interact effectively with AT&T's network services or capabilities, to the same extent that American Bell is able to use and interact with those network services or capabilities. This means that information about the network which AT&T discloses to American Bell and which reasonably could be expected to be relevant to the provision of CPE or enhanced services must be disclosed to the public.[10] The disclosure requirement also encompasses network information which is relevant to the competitive provision of CPE or enhanced services and which AT&T's research and manufacturing affiliates rely on for the benefit of American Bell, regardless of whether such information is actually disclosed directly to American Bell.[11] In this way AT&T's common carrier transmission facilities and network services and capabilities will remain a common element for all enhanced services and CPE offerings.

35. Some parties desire access to a broad range of technical information concerning AT&T's network beyond that which has been disclosed to, or for the benefit of, American Bell. As we have indicated in paragraphs 6–8 above, however, there are mechanisms other than the Computer II disclosure requirement which require disclosure of network information. For purposes of addressing our Computer II concerns we need not go beyond assuring that all enhanced services and CPE vendors are provided the opportunity to utilize common carrier facilities in the same manner as American Bell. While there may be instances where American Bell gains

[9] AT&T distinguishes between a "network capability" and a "network service." AT&T defines a "network capability" as, "a technical development, in hardware or software, which offers a class of features (e.g., direct signalling on CCIS network)," and a "network service as, "a package of features offered to customers; may use all of parts of one or more network capabilities, configured in a specific way (Calling Card Service, Expanded 800)."

[10] Because American Bell is in the business of providing CPE and enhanced services, there is a strong presumption that any network information disclosed to American Bell is relevant to the provision of CPE or enhanced services. We are not, however, adopting the proposal made by some parties that all information, no matter how trivial, relating in any way to the network must be publicly disclosed if it is disclosed to American Bell. Although this standard has a certain simplicity, it could, if adopted, result in inundating the market with large amounts of irrelevant "information." In addition, it might preclude certain joint activities which the Commission has specifically permitted, for example, research and development.

[11] As discussed below, the timing of public disclosure may vary depending on the circumstances.

special knowledge of network design or technical characteristics through such mechanisms as employee transfers and joint research and development, we would view it as a substantial violation of our disclosure rule if American Bell's CPE or enhanced service offerings were able to interact with AT&T's common carrier facilities in a unique or special way not generally made available or known to other vendors.

36. In order to implement this requirement, AT&T must publicly disclose information disclosed to or for the benefit of American Bell concerning network design, technical standards, interfaces, or generally, the manner in which interconnected CPE or enhanced services will interoperate with AT&T's network.[12] The information disclosed to the public must be sufficiently broad in scope and defined in detail to permit offerors of CPE and enhanced services to design services and equipment which will be completely interoperable with the basic network. The information required includes, for example, (a) circuit quality (transmission speeds, error rates, bandwidths, equalization characteristics, attenuation, transmission delays, quantization effects, non-linearities etc.); (b) performance specifications for switched systems (connection times, queuing delays, blocking probabilities, etc.); and (c) network protocols (message formats, requirements for synchronizing bits, error detection and correction procedures, signalling procedures, etc.). These lists are offered as examples of the disclosures required and not as limitations. The disclosure requirement encompasses the information necessary to enable all users to gain access to and use common carrier facilities, services and capabilities in the same manner and on a non-discriminatory basis. It encompasses new designs or design changes in basic network facilities which might affect CPE or enhanced service operation.

37. In addition to information relating to network design and technical standards, additional information which relates to commitments of the carrier with respect to the timing of introduction, pricing, and geographic availability of new network services or capabilities is subject to disclosure. This type of information is subject to the disclosure requirement if it is directly disclosed to American Bell or, even if no direct disclosure is made, if affiliated research or manufacturing affiliates rely on such information in the creation of new products or services for the benefit of American Bell.

38. Finally, in the absence of a disclosure to or for the benefit of American Bell, AT&T, like other carriers, is under the general obligation described above (paras. 7–8) to disclose, reasonably in advance of implementation, the information described previously regarding any new service or change in the network.

[12] To the extent that classified national security information is involved, this obligation is, of course, overlaid by regulations governing the dissemination of classified information. See, e.g., 18 U.S.C. §798, 50 U.S.C. §783, 47 U.S.C. §154(j) and 32 C.F.R. Subtitle A.

B. *When is a disclosure required?*

39. We are concerned here with the timing of disclosure, identifying those events and circumstances under which a public disclosure of network information is required. The Commission has made the following statements as to when a public disclosure is required:

> . . . prior to implementation and with reasonable advance notification. When such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions. §64.702(d)(2).

> . . . when it is disclosed to an enhanced services or CPE separate subsidiary, such information must be disclosed to competitors of the subsidiary at the same time and under the same terms and conditions. *Final Decision*, para. 246.

40. In clarifying this requirement we must consider four cases: first, where AT&T discloses information about the existing or planned network directly to American Bell; second, where network information not generally available to the public is used, without American Bell's knowledge, by BTL and Western Electric, AT&T's research and manufacturing affiliates, in developing equipment which will later be marketed by American Bell; third, disclosure or use of non-public network information by Bell Telephone Laboratories, Inc. (BTL) in the course of joint or contractual research and development for American Bell; and fourth, where AT&T is developing a new network service, feature or capability at the request of American Bell and communicating information regarding that developmental effort directly to American Bell.

41. The first case is relatively simple. Where AT&T communicates to American Bell information regarding the network, prompt public disclosure of that same information is required. *See* para. 64, *infra*. The other three cases are more complex.

42. Regarding the second case, the comments suggest that AT&T might evade the rule by making disclosures of network information to Western Electric which could then utilize that information to develop and manufacture equipment or enhanced services for marketing by American Bell. This development could go forward to the point of marketing of the finished product without any of the relevant network information ever having been directly "communicated" to American Bell. American Bell would, nevertheless, reap the benefits of any such disclosures. Alternatively, even without a disclosure of network information to Western Electric, Western could utilize whatever special knowledge it has of AT&T's common carrier network in manufacturing products to be marketed by American Bell.

43. This "loophole" could have the effect of frustrating the rule since American Bell will have a large marketing function for products developed by other AT&T affiliates. Aided by access to

network information not available to American Bell's competitors (and not directly disclosed to American Bell), Western's manufacturing operations could be geared up years in advance of any competitor's manufacturing, and a final product could be presented to American Bell for marketing. It would be unlikely for American Bell not to include such a product in its product lines, although it was not privy to the development. In view of this possibility, we believe that at some point AT&T must disclose information of this nature to the public even if the separate affiliate has not actually received it.

44. We are, therefore, including within the definition of disclosures to American Bell to which the disclosure rule applies, disclosures to other AT&T affiliates for the benefit of American Bell. This category is intended to apply to all network information which is disclosed to BTL or Western for the purpose of facilitating the development of products which could reasonably be expected to be later marketed by American Bell. In other words, when BTL or Western is developing a CPE or enhanced services product which will eventually be marketed by American Bell and, in that development, is utilizing or relying on information about the network not already publicly available, the same disclosure obligations apply as would apply if the network information relied upon were disclosed directly to American Bell.[13] This requirement goes to *network* information only; it does not require disclosure of competitive market plans or products.

45. The third area raises similar concerns. In Computer II we specifically allowed joint research and development between American Bell and affiliated entities. Joint activity in this area, however, should not be used as a mechanism for funneling network information to American Bell so as to avoid the disclosure requirements. The fourth case is also similar. It involves AT&T's development of new capabilities, services or service features for the basic communications network pursuant to a request from American Bell. This kind of developmental effort might take place to provide new basic network support for CPE or enhanced services offered or planned by American Bell. At an appropriate point in this process, the information about that network developmental effort which has been communicated to American Bell must be publicly disclosed.

46. Accordingly, for these cases our concern is to determine a disclosure point in the planning and development cycle which is sufficiently early to allow the competitors of American Bell to obtain useful planning information, but which, at the same time, is not so

[13] We recognize that not all preliminary product development efforts based upon network information disclosed to BTL or Western will emerge from the feasibility study phase. We shall, therefore, require that network information be made public only in those instances where a *firm commitment* (as defined in paras. 52-60, below) to carry a development effort to production has been made by BTL, Western Electric or AT&T management.

early as to discourage innovation, to subject American Bell's competitors to excessive business risks (due to possible cancellation of service development), or to generate anticompetitive chilling effects in the marketing of enhanced services, CPE, or basic services by AT&T's competitors.

47. The bases of our analysis of this difficult issue are the statutory standards of reasonableness (47 U.S.C. §201(b)) and avoidance of unreasonable discrimination against non-affiliated entities or preference in favor of affiliates (47 U.S.C. §202(a)). We note in particular that the statute reaches not only direct discrimination, but also unjust or unreasonable discrimination "by any means or device." Although premature disclosure of information could have anticompetitive effects, we shall not seek to determine a point at which disclosure might be "premature" in this context. The comments convince us that competitors would prefer that we err on the side of early disclosure, leaving them to assess the stability of the information disclosed, rather than allow AT&T unnecessarily broad discretion to withhold information. If a carrier were in fact to disclose information prematurely, especially with intent to mislead others, adequate remedies are available for redress of such conduct under the Communications Act and the antitrust laws, or other legal remedies. In sum, in this proceeding we are seeking to clarify AT&T's obligations to disclose under the Commission's rules. We are not defining any correlative obligations to refrain from premature disclosures.

48. AT&T has described in its comments and in discussions with the Commission staff the process by which a new network service is developed. The steps in AT&T's service development process are similar whether that developmental effort results from a request from an unrelated customer, a request from American Bell, or from within AT&T's network organization. In addition, the steps would be similar if the developmental effort involved a new CPE product or enhanced service. Although the following discussion is framed in terms of development of a new network service, we intend that it be used to define the points in cases two and three described above after which public disclosure of information about the basic network will be required.

49. In making the determination as to when in such a developmental cycle public disclosure of network information should be required, we have considered several options each of which has advantages and disadvantages. In particular, we have considered requiring AT&T to disclose any network information communicated to American Bell regardless of how early in the development process, how tentative the information, or how often in the development process the information disclosures take place. This approach would require disclosure of AT&T's responses to developmental inquiries by American Bell in which AT&T might disclose network "informa-

tion" which is in a very preliminary state, information regarding projects which may be aborted, and information indicating projects which are not contemplated.

50. This option would have the advantage of minimizing Commission regulatory presence. Requiring that *all* discussions about network developments between American Bell and other AT&T affiliates, no matter how preliminary or hypothetical, be disclosed to the public would avoid the difficulty of defining the point which separates the parts of the development cycle which are subject to the disclosure rule from those which are not. It would also reduce somewhat the difficulty of monitoring compliance with this requirement. Requiring very early disclosures might, however, inhibit joint developmental efforts between American Bell and AT&T, and thereby seriously inhibit innovation in products and services. In addition, a requirement for very early disclosures could lead to undesirable anticompetitive results—"market overhang", the chilling effect which premature disclosure of AT&T's basic service plans, or, by inference, competitive market plans of American Bell, might have on the sales efforts of other competitors. We have concluded that the public interest would be better served by requiring disclosure only after AT&T has reached a point of corporate commitment to proceeding with a specific network service or service feature under consideration.

51. The process of identifying the precise point of corporate commitment to the development of a network service after which disclosures to American Bell must be made public is complicated by the fact that, although there may be a typical service development pattern, the process will vary from case to case. Not every case will progress through the same developmental steps. Nor will the steps always proceed from one to another with precision, predictability or clarity. The following discussion describes a typical AT&T service development process. We present it only for purposes of describing the events which make a public disclosure of network information disclosed to or for the benefit of American Bell necessary. In so doing we do not intend to freeze future service development efforts into this pattern. We offer this scenario as a framework for analysis and to put into context the events which mark the point in the cycle after which public disclosure of information given American Bell is required.

52. AT&T's development of a new network service typically begins with an experimental technical development at BTL which might form the basis of a new or improved basic service offering. The process also might be initiated by a perception in the marketing departments that a new product or service is needed, or by a customer inquiry, a "Developmental Inquiry", or a request for proposal.

53. In the second phase of development, the new network

capability is proposed and market research is conducted as to the need for and feasibility of the new offering. In the third phase, the new service is more precisely defined as to system architecture and capabilities. After this phase, if a single customer were involved, the company would make a service proposal to the customer. If the proposal were entirely new, that is, not based on any recognized domestic or international standard, AT&T might make public a Preliminary Technical Reference in order to determine whether any equipment manufacturers would be interested in developing equipment to be used with the new capability.[14]

54. Until this point, the effort has been largely experimental and exploratory. A commitment to actual service development has not yet been made. At the next level, the company decides whether to proceed with actual service development. If it decides to proceed, the AT&T marketing organization develops an overall schedule for bringing the new service to the market. As part of this process, the marketing organization establishes a "product team" for the new network service. The "product team" will include individuals from various parts of the AT&T organization who together will possess all of the expertise needed to get the new network service into operation. At this stage, the project is approved for production, and the first major budgeting approvals (*i.e.*, beyond the budgeting necessary to sustain the preliminary, exploratory phase) are sought. If a single customer is involved, a schedule for final development is proposed to the customer.

55. At the next level, a decision is made as to whether to make or buy from third parties the necessary products for the new service (the "make/buy" decision). Precise production or purchasing specifications are developed and delivered to WECo (or the third party contractor if the decision is "buy" rather than "make"). Meanwhile, the marketing organization starts considering rate structure and deployment, and conducts discussions with potential customers in order to refine demand forecasts. A Preliminary Technical Reference will usually be released at this point if that has not already been done.

56. The remaining steps in the process include completion of development, production or procurement, field testing, final corporate approval and filing of a tariff. After the service goes into operation, the "Preliminary" label may (but will not always) be removed from the Technical Reference.

[14] This points out a difficulty adverted to by CBEMA in its comments, para. 16 supra. A "Preliminary" Technical Reference here would be in the nature of a "trial balloon", in advance of a firm commitment to a new service or feature. Yet, AT&T applies the same designation to Technical References for new services or features to which a relatively firm commitment has obviously been made, e.g., BPSS. It is clear that there is a difference between these circumstances. Accordingly, we shall require AT&T to report to the Bureau, within 30 days, the labels it will adopt to differentiate such circumstances in the future.

57. We have considered this issue in somewhat analogous circumstances in the past in *Satellite Business Systems*, 62 F.C.C. 2d 997 (1977), *aff'd sub nom. United States v. F.C.C.*, 652 F.2d 72 (1980) (*en banc*).) In that case we required SBS to deal at arm's length with its corporate parents, including a requirement that SBS obtain services and products from those corporate parents solely by contract. In addressing information disclosure we required SBS:

> ". . . to make public and to file with us all relevant interface specifications (including physical, electrical, timing and protocol specifications) of any equipment affecting the communications interface *at the time SBS contracts for its development or its purchase, whichever occurs first*" (emphasis added).

Id. at 1052. We explained that this would require SBS to make its interface specifications "available to the public, on a non-discriminatory basis, as early as is reasonably feasible." *Id.* at 1095. Thus, in the *SBS* decision we required disclosure at a point when the information had become relatively stable, *i.e.*, when a contract could be let for development or procurement of a product. A problem which arises here is that AT&T may not explicitly negotiate contracts with its research, development and manufacturing operations; rather, it may utilize alternative managerial tools (*e.g.*, the approval and budget tools addressed in para. 54, above).

58. We believe that an SBS-like standard, with suitable modification to address AT&T's operations (and which is not keyed to a particular managerial decisionmaking process which may change over time) would be appropriate in the present case. Specifically, an event which will occur within AT&T's operations which is similar to the events utilized in the *SBS* requirement is a make/buy determination, *i.e.*, when AT&T determines whether to manufacture a product itself or to procure it from a non-affiliated entity. At that point the product specification itself must be relatively stable in order that an informed make/buy determination might be made. We note that "product" in this context includes any hardware or software for use in the network which might affect the compatibility of CPE or enhanced services with the existing telephone network, or with any new basic network services or capabilities.

59. If we were, however, to pursue the approach of keying a disclosure requirement solely to the time at which a make/buy decision might be made with respect to products (hardware or software) which will affect the operability of other suppliers' products, such disclosures would in some circumstances be too late. Large systems are often designed in two phases, a functional design phase and an implementation design phase. During the first phase, sub-elements (or subsystems) of an overall design are defined and fully characterized electrically in terms of what they are required to do, and how they will interface with other sub-elements. Once the functional design is made relatively final, implementation design of the various sub-elements may proceed independently. Suppose that a

design change (or a new service) were being pursued for the telephone network which involved equipment at the central office and terminal equipment. Once the functional design were completed, new terminal equipment might be designed years in advance of the implementation design of the central office equipment. If a make/buy standard keyed to the central office design change alone were employed to trigger disclosure, the make/buy decision with respect to central office implementation—the actual network change which would affect the interface with other suppliers' terminal equipment—might occur years after AT&T's own terminal equipment manufacturing operations were being changed in reliance upon the functional design. For this reason, the disclosure requirement must be keyed to development of a stable design which either affects the interface (*e.g.*, at the central office), or relies upon the interface (*e.g.*, of new terminal equipment designed in anticipation of a not yet implemented central office change. Clearly, in such circumstances, the functional design would be sufficiently stable to be disseminated publicly, or else AT&T's manufacturing operations could not rely upon the functional design as a basis for product design.

60. In view of the foregoing, we summarize the disclosure requirements of Section 64.702(d)(2) as follows:

> AT&T shall make public all information regarding the network as defined in paras. 31–37, *supra*, when
>
> (1) any such information regarding the existing or planned network is communicated to the separate affiliate established under Section 64.702(c) (American Bell), except:
>
> (a) information related to joint or contractual research and development between American Bell and other AT&T affiliates in accordance with Section 64.702(c)(4)-(5); and
>
> (b) information related to the development, at the request of American Bell, of new network capabilities, services or features; or
>
> (2) any such information is used (but not directly communicated to American Bell) in the development by AT&T or its other affiliates of services or products which can reasonably be expected to be marketed by American Bell.
>
> In cases (1)(a), (1)(b) and (2), above, disclosure is required when AT&T or an affiliated company decides, in reliance on previously undisclosed information, to produce itself or to procure from a non-affiliated company (a "make/buy" decision), any product (whether it be hardware or software), the design of which either affects the network interface or relies on the network interface.

We believe that these requirements strike a reasonable balance among the many issues which are involved, and which are in some degree of tension. It is based on the precedent in the *SBS* decision which focuses on objective events, independent of a particular managerial decisional process, and which appears to have worked well in analogous circumstances in the past.

C. How and to whom should information be disseminated?

61. Disclosures of network information under our rule should be designed to communicate the information effectively and efficiently to those who might reasonably be expected to be interested in it. At present, AT&T states that it uses, at its option, the following media of dissemination in varying degrees and circumstances: (a) publication of papers in proceedings of technical symposia; (b) Bell System Technical References; (c) publication in AT&T house organs such as Bell Laboratories Record, Bell System Technical Journal, etc.; (d) press releases; and (e) tariff filings. At issue is whether a greater degree of formalism should be specified and, if so, what system will strike an appropriate balance between adequate information dissemination and the imposition of excessive clerical burdens on the Commission and AT&T.

62. We could continue with present procedures and merely require that any public disclosures which are made pursuant to our disclosure policies be appropriately publicized in the multimedia forum currently utilized by AT&T. Such a policy bears the risk that significant AT&T disclosures to American Bell will go unnoticed. In addition to the disclosures that AT&T may make under its existing procedures, we believe that we can make better use of our tariff procedures to monitor whether appropriate disclosures have been made.

63. American Bell is required to acquire any network services it uses in provision of enhanced services according to tariff. This Commission would view it as inconsistent with the Computer II rules, if American Bell were to use any AT&T network service or network capability that is not equally available to all. Accordingly, tariffs or tariff support material must either contain the necessary information, or indicate where such information can be obtained, that will allow competitors to use network facilities in the same manner as American Bell.

64. Where information is disclosed to or for the benefit of American Bell we shall require that AT&T file with the Commission, within seven calendar days of the date the disclosure obligation arises, a notice apprising the public that the disclosure has taken place and indicating in summary form the nature of the information which has been disclosed, the identity of any source documents and where interested parties can obtain additional details. These notices will be available for public inspection at the Commission. We anticipate that they will be publicized by the trade press. When AT&T files a tariff for a new or changed network service where there has been a prior disclosure to or for the benefit of American Bell, the tariff support materials must list any disclosure notices previously filed with the Commission that are relevant to the tariffed offering.

65. Some parties have suggested that the disclosure rule will be

insufficient to prevent the harms at which it was directed, and that additional restrictions on AT&T's interactions with American Bell should be imposed. Telenet suggests that the rule be supplemented to preclude American Bell from utilizing any new AT&T service, or existing service provided to new points, for a certain time period after the required public disclosures have been made. This time period should be substantially longer than the maximum tariff filing notice period. This time lag, Telenet argues, would allow other competitors sufficient lead time to utilize any new service on an equal basis with American Bell. In Telenet's view, this time lag would also mitigate the unavoidable transfers of advance information regarding AT&T's plans which will occur as AT&T employees are transferred to American Bell. Telenet comments, 8–9 (September 23, 1982).

66. Tymnet supports Telenet's proposal and suggests that American Bell be barred from using a new or expanded AT&T service for a period of eighteen months or until a competitor of American Bell uses the new or expanded AT&T service, whichever is less. In addition, Tymnet suggests that the burden should be on AT&T to assure that notification of impending changes to the network occur in sufficient time that users are able to maintain their present services without interruption and that potential users are able to use a new or changed service on the first date it is publicly offered. Tymnet Reply Comments, 6–10 (October 7, 1982).

67. These suggestions might have the advantage of reducing reliance on after-the-fact penalties for enforcement of the disclosure rule. We have concluded, however, that regardless of the merits of these suggestions, it would be unwise to change the present disclosure rule and existing enforcement procedures at this early stage. American Bell has been in operation a very short time. We are reluctant to fashion new remedies at this time in the absence of compelling evidence that the rule will be inadequate as presently clarified. Should that evidence begin to accumulate, however, we shall reexamine the necessity for further restrictions on the relationship between AT&T and American Bell.

68. The marketplace will be the chief monitor of compliance with the disclosure rule. We shall rely primarily on private parties to call possible violations of our disclosure rule to our attention through our complaint procedures. 47 U.S.C. §§207 and 208. It will be apparent in many CPE or enhanced service offerings whether the carrier has complied with the disclosure rule. In addition, our review of tariff support materials will indicate whether the required disclosures have been made regarding any new service. Failure to comply with our rules in this regard could constitute grounds to reject or suspend a tariff. Furthermore, on an appropriate showing we are prepared to impose administrative and other sanctions under the Act. Finally, we retain the right to make more stringent our

separation and disclosure requirements should such action prove necessary.

V. *Conclusion*

69. As stated above, our primary concern in this proceeding is a carrier's ability to use its control over information about the basic network to limit effective competition in unregulated CPE and enhanced services markets. This problem becomes acute where a company affiliated with a carrier competes in CPE or enhanced services markets. In that case, the carrier has every incentive to give its CPE or enhanced service subsidiary a competitive advantage by giving it preferential access to information regarding the network. The disclosure rule requires that "when such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions." In this order we clarify the meaning of that requirement. We note that, at present, the separate subsidiary requirement and, therefore, this portion of the disclosure rule, apply only to AT&T. Furthermore, all carriers are required reasonably to disclose such information under our *Reconsideration* order and our rules (Section 68.110(b)).

70. In summary, the disclosure rule requires the concurrent public release of any information relating to the network which could be relevant to the provision of CPE or enhanced services which AT&T or any of its affiliated companies communicates in any manner to, or for the benefit of, American Bell Inc., AT&T's CPE and enhanced services subsidiary. The rule applies to information regarding both the existing network and modifications and new developments in the network. Regarding modifications and new developments, however, disclosure is required only after a certain level of firm corporate commitment to proceeding with them is reached.

71. The rule does not require disclosure of information given the carrier by any CPE or enhanced services competitor, including its own subsidiary. AT&T need not disclose information communicated to it by American Bell. In addition, it is not our intention to "force" any carrier to make "premature" disclosures regarding planned new services or service features. Finally, we stress that the disclosure rule relates to *network* information only. We are not requiring disclosure of any company's competitive market plans for CPE or enhanced services, nor of the internal design of its network except to the extent that such design is relevant to the provision of CPE or enhanced services.

72. We do not at this time add to the restrictions on the relationship between AT&T and American Bell. We shall not hesitate to do so, however, if our present rules prove to be inadequate.

73. IT IS THEREFORE ORDERED pursuant to §§1, 4(i), 4(j), 201–05 218, 220(c) and 602(d) of the Communications Act of 1934 as amended, 5 USC §§553(b)(3)(A) and 554(e), and Section 1.2 of the Commission's Rules, that the petition for declaratory ruling is HEREBY GRANTED TO THE EXTENT INDICATED, and IS OTHERWISE DENIED.

FEDERAL COMMUNICATION COMMISSION
WILLIAM TRICARICO *Secretary*

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON RE: INFORMATION DISCLOSURE RULE

In this decision, the Commission tackles the difficult task of determining what, when and how network information passing between AT&T and American Bell must be publicly disclosed. Timely and nondiscriminatory access to such information by all competitors is critical to the continued rapid development of competition in the CPE and enhanced services markets.

The scheme we have adopted today places heavy reliance on a self-enforcement mechanism on the part of AT&T. To a great extent, however, the effective implementation of these information disclosure rules clearly depends on this Commission's commitment to the rapid and timely disposition of all related complaints. Absent such diligence on our part, fair and robust competition in the deregulated CPE and enhanced service markets most certainly will be threatened.

Ex parte, Permissible Presentations
Ex parte, Prohibited Presentations

Memorandum Opinion and Order adopted on reconsideration of *Report and Order* adopting policies and rules permitting but requiring disclosure of *ex parte* presentations in nonrestricted rulemaking proceedings.
-Ex Parte Communications
Gen. Docket No. 78–167

FCC 83–167

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings	Gen. Docket No. 78–167

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983; Released: May 20, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURING IN THE RESULT; COMMISSIONER JONES ABSENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it two petitions for reconsideration of its *Report and Order re: Ex Parte Communications in Rulemaking Proceedings*, 78 FCC 2d 1384 (1980) (hereafter *Report and Order*). These petitions were timely filed by the Media Access Project (MAP) and by the National Telecommunications and Information Administration (NTIA).

I. *SUMMARY OF REPORT AND ORDER*

2. In its *Report and Order*, the Commission adopted the general policy of permitting but requiring disclosure of *ex parte* presentations in most informal rulemaking proceedings. However, the Commission further concluded that *ex parte* presentations would be prohibited in those informal rulemaking proceedings that involve "competing claims to a valuable privilege," as that term is used by the court in *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977) (hereafter *ACT*). The Commission recognized that its policy was not consistent with the literal language of the court's decision in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.

1977) (hereafter *HBO*), but asserted that its policy adequately responded to the concerns raised by the court majority in *HBO*. Finally, the Commission emphasized that its action was strengthened by the fact that the idea of a flat ban on *ex parte* presentations was heavily criticized by recognized authorities and that Section 4(j) of the Communications Act expressly empowered the Commission to determine the manner of conducting its own proceedings. *See generally*, 78 FCC 2d at 1393–1396, 1405.

3. The rules adopted in the *Report and Order* permit *ex parte* presentations in non-restricted rulemaking proceedings from the time a notice of proposed rulemaking is adopted until, in most instances, a sunshine notice is issued announcing that a proposal for final action has been scheduled for consideration at an upcoming Commission meeting. *Ex parte* presentations would be prohibited between the time the sunshine notice is issued until a full text of the order is released, or until it becomes clear that the Commission has postponed final consideration and returned the matter to the staff for further work. *Ex parte* presentations would again be permitted once the cut-off period ends. The new rules also set forth specific disclosure procedures to be followed during those periods when *ex parte* presentations are permitted. Any interested person submitting a written *ex parte* presentation to a Commissioner or staff person also must send a copy of that presentation to the Secretary of the Commission for inclusion in the public record. The rules are somewhat different for oral *ex parte* presentations. The rules impose no disclosure requirements where an interested person discusses with a Commissioner or staff person matters that are already reflected in previously filed written comments in that proceeding. If an interested person intends to depart from matters covered in previously filed comments, however, that person must deliver a written summary of the presentation to the Secretary on the day of presentation, with a copy to the involved Commissioner or staff person. *See generally*, 78 FCC 2d at 1397–1404.

II. *SUMMARY OF PETITIONS FOR RECONSIDERATION*

4. In its petition for reconsideration, MAP argues that the Commission's procedures flatly ignore the holding in *HBO*, which MAP believes is still the operative law, and that the Commission's reasons for circumventing that holding are legally impermissible. MAP also contends that the Commission's procedures for disclosure, especially with respect to certain oral *ex parte* presentations, are inadequate to protect the public's right to comment. Next, MAP urges that the Commission's *ex parte* rules should apply to all persons outside the Commission and not merely to "interested persons" within the meaning of these rules. Finally, MAP recommends that the obligation to disclose unauthorized *ex parte* presenta-

tions, as provided in the Commission's rules, should apply to any person and not merely to parties to a proceeding.

5. The petition for reconsideration filed by NTIA principally contends that the Commission has erred by limiting the "restricted" classification only to those *Sangamon*-type[1] rulemaking proceedings that are "quasi-adjudicatory" in nature. NTIA urges the following to be the correct view: "Under *HBO* and *ACT*, however, *Sangamon* is applicable to a much wider range of informal, quasi-legislative rulemaking proceedings involving private parties competing for valuable privileges . . . ." NTIA Petition for Reconsideration, at 2–3. NTIA proposes that, instead of trying to distinguish between *Sangamon* and non-*Sangamon* proceedings for purposes of classification, the Commission should apply a "basic fairness" standard required by *Sangamon*, namely, "public disclosure of all new material presentations, with an opportunity to respond, where appropriate." *Id.* at 3.

III. *DISCUSSION*

6. We turn first to answer MAP's contention that the Commission's action flatly ignores the holding in *HBO*, which MAP believes to be the controlling law on this subject. At the same time, we will respond to NTIA's related argument that the Commission has misread *HBO* and *ACT* by limiting the "restricted" classification to "quasi-adjudicatory" proceedings. In the first place, the Commission's position on this subject has been amply discussed. In our *Order, Notice of Inquiry*, and *Interim Policy Statement*, 68 FCC 2d 804 (1978), the Commission covered the main points—the sweeping opinion by the *HBO* majority that apparently bans *ex parte* contacts in all informal rulemakings, the special concurring opinion by one member of the *HBO* panel (Judge MacKinnon) stating that the *ex parte* ban should be limited to a certain type of proceeding, and the subsequent decision in *ACT* that adopts the position of Judge MacKinnon. *Id.* at 805. We also took note of the view expressed by the Solicitor General of the United States, namely, that the majority decision in *HBO* does not appear to be the law of the circuit since that majority included only one D.C. Circuit judge while the *ACT*

[1] *Sangamon Valley Television Corporation v. United States*, 269 F.2d 221 (D.C. Cir. 1959). This case arose out of a television channel allocation proceeding. The Commission had to decide, *inter alia*, whether a potentially valuable VHF channel should be allocated to Community A or Community B. One prospective applicant from Community B engaged in *ex parte* contacts or, as the court recounted, "he had every Commissioner at one time or another as his luncheon guest, and . . . he gave turkeys to every Commissioner. . . ." *Id*, at 224. The Commission later allocated the VHF channel to Community B. On appeal, the court vacated the Commission's decision, stating that the proceeding "involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open." *Id.*

majority consisted of three D.C. Circuit judges. *Id.* at 805–806. And, as expressed in our *Report and Order*, we believe the *HBO* majority decision and the *ACT* decision are not consistent with each other. 78 FCC 2d at 1385. This continues to be our position.

7. Nevertheless, MAP still insists that the *HBO* holding remains the law and cites, as principal support for its position, the court's decision in *United States Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978). That case arose when an administrative agency approved a service agreement between two common carriers; then a third carrier, in competition with the two, sought judicial review. The court found that at least one carrier had engaged in secret *ex parte* contacts. The court remanded the case to the agency citing the *HBO* decision and other authorities; the *ACT* decision was nowhere cited in the opinion. However, the court in *United States Lines* recognized that the agency proceeding was probably quasi-adjudicatory in nature since it involved the adjudication of rights of certain named parties. 584 F.2d at 539–540. The court seemed most concerned that these secret contacts violated the *Overton Park* [2] "whole record" requirement. *Id.* at 526–527, 541–542. The *HBO* decision seemed to be cited primarily as subsidiary authority illustrating how the "whole record" requirement could be undermined, and not as absolute authority that all *ex parte* contacts are prohibited. *Id.* at 526, 539–540, 542. Interestingly, the court in *United States Lines* never cited the sweeping prohibition language of *HBO*. It was also not unusual for the court to ignore the *ACT* decision, since *ACT* involved a rulemaking proceeding while *United States Lines* clearly did not. Thus, contrary to MAP's view, we do not believe that the court's decision in *United States Lines* demonstrates that *HBO* is still the controlling authority on *ex parte* contacts, since the court did not appear to place primary weight on the applicable language of the *HBO* decision.[3]

8. In a somewhat related argument, NTIA contends that the concurring opinion in *HBO* and the *ACT* decision may be read consistently to state that the *Sangamon* test is not limited to quasi-adjudicatory proceedings. According to NTIA, certain language in Judge MacKinnon's special concurring opinion in *HBO* forms the basis for finding such consistency. Judge MacKinnon stated that an

[2] *Citizens to Preserve Overton Park v. Volpe*, U.S. 402 (1971).

[3] In further response to MAP's position, we again note that the Solicitor General, in its petition for certiorari of *HBO*, opined that *HBO* was not considered to be the "law of the circuit." More recently, in *Association of National Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979), a panel consisting of the late Judge Leventhal together with Judges Tamm and MacKinnon refused to pronounce *HBO* as the "law of the circuit." 627 F.2d at 1169, n. 40. Consequently, the continuing force of *HBO* in non-*Sangamon* rulemakings is open to serious doubt. Furthermore, since *ACT* was decided later in time than *HBO*, it appears that *ACT* may be entitled to greater deference.

agency should apply *Sangamon* principles only to those informal rulemaking proceedings "that will involve competing private claims to a valuable privilege or selective treatment of competing business interests of great monetary value . . ." *HBO*, 567 F.2d at 64 [footnote omitted]. NTIA reads this language in the complete disjunctive, with the "competing private claims" language referring to a quasi-adjudicatory proceedings, and the "competing business interests" language referring to quasi-legislative proceedings. And, since Judge MacKinnon viewed the pay cable proceeding at issue in *HBO* as involving "competitive interests of great monetary value," *HBO*, 567 F.2d at 62, NTIA concludes that that proceeding was quasi-legislative in nature. Finally, as NTIA states, the court in *ACT* relied on Judge MacKinnon's formulation and held that the children's television proceeding at issue there was not restricted because "private groups were not competing for a specific valuable privilege." *ACT*, 564 F.2d at 477. Therefore, according to NTIA, since the *ACT* panel relied upon Judge MacKinnon's so-called "quasi-legislative" language, the *Act* decision and Judge MacKinnon's opinion in *HBO* are consistent and the *Sangamon* principles are not limited to quasi-adjudicatory proceedings.

9. We find that NTIA has applied too narrow a reading of these selected passages from Judge MacKinnon's opinion. Furthermore, we believe it reasonable to interpret Judge MacKinnon's disjunctive terms "competing private claims" and "competing business interests" as two different ways of describing a quasi-adjudicatory proceeding. At the same time, we freely concede that Judge MacKinnon's opinion may be subject to other interpretations.

10. Rather than belabor that language just to muster further support for our interpretation, we think it prefereable to draw upon more recent judicial pronouncements on the subject of *ex parte* contacts in rulemaking proceedings. In *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), the D.C. Circuit further eroded the *HBO* prohibition on *ex parte* contacts and endorsed the view that such contacts should be strongly encouraged in informal rulemaking proceedings. During a discussion of the propriety of face-to-face *ex parte* contacts, the court stated:

> Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

657 F.2d at 401.

Aside from the clear message that *ex parte* contacts should be more widely encouraged, it follows from the court's statement that the Commission is free to narrow the category of rulemaking proceed-

ings that are to be restricted. We believe our current standard governing the classification of restricted rulemaking proceedings is consistent with the court's statement in *Costle*. Stated differently, we expect to restrict very few informal rulemaking proceedings so that the Commission and the public are not denied the benefits of "continuing contact" noted by the court. Thus, we will continue to restrict only those proceedings involving "competing claims to a valuable privilege", that is, proceedings involving facts substantially the same as those encountered in *Sangamon*. *See* Section 1.1207(d), 47 C.F.R. §1.1207(d). Restricted proceedings would include FM and television channel assignments and a very few other quasi-adjudicatory matters.[4]

11. Notwithstanding Judge MacKinnon's concurring opinion in *HBO* and the *ACT* panel's reliance on it, we continue to believe that *HBO* and *ACT* are inconsistent with each other since the *HBO* majority adopted a general ban on *ex parte* contacts once a rulemaking proceeding has commenced, while a unanimous panel in *ACT*, without reversing *HBO*, severely circumscribed that ban. In the face of this situation, we find that our reasons for adopting this policy are consistent with case precedent as reasonably construed. *Report and Order*, 78 FCC 2d at 1393–1395. This policy sufficiently alleviates the major concern raised by the *HBO* majority, namely, "that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings." *HBO*, 567 F.2d at 54.

12. We turn next to MAP's contention that our newly adopted rules do not fully satisfy one of our stated objectives —namely— disclosure of all *ex parte* communications. MAP focuses particularly on our procedures for disclosing oral *ex parte* presentations, which are embodied in Section 1.1231(b)(2) and (4) of the Commission's rules, 47 C.F.R. §1.1231(b)(2) and (4).

13. When these rules were being drafted, we had in mind several related concerns. First, we placed threshold importance on the obligation to satisfy the *Overton Park* "whole record" requirement, to be certain that the reviewing court would have access to the full administrative record that was before the agency at the time the

[4] Since we adhere to this position, we need not reach the merits of NTIA's proposal for a "basic fairness" approach. Suffice it to say, however, that our disclosure policy is one of "basic fairness" within the meaning of *Sangamon*. In all non-restricted proceedings, our rules require disclosure in the public file of contacts that address the merits or outcome of such proceedings. We are barring contacts in all restricted proceedings. In our view, this is a fair and reasonable approach. Further, relying upon our threshold rule of limiting the "restricted" classification to quasi-adjudicatory proceedings involving "competing claims to a valuable privilege", we do not anticipate difficult problems of distinguishing *Sangamon* from non-*Sangamon* proceedings.

decision was made. *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 420. Second, we were concerned that this requirement would go unfulfilled "if communications are made to the agency in secret and the agency itself does not disclose the information presented." *HBO*, 567 F.2d at 54. Third, however, even the *HBO* majority recognized "that informal contacts between agencies and the public are the 'bread and butter' of the process of administration. . . ." *Id.* at 57.[5] Consistent with the "whole record" requirement, we wanted to strike a reasonable balance between the second and third concerns mentioned above.

14. Section 1.1231(b)(2), which covers oral *ex parte* presentations, is a good illustration of that balance. That rule requires written disclosure where the matters to be discussed are not covered in previously filed written comments. This disclosure requirement generally relieves our concern about secret contacts. At the same time, the rule does not require any written disclosure of presentations which do not depart from the content of previously filed comments. We believe this part of the rule will encourage the necessary exchange of information between the Commission and the public. To impose a disclosure requirement in these latter situations could unnecessarily stifle such exchanges. Section 1.1231(b)(2) places the burden on the outside party to determine whether the disclosure procedures should be followed. Our rules also provide for sanctions as a deterrent to any outside party who might be considering an unauthorized *ex parte* presentation. *See* Section 1.1251(d), 47 C.F.R. §1.1251(d). However, we believe that a Commissioner or staff person will be alert to any oral presentation that departs from the written record. Where this occurs, the Commission ultimately will be responsible for ensuring that a summary of the contact is inserted into the public record.

15. We also believe that Section 1.1231(b)(4) is consistent with our scheme of ensuring adequate disclosure without imposing undue burdens. This rule provides in relevant part that the Commission will publish lists of all oral *ex parte* presentations made to Commissioners, along with dates of those contacts. MAP, however, focuses on what the rule omits, namely, that the Commission is not required to publish a list of oral presentations made to staff involving matters already reflected in previously filed comments. As stated above, one of our objectives in adopting these rules is to satisfy the *Overton Park* "whole record" requirement. In satisfying this requirement, however, we did not want to impose huge paperwork burdens on our staff. We have confidence in our Commissioners and professional staff to know the difference between an oral *ex parte* presentation that reflects the record and one that does not, and that a written

[5] *See also Report and Order*, 78 FCC 2d at 1394.

summary will be required when necessary, in accordance with Section 1.1231(b)(2).[6]

16. Next, MAP argues that our rules should apply to all *ex parte* presentations, not merely to those from "interested parties." In response, we believe the definition of "interested person" in Section 1.1201(e) of our rules, 47 C.F.R. §1.1201(e), is sufficiently broad to encompass all persons outside the Commission who would likely be involved in *ex parte* contacts. With this broad definition, we think the Commission and parties need only be protected to the extent of contacts from "interested persons," since such persons are probably the most knowledgeable and are likely to be the most influential. Furthermore, it would be unrealistic to adopt MAP's view and apply the rules to all persons. It would effectively frustrate even the most casual conversation with members of the public. Also, we believe that adoption of MAP's proposal would stretch the *Overton Park* requirement beyond its rational limits. We believe this requirement is satisfied by ensuring that the public record contains evidence of contacts by parties likely to be influential; in our view, a Commissioner or staff person is not likely to be influenced by someone who is not an "interested person" within the meaning of our rules.

17. Finally, MAP believes our rules should be revised to provide that any person who becomes aware of an unauthorized *ex parte* presentation is required to report that fact to the Commission. Section 1.1245 of the rules, 47 C.F.R. §1.1245, imposes this obligation solely on parties to a proceeding. We perceive no sound reason to change this rule, primarily because we believe it may be unwarranted—as well as impracticable— to impose sanctions against nonparties, who are far less likely to be aware of the potential significance of impermissible presentations.

IV. *OTHER MATTERS*

18. During the period between adoption of the *Report and Order* and this reconsideration, we have had the opportunity to observe the application of these rules to actual situations. For the most part, we believe the rules are coherently organized and reasonably understandable. But as discussed below, there is one area where we believe reform is necessary.

19. In our *Report and Order*, we committed the Commission to providing, on a periodic basis, a list of those proceedings for which the *ex parte* procedures apply. 78 FCC 2d at 1404, par. 73. We have

[6] MAP also urges us to revise Section 1.1231(b)(3), 47 C.F.R. §1.1231(b)(3), and to require Commission staff who initiate contacts to place a memorandum in the public record before the deadline for reply comments expires. It should be noted that any oral *ex parte* presentation, even if initiated by the staff, is covered by the rules and will require the submission of documents in the record if the oral comments are not already reflected in the record. If *ex parte* presentations are made after the close of the pleading cycle, parties are of course free to ask for leave to file a new pleading responding to the *ex parte* matters.

found that the work of compiling these lists has taken up an inordinately large amount of time in the Commission's offices and bureaus. We could see the initial need to publish these lists, since many of the reported proceedings did not give adequate notice, in the texts themselves, as to whether they were restricted or not. Under current practice, the Commission provides in each notice of proposed rulemaking (NPRM) sufficient information so that a person may determine whether a particular proceeding is or is not to be regarded as restricted. For example, each NPRM will include boilerplate language summarizing the Commission's *ex parte* procedures; the inclusion of this language means the proceeding is not restricted. Since each NPRM provides such information, we will no longer publish these lists.

V. *CONCLUSION*

20. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by MAP and NTIA are Denied.

21. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Policies and Procedures Regarding *Ex Parte* Communications During Informal Rulemaking Proceedings

My concurrence in the Commission's result should not be understood to indicate that I am satisfied with the rules governing *ex parte* contacts in non-restricted rulemakings.

Contrary to the MO&O's claim that these rules are reasonably understandable, *see* para. 18, I am sorry to say that the rules are, too often, little more than traps for the unwary. On many occasions, they stifle meaningful exchanges between policymakers and well-intentioned members of the public about the effect of potential decisions by casting a shadow of uncertainty over the permissibility of a discussion. Those who are sufficiently confident or blissfully ignorant of the rules may plunge ahead, risking later embarrassment if their judgment was in error. All too often, there is substantial confusion about the scope and applicability of the rules, even among the Commission's own staff.

Even when there is no bar to a contact, there are too many times when members of the Commission and the general public have avoided discussion because of the disquieting concern that they may unintentionally run afoul of an *ex parte* stricture. The result is that

decisionmakers are deprived of material that is pertinent to policy formation.

In still other situations, sophisticated counsel are able to navigate deftly within the letter of the rules, while imparting information that has a clear and undeniable bearing upon a restricted proceeding. I do not mean to cast aspersions at members of the bar (after all, we lawyers are paid to navigate our clients safely around legal shoals), but only to identify a troublesome area that some of us have wrestled with repeatedly.

In sum, the *ex parte* rules as currently written, and their associated interpretive lore, do not optimally serve the public or the Commission. Instead, they falsely guarantee the public that a complete record of relevant contacts will be compiled in every notice-and-comment proceeding, while placing a millstone of substantial proportion around the Commission's neck. Having registered this strong protest, I want to emphasize my firm and abiding conviction that decisionmakers should not operate in secret. The public has a right to know about the extent and nature of contacts between policymakers and the public. But surely we can find a better way to achieve this essential objective than the existing rules.

READEX FICHE best copy available

Domestic Fixed Satellite
Policy Statement
Procedures
Space Communications

Memorandum Opinion and Order adopted specifying policies and procedures for filing of applications for new space stations in Domestic Fixed-Satellite Service.
–Fixed-Satellite Service

FCC 83–185

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service.

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: August 12, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT

1. The Commission presently has on file a number of applications requesting authority to construct and/or launch new space stations in the domestic Fixed-Satellite Service. These applications, listed in Appendix A, were filed subsequent to the adoption of our *1982 Processing Order*.[1] They propose construction of 22 new satellites and launch of 18 additional satellites. If all are granted, new entrants will be able to establish initial domestic satellite systems and existing licensees will be able to expand authorized systems to meet growth requirements. Excessive administrative delays are likely to interfere with the timely availability of the proposed satellite facilities as well as frustrate the business plans of current applicants. We therefore believe it important to begin processing these applications as soon as possible. Due to the unique

[1] Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982), *recon. denied*, *Memorandum Opinion and Order*, FCC 83–183, adopted today. In our *1982 Processing Order*, we stated that space station applications on file with the Commission by May 18, 1982 would be processed as a group. Action was taken on them in separate actions today. We are also dismissing as premature a petition for expedited treatment of its applications filed by Ford Aerospace Satellite Service Corporation. Notwithstanding any potential merits of its proposed satellite system vis-a-vis the group of applications granted today, we believe the public interest lies in considering the applications of Ford Aerospace in the light of contemporaneously filed proposals.

characteristics of the satellite industry, it has been our practice to process space station applications in groups.[2] Today we are adopting a procedure that will allow us to define the next group. Thus, interested parties wishing to file satellite applications are on notice that any application for a new domestic satellite space station authorization must be submitted no later than 60 days from the publication of our *Report and Order* in CC Docket No. 81–704, FCC 83–184, in the Federal Register if it is to be considered with the applications presently on file.[3]

2. We are giving notice to interested parties because of the changes that have occurred in the domestic satellite industry.[4] After today's grants, it is not certain that we will be able to accommodate all qualified applicants in the 4;6 and 12;14 GHz frequency bands in the time frame and the manner they desire. Because there could be excess demand for orbital locations in this next processing group, it will be necessary to preserve the substantive rights of the parties. Therefore, we are establishing a cut-off procedure similar to those used for other regulated services.[5] This procedure will preserve the hearing rights[6] of all existing and potential applicants if further proceedings are unable to find means of reasonably accommodating all the then pending concrete orbital location requests by qualified applicants. Until the next group of applications is defined for concurrent processing, it does not appear possible for us to determine what administrative and regulatory approach will maximize the likelihood of promptly authorizing the additional satellites to be built to satisfy growing user demand.[7] Thus, to be considered for a new space station authorization in this next group, an applicant

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[2] *See Domestic Fixed Satellite Service*, 77 FCC 2d 956 (1980); *Domestic Communications Satellite Facilities*, 22 FCC 2d 86 (1970); *Report and Order* in CC Docket No. 81–704, FCC 83–184, adopted today.

[3] If for some reason this order is published after the publication of the *Report and Order*, the required date for filing will be 60 days after publication of this order.

[4] *See generally, Report and Order* in CC Docket No. 81–704, *supra* note 2.

[5] *See e.g., Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961).

[6] *See e.g., Ashbacker v. FCC*, 326 U.S. 327 (1945).

[7] If, after the group is defined, it appears that there are more qualified applicants than there are orbital locations available in the usable arc, we intend to examine methods for prompt and efficient disposition of those applications, including the opportunity for public comment on the methods to be employed. We plan, for example, to examine the feasibility of further orbital spacing reductions and/or the feasibility of strict criteria to determine licensing eligibility and/or exclusion of speculative proposals. If there are still an insufficient number of orbital positions available to accommodate all pending applications, we may also specify procedures to conduct expedited evidentiary and/or comparative hearings or structure some other administrative selection. It is possible, however, that sufficient orbital locations will exist if, for instance, those applicants that are granted authorizations today do not meet the construction and launch milestones specified in their authorizations, and speculative proposals are eliminated from consideration at an early stage of processing the next group of applications. In such an event, we will employ our past open entry policies that have allowed the industry to develop free from unnecessary regulatory requirements.

must have an application that is acceptable for filing actually on file with the Commission on the date specified above.

3. The basic information that must be submitted in a space station application was specified in our Docket No. 16495 proceeding. *Domestic Communications Satellite Facilities*, 22 FCC 2d 86, 92 (1970). *See also, Report and Order* in CC Docket No. 81–704. These requirements were elaborated on in our *1980 Processing Order*, *Domestic Fixed Satellite Service*, 77 FCC 2d 956, at 962–963 (1980), and our *Orbit Deployment Plan*, 84 FCC 2d 584 (1981). They are not meant to be all inclusive, but to insure a consistent level of basic information. Nor does the submission of this information in itself demonstrate the qualifications of the applicant or that the public interest would be served by grant of the application(s). Rather, these information requirements simply comprise the minimum amount of data necessary to enable the staff to begin to process space station applications. Because these information requirements have evolved over the years, they have been published in different decisions. For the convenience of potential and existing applicants, these requirements have been consolidated and are attached to this order as Appendix B.

4. We require each applicant to file a concrete, comprehensive proposal for its proposed system and services, describing in detail all pertinent technical and operational aspects of the proposed system. Applicants with applications already on file with the Commission should review the information requirements listed in Appendix B to ensure that their applications are acceptable for filing.[8] An applicant must demonstrate its financial, technical and legal qualifications, as well as an ability to proceed promptly with construction and launch of the proposed satellites.[9] If more than two orbital locations are requested, applicants shall demonstrate firm customer requirements.[10] We recognize the increasing difficulties that will arise in

[8] The fact that these applications have already been listed on public notices of applications filed is not to be construed as a finding that they are acceptable for filing or meet the requirements of Appendix B. The Commission will dismiss any of these applications as unacceptable for filing if, upon later review, it is determined that they do not meet the requirements of Appendix B or our *Report and Order, supra*.

[9] *See e.g., Domestic Fixed Satellite Service, supra* note 2 at 960. To be acceptable for filing, the applicant must submit a concrete business plan to achieve this result. If the applicant can not prove it has sufficient funds committed to finance the construction and launch of the proposed satellite and the initial year of operation, it should indicate what steps have been taken to obtain financing and when it anticipates the necessary funds will be available. We intend to assess our experience with today's conditioned grants to applicants who have not firmly demonstrated their qualifications to determine if our domestic satellite policy objectives have been furthered by such an administrative approach. Thus, applicants should note that a financial qualification issue may be included in any evidentiary hearing that may be needed.

the course of achieving our objective to increase the supply of domestic satellite capacity as needed to satisfy growing user demand. We also recognize that a possibility exists that a mutually exclusive situation could arise if there are more fully qualified applicants with firm requirements than can be accommodated in orbit under the current state-of-the-art in satellite design. Thus, we are placing applicants on notice that all domestic satellite applications will be thoroughly scrutinized to insure that they strictly adhere to the informational requirements specified in Appendix B in a manner that demonstrates a real and independent business plan to provide domestic satellite service to the public. Failure to comport with these requirements, or to respond promptly to Commission requests for additional information, will result in dismissal of an applicant's application.

5. Therefore, applicants should note that if their applications are not acceptable for filing as of the cut-off date they will be returned. Furthermore, they will not be reinstated *nunc pro tunc*; thus they will not be entitled to any further consideration by the Commission. This includes any comparative evaluation that may become necessary. In this way, we intend to avoid, to the extent possible, speculative applications. To be acceptable for filing, applicants must meaningfully and concretely address each and every one of the information requirements listed in Appendix B. If, for some reason, an applicant is unable to respond to a specific requirement, the application should be accompanied by a request that sets forth the reasons that support a waiver of (or an exception to), in whole or in part, the particular requirement. If, upon prescreening, an application is found to be defective, it will be returned to the applicant. In order for it to receive comparative consideration with other, timely-filed, non-defective applications, amendments must be filed before the cut-off date. Additionally if a defect is overlooked at prescreening and discovered during normal processing, the application will be returned as unacceptable for filing. The burden is therefore on the applicant to insure that meaningful responses to the information requirements of Appendix B are contained in the application. To do otherwise could result in serious processing disruptions.

6. Accordingly, IT IS ORDERED that the policies and procedures specified herein are adopted pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, 47 U.S.C. §§154(i) and (j), and that the applications whose file numbers are listed in Appendix A to this order, as well as those domestic space station applications that may be filed by the time specified above, shall be considered as a group with respect to further processing by the Commission.

[10] *See Orbit Deployment Plan*, *supra*, and *Report and Order* in CC Docket No. 81-704, *supra* note 2. Such information and forecasted requirements should be related as specifically as possible to the applicant's experience, rather than to general industry forecasts.

7. IT IS FURTHER ORDERED that the Motion for Expedited Consideration filed by Ford Aerospace Satellite Service Corporation IS DISMISSED.

8. IT IS FURTHER ORDERED that the Secretary of the Federal Communications Commission shall cause this order to be published in the Federal Register at the earliest practical date.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

PENDING DOMESTIC SPACE STATION APPLICATIONS*

Cablesat General Corporation

2798-DSS-P/LA-82
2799-DSS-P/LA-82
2800-DSS-P-82

Ford Aerospace Satellite Service Corporation

528-DSS-P/LA-83
529-DSS-P/LA-83
530-DSS-P-83

GTE Satellite Corporation

2084-DSS-LA-82
2085-DSS-P-82

Hughes Galaxy, Inc.

1820-DSS-P/LA-83
1821-DSS-P/LA-83
1822-DSS-P/LA-83
1823-DSS-P/LA-83

National Exchange, Inc.

1824-DSS-P/LA-83
1825-DSS-P/LA-83
1826-DSS-P/LA-83
1827-DSS-P/LA-83
1828-DSS-P-83

Satellite Business Systems

1-DSS-P-83

Western Union Telegraph Company

1831-DSS-P/LA-82
1832-DSS-P/LA-82
2795-DSS-P/LA-82
2796-DSS-P/LA-82
2797-DSS-P/LA-82

* Received in Secretary's Office by April 26, 1983

Appendix B

Information Required For Domestic Satellite Space Station Applications

I. General Requirements

A. The original and nine (9) copies of any application to be considered at the same time with the pending applications for domestic Fixed Satellite systems shall be submitted for filing at the Commission's Main Office in Washington, D.C.

Mr. William J. Tricarico
Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Attention: Satellite Radio Branch
Brown Building - Room 307

B. The comprehensive proposal for the entire system may be submitted in narrative form with attached exhibits.

C. A separate and distinguishable application should be submitted for each proposed space or ground station. Information that is duplicated in the system proposal may be incorporated in these applications by reference.

D. The original of the system proposal and each of the individual applications must be signed in accordance with the requirements of Section 1.743 of the rules, 47 C.F.R. §1.743, and contain the formal waiver required by Section 304 of the Communications Act, 47 U.S.C. §304.

II. System Proposal/Description

A. Name and post office address of the applicant.

B. Name, address and telephone number of the person(s), including counsel, to whom inquiries or correspondence should be directed.

C. General description of overall system facilities, operations and services, including the arrangements for access to the system between the premises of the users and the earth stations.

D. General Technical Information

Technical standards for domestic fixed-satellites are set forth in the international Radio Regulations, Part 25 of the Commission's Rules and Regulations, and the *Report and Order* in CC Docket No. 81-704. Applicants are required to design and operate their satellites to the most current state-of-the-art in satellite design. New space station designs must be compatible with two degree orbital separations in the 4;6 GHz and/or 12;14 GHz bands, as appropriate. Additional constraints or adjustments to the technical parameters of the system may be required as a condition of any station authorization or to effect frequency coordination with other countries.

1. Radio frequency plan—including frequencies, bandwidth, polarizations, emission designators, power into antenna(s) and satellite antenna gain contours.

2. Calculations of power flux density levels within each coverage area and of the energy dispersal, if any, needed for compliance with Section 25.208 of the rules, 47 C.F.R. §25.208.

3. Number of satellites:

(a) In-orbit

(b) On-the-ground spares

4. Estimated number and geographic distribution of earth stations:

(a) Transmit and receive

(b) Receive-only

(c) Transmit-only

5. Physical characteristics of the space station:

(a) Weight and dimensions of spacecraft, including drawings (when available), detailed mass (on ground and in orbit) and power (beginning and end of life) budgets.

(b) Estimated operational lifetime of the space station and the basis for that estimate.

E. A description of the types of services to be provided, the estimated demand for such services, and the areas and entities to be served, including a description of the transmission characteristics and performance objectives for each type of proposed service, details of the link noise budget, typical or baseline earth station parameters, modulation parameters and overall link performance analysis (including an analysis of the effects of each contributing noise source). An estimate of transponder capacity under each of the proposed operating conditions should also be supplied.

F. An applicant should provide interference analyses to demonstrate the compatibility of its proposed system 2° from any authorized space station. In order to allow such analyses to be completed by the Commission and other applicants in the course of future consideration of these applications, applicants should also provide details of their proposed r.f. carriers which they believe should be taken into account in such analyses. At a minimum, such details should include, for each type of r.f. carrier, the link noise budget, modulation parameters, and overall link performance analysis. (*See e.g.* , Appendices B and C to *Report and Order* in CC Docket No. 81-704).

9. Systems reliability, redundancy and link availability:

(a) in satellite
(b) in earth stations
(c) solar noise outages
(d) eclipse conditions
(e) other

10. Launch vehicle and arrangements for procuring launch services.

11. Arrangements for tracking, telemetry, and control, including proposed operating frequencies, polarization, bandwidth, power into the antenna(s), antenna beam(s), and earth stations.

G. Preferred range of locations of satellites and reasons therefor.

Applicant shall consider and submit details regarding the selection of the orbital longitude(s) for its proposed system. In such showing, applicant shall discuss and where appropriate determine the probability of interference between its proposed satellite system and other satellite systems which are either established or proposed systems. The effect of the applicant's proposed system on the overall utilization and management of the available orbital space should be considered and discussed. Satellites shall be capable of reasonable shifts in orbital longitude since the

Commission reserves the right to reassign orbital locations. *See Western Union Telegraph Company*, 47 FCC 2d 274 (1974).

1. For each proposed in-orbit satellite, a detailed explanation of all factors that would limit the orbital arc over which the satellite could adequately serve its expected users. Applicants should also include a detailed explanation of the impact on them and their customers if such orbital locations are not in fact assigned to them.

2. A detailed description of the capabilities, if any, of each proposed satellite to provide service to Alaska, Hawaii, and/or Puerto Rico/Virgin Islands. For each of the proposed satellites, identify which transponders and antenna beams (including the associated receiving system noise temperatures and transponder output powers) are connected or are switchable to provide service to each of these offshore areas, and describe any differences in services and/or earth station facilities in these offshore areas from the baseline services and facilities available in the contiguous states.

3. If more than two orbital locations are being requested, detailed information on the historical use of the system transponder-by-transponder and on a year-by-year basis, together with a projection of the types and amount of services, including restoral or protection requirements, for each additional satellite on a year-by-year and transponder-by-transponder basis over the estimated lifetime of the satellite(s).

H. A detailed schedule specifying specific dates by which any significant milestones are planned to be achieved. At a minimum, the following milestones should be included in this schedule:

1. negotiations completed and contracts executed

   a. Spacecraft RFP issued
   b. Spacecraft contractor selected
   c. Spacecraft contract executed
   d. Launch services contract executed
   e. Financing completed (See Item J.2)

2. For each spacecraft

   a. Spacecraft construction begun
   b. Spacecraft construction completed
   c. Spacecraft launched
   d. Spacecraft in service

I. A detailed schedule of the estimated investment costs and operating costs for the proposed system by year, including annual depreciation, maintenance and operating costs, and the basis on which such costs are calculated. Estimated annual revenue requirements should be provided in detail on a year-by-year basis over the estimated design lifetime of the satellites, including any pre-operational periods. Costs and revenue requirements should be broken down into at least the following components:

1. Pre-operating expenses
2. Research and development
3. Satellite construction
4. Satellite launch services
5. Satellite incentive assuming successful launch
6. Insurance premiums (launch failure, business interuption, etc.)
7. Earth station investment (transmit/receive, receive-only, transportable, and tracking, telemetry, and control) (Estimated cost totals for each type of earth station may be calculated on the basis of the estimated average cost of a

station of that type. The estimated average cost should be subdivided into components such as equipment, building, land power, etc. Specific construction cost estimates for each earth station should be submitted with the application for the particular facility.)

8. Earth station operations
9. Other investment (please identify)
10. Other operating (please identify)

J. Detailed information on the financial qualifications of the applicant to construct and launch the proposed satellites including the following items:

1. The source and amounts of funds firmly committed to the satellite program on a year-by-year basis (e.g. current assets, scheduled debt financing or stock issues, established lines of credit, or other forms of internal financing).
2. The source and amounts of funds that are potentially available to the satellite program on a year-by-year basis (including the identity of the financers and the degree of commitment to provide financing).
3. The source and amounts of estimated revenues or income from the proposed satellite operations on a year-by-year basis.
4. Detailed financial statement of the applicant (and parent companies if relied on for financial qualification showings), including current balance sheet and current operating statement.

K. Legal qualifications of applicant (FCC Form 430 - if FCC Form 430 is already on file, please indicate date and radio service of most recent filing).

L. A clear and detailed statement of whether the space station is to be operated on a common carrier basis, or whether noncommon carrier transactions are proposed. Where common carrier services are proposed and the applicant has not yet been certified pursuant to Section 214 of the Act, the information listed in Section 63.01 of the rules should be supplied. *See Domestic Satellite System Applications*, 38 FCC 2d 40 (1972), *Orbital Deployment Plan*, 84 FCC 2d 584 (1980), and *Competitive Carrier Rulemaking*, 85 FCC 2d 1 (1980), for further details. Where noncommon carrier transactions are proposed, the information specified in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), must be supplied. *See also Domestic Communications Satellite Facilities*, 22 FCC 2d 86, 101–102 (1972).

M. Public interest considerations in support of a grant.

III. Individual Applications

A separate application should be filed for each satellite to be constructed. Launch and operating authority should be requested for each in-orbit satellite, including any previously constructed as a ground spare. Only construction authority is needed for an on-ground spare satellite, and some of the information requested below would not be relevant. Each application must constitute a concrete proposal for Commission evaluation, although the applicant may propose alternatives that increase flexibility in accommodating the satellite in orbit. Each application must be signed by the person specified in Section 1.743 of the rules, 47 C.F.R. §1.743 and contain the formal waiver required by Section 304 of the Communications Act, 47 U.S.C. §304.

The technical information for a proposed domestic satellite radio system need not be filed on any prescribed form but should be complete in all pertinent details. Applications should be captioned in a manner that clearly distinguishes individual satellites within the applicant's system. The format of the application should conform

to the specifications of Section 1.49 of the rules, 47 C.F.R. §1.49. The following information should be contained in the separate applications.

A. Name and post office address of the applicant.

B. Name, address and telephone number of the person(s), including counsel, to whom inquiries or correspondence should be directed.

C. Radio frequency and polarization plan (including beacon, telemetry and telecommand functions), center frequency and polarization of transponder or TT&C function (both receiving and transmitting frequencies), emission designator or allocated bandwidth of emission, final amplifier output power (identify any net losses between output of final amplifier and input of antenna), identification of which antenna beams are connected or switchable to each transponder and TT&C function, receiving system noise temperature, and the gain of each transponder channel (between output of receiving antenna and input of transmitting antenna) including any adjustable gain step capabilities. Receiver and transmitter channel filter response characteristics are also requested when available.

D. Orbital location, or locations if alternatives are proposed, requested for the satellite, the factors which support such an orbital assignment, the range of orbital locations from which adequate service can be provided and the basis for determining that range of orbital locations.

E. Predicted space station coverage contour(s) for each antenna beam and nominal orbital location requested, displaying the following space station technical parameters:

1. Receiving antenna gain
2. Transmitting antenna gain
3. Receiving system sensitivity (G/T ratio)
4. Saturation power flux density
5. Effective isotropically radiated power
6. Identification of transponders with antenna beam(s), including a functional block diagram of the satellite communication system and switching capabilities.

It is desirable that these contour(s) be plotted on an area map at 2 dB intervals down to 10 dB below the peak value of the parameter and at 4 dB intervals between 10 dB and 20 dB below the peak values. If the contours change as a function of transponder frequency or polarization, separate contours or a description of any significant changes should be provided. (One or more of these parameters may be plotted on the same figure if the shape of the parameter contours are identical and the numerical value of the parameter associated with each contour is clearly identified.)

F. Physical Characteristics of Space Station.

1. Accuracy with which orbital parameters will be maintained:

(a) orbital inclination
(b) antenna axis attitude
(c) longitudinal drift

2. Accuracy of spacecraft antenna pointing toward the earth.

3. Estimated lifetime of satellite in-orbit and the basis for that determination.

4. Description of spacecraft attitude stabilization and station-keeping systems.

5. Electrical energy system description, including provision, if any, for operation during eclipse conditions.

G. Emission limitations. The degree to which spurious emissions are attenuated below the mean power output of the transponder under actual electrical condition of proposed operation.

1. On any frequency removed from the assigned frequency by more than 50 percent up to and including 100 percent of the authorized bandwidth.

2. On any frequency removed from the assigned frequency by more than 100 including 250 percent of the authorized bandwidth.

3. On any frequency removed from the assigned frequency by more than 250 percent of the authorized bandwidth.

H. Dates by which construction will be commenced and completed, launch date, and estimated date of placement into service.

IV. Earth Stations

Concrete applications need not be filed initially for communications or TT&C earth stations unless specific sites have been already selected or existing facilities are being modified. If such applications are being filed, the frequency coordination between earth stations and terrestrial radio relay stations specified in Part 25 of the Rules and Regulations must be completed. For other application requirements, *see Processing Procedures for Domestic Satellite Earth Station Applications*, FCC 75-932, Public Notice released August 8, 1975.

Contour, Overlap
Measurement, Required

Review Board directs parties to take joint field intensity measurements to locate applicant's 0.5 mV/m contour and station WPGW's 0.025 mV/m contour. Although existing measurements have been taken by the parties separately in "concurrent" measurements, their accuracy and validity have been challenged in this proceeding.
–GSM Media Corporation
BC Docket No. 81–606

FCC 83R-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of GSM MEDIA CORPORATION Ontario, Ohio	BC Docket No. 81–606 File No. BP-20,202
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: April 20, 1983; Released: April 22, 1983.)

BY THE REVIEW BOARD:

1. This proceeding began more than seven years ago when GSM Media Corporation (GSM) filed an application on January 2, 1976, for authority to construct a new AM station in Ontario, Ohio. As a result of a petition to deny filed by Greater Mansfield Broadcasting Company (GMBC), licensee of Stations WCLW and WCLW-FM, Mansfield, Ohio, GSM's application was designated for hearing to determine whether its proposed 0.5 mV/m contour would overlap the 0.025 mV/m contour of AM Station WPGW, Portland, Indiana in violation of Section 73.37(a) of the Commission's Rules, 47 CFR 73.37(a), and whether its proposed antenna system can be adjusted and maintained within the proposed limits of radiation. Memorandum Opinion and Order, Mimeo No. 003113, 46 Fed. Reg. 45188, published September 10, 1981. GMBC was made a party to the proceeding. Prior to commencement of the hearing, Administrative Law Judge James F. Tierney (ALJ) issued a Summary Decision (*S.D.*) granting GSM's application upon a finding that no genuine issue of material fact remained for determination at hearing concerning

either issue. FCC 82D-78, released December 15, 1982. This proceeding is now before the Review Board on exceptions filed by GMBC. Oral argument was held on March 25, 1983.

2. In its exceptions, which pertain solely to the overlap issue, GMBC contends that summary decision is inappropriate since unresolved factual questions exist concerning the location of the two contours in question and the validity of GSM's engineering data pertaining to the question of overlap. GSM and the Mass Media Bureau disagree with GMBC and argue that the ALJ properly relied on the Bureau's engineering analysis, which averaged all available data submitted by the parties, a methodology approved in *United Broadcasting Co., Inc.*, 1 FCC 2d 555, 559, 5 RR 2d 684, 689 (1965), and that he correctly found no prohibited overlap. After reviewing the *S.D.*, the record, and the oral and written arguments, the Board believes that the best course at this time is to direct the parties to take joint field intensity measurements of both contours within 45 days from the release date of this opinion. Our reasons follow.

3. GSM calculated the distance separating Station WPGW from GSM's proposed transmitter site as 128.2 miles. *S.D.*, n.1. Rather than rely on the Commission's Figure M3 conductivity data to calculate the location of the two contours, GSM submitted actual field intensity measurements with its application to show that there would be no overlap. GMBC submitted its own field intensity measurements of Station WPGW's 0.025 mV/m contour in its petition to deny in order to rebut GSM's showing and to prove that the contour did overlap GSM's 0.5 mV/m contour. Because of considerable differences in the measurements submitted regarding the 0.025 mV/m contour, in 1978 the Mass Media Bureau requested the parties to conduct joint measurements of that contour. The parties could not agree on joint measurements, however, and instead conducted "concurrent" measurements, that is, their own separate measurements on the same days. GSM's analysis of its data showed the 0.025 mV/m contour to lie at 106 miles from Station WPGW; GMBC found it to fall at 115.3 miles. GMBC also took measurements near the location spots that GSM had used (GMBC using slightly different locations to avoid what it considered to be obstructions that would affect signal intensity) and claimed that these measurements showed the contour to fall at 117.5 miles. GSM's application was subsequently designated for hearing.

4. In its motion for summary decision, GSM averaged the "concurrent" measurements and found Station WPGW's 0.025 mV/m contour to lie at 116 miles. Having calculated its own 0.5 mV/m contour to fall at a distance of 10.2 miles, it asserted that a 2 mile separation with no overlap exists between the contours, since the sites are 128.2 miles apart (see paragraph 3, *supra*). The Bureau supported GSM's motion, averring in an affidavit that it had averaged *all* available data submitted by both parties and concluded

that there was no overlap. The ALJ then issued his Summary Decision granting GSM's application.

5. Although GMBC agreed in principal at oral argument that data averaging is proper when all of the data are valid (Tr. 68–69, 71), it objects to including GSM's data in any engineering analysis because of GSM's mode of procedure in taking the "concurrent" measurements. Thus, it claims GSM waited until a drought in midsummer to conduct its tests (Tr. 147), a period when signal intensity is low, and took its measurements at pre-selected points which were located under overhead wires or other obstructions. GMBC Br. at 25. GMBC states that fluctuations in signal intensity occur with seasonality and contends that GSM refused to conduct the "concurrent" measurements midway between summer and winter when the extreme effects of seasonality are minimized. Tr. 147–49. GMBC argues that all of GSM's measurements, including its 0.5 mV/m contour, are tainted by these alleged tactics. GMBC particularly points to the testimony given by Harry James Hire, who directed the taking of GSM's measurements, that the pre-selected points for the "concurrent" measurements were determined by walking around and finding a low spot, *i.e.*, a low signal. GMBC Br. at 20.

6. Although the Board is reluctant to prolong this already protracted proceeding, it appears that the evidence presently of record may lack the necessary certainty required for a sound resolution that comports with the public interest. Thus, many of the measurements are disputed—either as unusually distorted by seasonality or as invalid because of improper locations or techniques—yet valid measurements are critical to a reasoned analysis and decision. *See* Section 73.153 ("field strength measurements will take precedence . . . provided such measurements are properly taken and presented"). And there is no clear guidance for separating the wheat from the chaff. We are therefore ordering new supplemental measurements of the 0.5 mV/m contour of GSM and the 0.025 mV/m contour of Station WPGW to be jointly taken by the parties. *See Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 25 RR 2d 135, *affirmed*, 37 FCC 2d 583, 25 RR 2d 595 (1972), where joint field intensity measures were ordered. *See also* Section 73.188(i). We specifically direct that actual field measurements be used; if there is any need to rely on theoretical values, such reliance must be fully explained and justified.

7. We recognize that additional measurements will create some delay in resolving this proceeding; however, we believe that this action will provide the necessary additional engineering evidence to overcome present uncertainties and ensure a just ultimate disposition. In light of past disagreements between GSM and GMBC, we emphasize that "concurrent" measurements will not be considered as complying with this Order. Noting that the Bureau indicated at

oral argument its desire to assist in the expeditious resolution of this matter, we encourage it to participate as fully as possible in the taking of the joint measurements that we are ordering, the mediation of any related disputes that may arise, and the analysis of the resulting data. Since time is of the essence to ensure that seasonality will not have an excessive impact upon the measurement data, the parties are directed to conduct their joint measurements of both contours within 45 days from the release date of this Memorandum Opinion and Order. Once such measurements have been taken, the parties will have 30 days in which to submit their studies to the Board, and 15 days thereafter in which to file comments on the studies. Extensions of time will not be approved absent extraordinary cause.

8. ACCORDINGLY, IT IS ORDERED, That GSM Media Corporation and Greater Mansfield Broadcasting Company ARE DIRECTED to take joint field intensity measurements to locate the pertinent GSM Media Corporation and Station WPGW contours in accordance with this Memorandum Opinion and Order within forty-five (45) days from the date of its release and to submit their studies of such measurements thirty (30) days thereafter; and the parties MAY FILE comments on the studies within fifteen (15) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS *Member, Review Board*

Allegations, Sufficiency of
Application, for Review
Remand

Case remanded to ALJ for further evidentiary proceedings. Review Board decision, 88 FCC 2d 830 (1981) remanded for further consideration. Allegations and pleadings raise questions of probable decisional significance and are of such substantial public interest importance as to warrant consideration. Applications for review dismissed; petition for Section 403 inquiry denied.
–*New Continental B/cing Co.*
BC Docket No. 79–305

FCC 83–159

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THE NEW CONTINENTAL BROADCASTING COMPANY Miami, Florida	BC Docket No. 79–305 File No. BP-21251
DADELAND BROADCASTING COMPANY, INC. Miami, Florida	BC Docket No. 79–307 File No. BP-780905AN
COMMUNITY BROADCASTERS, INC. Miami, Florida	BC Docket No. 79–310 File No. BP-780906AH
RADIO AMERICA BROADCASTING INCORPORATED Miami, Florida	BC Docket No. 79–312 File No. BP-780906AJ
For Construction Permit for New AM Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 7, 1983; Released: April 13, 1983)

BY THE COMMISSION: CHAIRMAN FOWLER NOT PARTICIPATING; COMMISSIONER FOGARTY ABSENT.

1. This proceeding involves four applications for a new AM broadcast station in Miami, Florida. Now before us are: (a) four Applications for Review of a Review Board Decision, 88 FCC 2d 830 (1981), reconsideration denied, 89 FCC 2d 631 (1982);[1] (b) a Petition for Section 403 Inquiry,[2] filed September 9, 1982, by Community Broadcasters, Inc. (Community);[3] (c) a Motion to Reopen the Record and Remand for Further Evidence Concerning The Radio America Broadcasting Incorporated's (RAB) Integration Proposal, filed August 27, 1982, by The New Continental Broadcasting Company (New Continental);[4] and (d) a Motion to Reopen the Record and Enlarge the Issues against RAB, filed September 2, 1982, by New Continental.[5]

2. In its Petition for Section 403 Inquiry, Community seeks an investigation into the possibility that New Continental violated the Commission's *ex parte* Rules, prohibiting unilateral contacts with FCC decision-making personnel during the pendency of an adjudicatory proceeding. 47 CFR §1.1201–1.1251. Community relies on a July 1, 1982, letter from Charlie Black to Chairman Fowler which enclosed a June 24, 1982, letter from Genean McKinnon to Charlie Black. The McKinnon letter suggests that the Review Board's Decision in this proceeding may have been politically motivated. It also refers to McKinnon's telephone conversation with Black which

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[1] On January 29, 1982, all of the above-captioned applicants filed Applications for Review. In addition, Radio America Broadcasting Incorporated (now The New Radio Broadcasting Company) filed an amended Application for Review on May 7, 1982. Various responsive pleadings were filed on May 24, 1982. Radio America Broadcasting Incorporated filed a Motion for Expedited Consideration on June 2, 1982. Christian Tele-Communications, Inc. filed an Amicus Curiae Brief and Petition for Leave to file Amicus Curiae Brief on February 17, 1983.

[2] Section 403 of the Communications Act of 1934, as amended, provides in pertinent part:

> The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.

[3] We also have before us: (a) an Opposition, filed September 14, 1982, by The New Continental Broadcasting Company; and (b) an Opposition, filed September 20, 1982, by the Broadcast Bureau.

[4] We also have before us: (a) an Opposition, filed September 7, 1982, by the Broadcast Bureau; (b) an Opposition, filed September 8, 1982, by RAB; (c) Comments in Support of Motion to Reopen the Record, filed September 1, 1982, by Community; and (d) Motion to Strike Comments, filed September 8, 1982, by RAB.

[5] We also have before us: (a) Comments in Support of Motion to Reopen the Record, filed September 15, 1982, by the Broadcast Bureau; (b) Opposition, filed September 20, 1982, by RAB; (c) Reply to Opposition, filed October 4, 1982, by New Continental; (d) a Motion to Strike the Reply, filed October 20, 1982, by RAB; (e) Opposition to Motion to Strike Reply, filed October 26, 1982, by New Continental; and (f) Opposition to Motion to Strike Reply, filed October 29, 1982, by the Broadcast Bureau.

concluded that "it would be wonderful if [General Counsel Stephen Sharp] could act to approve review before his departure from the Commission." In this context, Community maintains there is no question that the McKinnon letter was written on behalf of New Continental. Community further surmises that New Continental must have authorized the *ex parte* contact. In this regard, Community relies on the affidavits of Genean McKinnon, Charlie Black, and New Continental principals Emilio Milian and Jorge Mas Canosa[6] which New Continental submitted to explain that no one connected with it solicited, or was aware of the correspondence sent to the Chairman. Community notes that these affidavits show that McKinnon and Mas Canosa are friends, who confer frequently on business matters; that McKinnon discussed the merits of the case with Mas Canosa and Milian; and that McKinnon and Black are friends, as are Black and Chairman Fowler. In view of the close relationship of the parties, Community finds it inconceivable that no one connected with New Continental knew that McKinnon wrote to Black and that Black forwarded McKinnon's letter to Chairman Fowler. Accordingly, Community submits that there are substantial and material questions of fact which warrant an investigation into this matter.

3. We will deny Community's petition. In our view, there is insufficient factual basis to warrant a Section 403 inquiry. Section 403 affords us broad discretion to determine whether to institute such an investigation. Nevertheless, we have generally not ordered an inquiry absent some actual basis for believing that either the Communications Act or our Rules have been violated. Here a letter discussing the merits of this proceeding was sent to Chairman Fowler.[7] However, neither the author of the letter, Genean McKinnon, nor the person who forwarded it to the Chairman, Charlie Black, have any official connection with, or interest in, New Continental. More importantly, both have averred that each was acting on his own when he wrote the letters in question. The affidavits of New Continental principals Emilio Milian and Jorge Mas Canosa confirm that they did not solicit, and were not aware of, the correspondence. In view of these uncontroverted statements, we do not believe that the letter together with the relationship of the people involved are sufficient to warrant a Section 403 investigation. To order an investigation based entirely on such circumstantial evidence as Community offers, would unnecessarily delay this proceeding without any firm indication that an issue would ultimately be added. Nor will we enlarge the issues on our own motion, based on Community's circumstantial showing. Section 1.229 of our Rules

[6] Emilio Milian is the president of New Continental and Jorge Mas Canosa was a shareholder until July 10, 1982.

[7] Upon receipt of the letter, the Chairman's Office placed it in the public correspondence file associated with this proceeding.

requires that motions to enlarge issues contain "specific allegations of fact sufficient to support the action requested." Generally, we have required more than circumstantial evidence that a party to the proceeding is responsible for an *ex parte* communication to justify the addition of an *ex parte* issue.[8]

4. On August 13, 1982 RAB amended its application to report that one of its integrated stockholders, Carmen S. Rosado,[9] had remarried and moved to Oklahoma City. Attached to the amendment was a letter, dated July 30, 1982, from Carmen S. VanOrman (formerly Carmen S. Rosado) to RAB's president Jose A. Rosado, which states that she intends to move back to Miami approximately one month before the station goes on the air, and that she intends to work full-time at the station. In its Motion to Reopen the Record,[10] New Continental maintains that there is substantial question as to whether Carmen S. VanOrman will fulfill her pledge to be full-time public relations director at the station. In this regard, it claims that the Commission must disregard the statements in Mrs. VanOrman's letter since they are unsworn and have not been subject to cross-examination. Moreover, since the letter does not explain the circumstances of Mrs. VanOrman's move, New Continental submits that there is no basis for determining whether her promise to return to Miami is realistic. Accordingly, New Continental asserts that a hearing is necessary to resolve the uncertainty created by Mrs. VanOrman's remarriage and move to Oklahoma.

5. With its opposition pleading, RAB submitted an affidavit from Mrs. VanOrman which corroborates her statements in the letter. It reaffirms that her commitment to RAB is unchanged, that she intends to return to Miami approximately one month before the station goes on the air, and that her husband is aware of her intention to do so. In view of these unequivocal representations, we

[8] *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980), *review denied*, FCC 80-688, released Nov. 21, 1980; *Western Communications, Inc.*, 40 FCC 2d 768 (Rev. Bd. 1973).

[9] Carmen S. Rosado was a 25% shareholder of RAB which consisted of five stockholders. Following the release of the Initial Decision, the corporation was reformed to exclude Janice and Armando Sanchez-Ossorio who indicated that they were no longer willing to participate in the operation of the station. Mrs. VanOrman (formerly Carmen S. Rosado) is now a 33% shareholder in the newly formed corporation, the New Radio America Broadcasting Company. The Review Board awarded RAB 25% integration credit for Mrs VanOrman's promise to work full-time at the station.

[10] In Comments, filed September 1, 1982, Community supports the Motion to Reopen the Record. On September 8, 1982, RAB moved to strike the Comments on the ground that Section 1.294 of the Rules does not permit the filing of comments unless specifically authorized by the Commission. We will deny the Motion to Strike. In our view, Section 1.294 does not preclude a party to a proceeding from filing a pleading in support of a Motion to Reopen the Record. Opposition is a generic term which includes any type of responsive pleading. *See Charles W. Holt*, 38 FCC 2d 538 (Rev. Bd. 1972).

do not believe that a further evidentiary hearing would serve any useful purpose.[11] As the Bureau notes, New Continental has furnished no information which contradicts Mrs. VanOrman's statements and, therefore, there is no reasonable basis to believe that RAB's integration proposal will not be fully effectuated. Thus, we will deny New Continental's Motion.

6. In its second Motion to Reopen the Record, New Continental alleges that the signatures on two affidavits, furnished by RAB and verified by its President (Jose A. Rosado), were forgeries. The affidavits in question were included in an amendment which RAB filed on September 4, 1979 and were submitted to demonstrate that a $130,000 loan commitment from the Manufacturers National Bank would be available to the applicant. They state that, as required by the bank's letter, Janice and Armando Sanchez-Ossorio will pledge their RAB stock as collateral and personally guarantee the loan.[12] At the hearing, RAB offered the affidavits into evidence to meet a financial qualifications issue. In an affidavit supporting the hearing exhibit, Rosado stated that the affidavits were true copies of authentic originals.

7. In support of its contention that the affidavits were forged, New Continental relies upon a written acknowledgement, dated August 18, 1982, from the Sanchez-Ossorios which states that they never signed the affidavits or authorized any one else to sign on their behalf.[13] New Continental also relies on the report of Lyndal L. Shaneyfelt, an Examiner of Questioned Documents. According to his report, the signatures on the affidavits in question were traced from signatures affixed to RAB's By Laws. New Continental maintains that, in light of evidence that the signatures were forged and that RAB was responsible for the forgeries, the record must be reopened and a character issue must be designated against RAB. It acknowledges that it became aware that the Sanchez-Ossorios had not signed the affidavits many months ago. It explains, however, that they would not confirm in writing the fact that the affidavits were forged until August 18, 1982, and that its motion was filed within 15 days thereafter as required by Section 1.229(b) of the Commission's Rules. Because of the serious nature of the allegations, New Continental claims that, even if its motion is deemed untimely under Section 1.229(b), it must be considered under Section 1.229(c) inasmuch as it raises a question of probable decisional significance. Hence, New

[11] *Henderson Broadcasting Co.*, 63 FCC 2d 119 (Rev. Bd. 1976).

[12] To demonstrate the availability of the bank loan, RAB submitted affidavits from all five shareholders as the bank required. The authenticity of the other three affidavits is not in question.

[13] On August 17, New Continental principal Emilio Milian wrote to the Sanchez-Ossorios requesting them to confirm that they had not signed the affidavits. They returned the letter the next day with their signatures affixed, signifying that the information contained in the letter was true.

Continental submits that, under established precedent, the Commission cannot affirm the grant to RAB without exploring these alleged misrepresentations.[14]

8. In Opposition, RAB first claims that the motion is inexcusably late since New Continental has known for many months that the Sanchez-Ossorios did not sign the affidavits. Citing *West Central Ohio Broadcasters* [15] and *Ultravision Broadcasting Co.*,[16] RAB maintains that a request for a misrepresentation issue which is not based on newly discovered evidence should not be entertained. Turning to the merits, RAB submits an affidavit, dated September 13, 1982, from Rosado which states that he signed the affidavits in question but that the Sanchez-Ossorios expressly authorized him to sign on their behalf. The affidavit explains that Rosado signed the affidavits only because the Sanchez-Ossorios were not in Miami at the time and the applicant was under substantial time pressure, and that, although he believes he copied the signatures freehand from samples, he does not remember tracing them. Moreover, RAB contends that the written acknowledgement from the Sanchez-Ossorios that they did not personally sign the affidavits does not mean that they did not authorize Rosado to sign on their behalf. Furthermore, RAB asserts that the Sanchez-Ossorios have, by testimony substantiating their willingness to guarantee the loan as well as by their subsequent conduct, ratified the September 1, 1979 affidavits. Relying on *RKO General, Inc.*,[17] RAB therefore maintains that, since the signatures were authorized, since the nominal signatories were unavailable, and since the information contained in the affidavits has been fully corroborated, there is no substantial question of forgery or intent to defraud which would warrant reopening the record.

9. In reply,[18] New Continental has submitted affidavits from the

[14] New Continental relies upon *Payne of Virginia, Inc.*, 66 FCC 2d 633, 641–42 (1977); *Lamar Life Broadcasting Co.*, 44 FCC 2d 816 (Rev. Bd. 1974); and *Chapman Radio and Television Co.*, 24 FCC 2d 282 (1970).

[15] 4 FCC 2d 934 (Rev. Bd. 1966).

[16] 6 FCC 2d 485 (Rev. Bd. 1967).

[17] 22 FCC 2d 737 (1970).

[18] On October 20, 1982, RAB moved to strike the Reply. It first alleges that, pursuant to Section 1.294(b) of the Rules, replies to oppositions to motions to reopen are not permitted. It next submits that New Continental's Reply impermissibly relies on new material. We will deny the Motion to Strike. New Continental seeks the addition of an issue, and Section 1.294(c) specifically allows replies in the case of petitions to enlarge issues. Furthermore, the material contained in the Reply is largely responsive to specific allegations raised in RAB's Opposition and does not rely upon wholly new material to support its allegation that the signatures were forged. In this regard, we do not believe that New Continental was obliged to anticipate that RAB would claim that the signatures were authorized and that the Sanchez-Ossorios were unavailable at the time the affidavits were signed. Moreover, the August 17 letter, which the Sanchez-Ossorios acknowledged, specifically states that the signatures were unauthorized.

Sanchez-Ossorios which state that they never authorized Rosado to sign the questioned affidavits on their behalf, and that they were not willing to personally guarantee the loan. Cancelled checks and credit card receipts of the Sanchez-Ossorios have also been submitted to show that they were in Miami on the day that the affidavits were executed. In addition, New Continental has provided a second affidavit from documents expert Lyndal L. Shaneyfelt which states that the signatures could not have been copied freehand, as Rosado's affidavit claims. Finally, New Continental maintains that the Sanchez-Ossorios have not ratified the forged signatures by their subsequent conduct. This is so, it is alleged, because both have made clear in their affidavits that they severed all connections with RAB once they realized their signatures had been forged.

10. For the reasons which follow, we will grant this motion because the allegations contained therein and in the responsive pleadings raise questions of probable decisional significance and are of such substantial public interest importance as to warrant consideration.

11. The allegation that RAB submitted forged affidavits to meet a financial qualifications issue raises a serious question as to its qualifications to be a Commission licensee. Since the bank loan would not be available unless each stockholder pledged his stock as collateral for and personally guaranteed the loan, RAB had an apparent motive to deceive the Commission as to the Sanchez-Ossorios' willingness to do so. It is undisputed that Rosado signed the affidavits, and that he did so in manner which suggested that the signatures were genuine. Although Rosado claims that the Sanchez-Ossorios authorized him to sign on their behalf, the August 17, 1982 letter from Emilio Milian, which the Sanchez-Ossorios verified on August 18, 1982, and which was submitted with the Motion to Reopen, specifically states that the Sanchez-Ossorios' names were signed without their authorization. In addition, documents expert Lyndal L. Shaneyfelt concluded that the signatures are traced forgeries. Furthermore, the sworn statements of the Sanchez-Ossorios and Shaneyfelt appear to contradict Rosado's statement that the Sanchez-Ossorios authorized him to sign on their behalf and that he copied their names freehand because they were unavailable.[19] Finally, the September 30, 1982 affidavits of Armando and Janice

[19] We will not, as New Continental requests in its Reply, add a misrepresentation or lack of candor issue against RAB based on the discrepancies between Rosado's statements and those of Shaneyfelt and the Sanchez-Ossorios. New Continental has not submitted its request for an additional issue in the form of a motion to enlarge issues, and we do not entertain requests for new issues which are contained in responsive pleadings. *See* Section 1.44 of the Commission's Rules; *Milam & Lansman*, 4 RR 2d 463 (Rev. Bd. 1964). Furthermore, any discrepancies in RAB's Opposition can be explored in the context of the issues which we are adding.

Sanchez-Ossorios affirmatively state that they were not willing to personally guarantee the bank loan. In view of the foregoing we are unable to conclude, based on the pleadings which are before us, that no misconduct has occurred.

12. Since the pleadings raise a substantial public interest question of probable decisional significance, we will dismiss the four Applications for Review which have been filed in this proceeding and the Motion for Leave to File Amicus Curiae Brief filed by Christian Tele-Communications, Inc., remand this case to the Administrative Law Judge for further evidentiary proceedings, and deny RAB's Motion for Expedited Consideration. Moreover, we will remand to the Review Board its Decision, 88 FCC 2d 830 (1981), in this proceeding for further consideration in view of the action here taken.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Section 403 Inquiry, filed September 9, 1982, by Community Broadcasters, Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and Remand for Further Evidence Concerning RAB's Integration Proposal, filed August 27, 1982, by The New Continental Broadcasting Company IS DENIED; and that the Motion to Strike, filed September 8, 1982, by The New Radio America Broadcasting Company IS DENIED.

15. IT IS FURTHER ORDERED, That the Motion to Strike Reply, filed October 20, 1982, by The New Radio America Broadcasting Company IS DENIED.

16. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and Enlarge the Issues Against Radio America Broadcasting Incorporated, filed September 2, 1982, by The New Continental Broadcasting Company IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

17. IT IS FURTHER ORDERED, That the record in this proceeding IS REOPENED AND REMANDED to the presiding Administrative Law Judge for further hearing and the preparation of a Supplemental Initial Decision on the following hearing issues:

(1) To determine all of the facts and circumstances surrounding the execution and filing of the affidavits, filed by Radio America Broadcasting Incorporated on September 4, 1979, which purport to bear the signatures of Armando and Janice Sanchez-Ossorio, dated September 1, 1979; and whether Rosado misrepresented facts to the Commission concerning the execution of the affidavits;

(2) To determine the effect of the findings made under (1) above upon the basic and/or comparative qualifications of Radio America Broadcasting Incorporated to be a Commission licensee.

18. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under Issue 1 SHALL BE on The New Continental Broadcasting Company; and that the burden of

proof under Issue 2 SHALL BE on The New Radio America Broadcasting Company.

19. IT IS FURTHER ORDERED, That the Administrative Law Judge IS DIRECTED to expedite the further hearings herein ordered.

20. IT IS FURTHER ORDERED, That its Decision, 88 FCC 2d 830 (1981), in this proceeding IS REMANDED to the Review Board for further consideration in view of the action here taken.

21. IT IS FURTHER ORDERED, That the Applications for Review, filed January 29, 1982 and May 7, 1982, by The New Continental Broadcasting Company, The New Radio Broadcasting Company, Dadeland Broadcasting Company, Inc., and Community Broadcasters, Inc., and the Motion for Leave to file an Amicus Curiae Brief, filed February 17, 1983, by Christian Tele-Communications, Inc. ARE DISMISSED without prejudice, subject to being refiled at an appropriate time in this proceeding and that the Motion for Expedited Consideration, filed June 2, 1982, by the New Radio America Broadcasting Company IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

Domestic Public Land Mobile Radio Service
Operation Continuation
Special Temporary Authorization
Temporary Authorization

Conditional operating authority, subject to mandatory accounting terms, granted to DPLMRS operator, whose licenses were revoked. Public interest necessitated limited continuation of service while new licensee could be chosen. Request for special temporary authority denied.
–Pass Word, Inc.
Docket No. 20939

FCC 83-216

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Revocation of the Licenses of PASS WORD, INC. Licensee of Stations KMM697, KOA271 KRS678 and KUC918 in the Domestic Public Land Mobile Radio Service and	Docket No. 20939
RODNEY J. BACON d/b/a COEUR d'ALENE ANSWERING SERVICE Licensee of Stations KWU337 and KUO646 in the Domestic Public Land Mobile Radio Service	Docket No. 20940

MEMORANDUM OPINION AND ORDER

(Adopted May 10, 1983 Released May 12, 1983)

BY THE COMMISSION:

1. The Commission by *Memorandum Opinion and Order*, CC Docket No. 20939, FCC 82-484, November 3, 1982 (Order), extended the authority of Pass Word, Inc., and Rodney J. Bacon d/b/a Coeur d'Alene Answering Service (collectively as Password) to continue to operate Domestic Public Land Mobile Radio Stations (DPLMRS) KMM697, KOA271, KRS678, KUC918, KWU337, and KUO646 and denied Special Temporary Authority (STA) to Courtesy Communications, Inc., (Courtesy) to construct and operate DPLMRS facilities on the frequencies previously authorized to Pass Word.

2. By way of background, the Commission revoked the common carrier licenses of Pass Word, Inc., in Spokane, Washington, and of

Coeur d'Alene Answering Service, Coeur d'Alene, Idaho. The revocation was based on the Commission's finding of numerous deliberate and unmitigated misrepresentations made by Rodney Bacon, president of both companies, in license applications and in subsequent communications with the Commission. *Pass Word, Inc.*, 76 FCC 2d 465 (1980) *recon. denied*, 86 FCC 2d 437 (1981), *aff'd sub nom. Pass Word, Inc. et al.* v. *FCC*, 673 F.2d 1363 (D.C. Cir. 1981), *cert. denied* 103 S.Ct. 89 (1982).

3. We granted the request for an extension of operating authority for a period of 180 days based upon our conclusion that cessation of DPLMRS service to the residents of Washington and Idaho would not be in the public interest. This authority was to expire May 2, 1983. At paragraph 5 of the *Order*, we conditioned the grant upon Pass Word accepting certain conditions, namely, to place in escrow with an independent escrow agent all net profits derived from its operations from November 3 to the present, to distribute its profits to a charitable organization, and to keep salary and expenditures to principals and their related employees at status quo.[1] Pass Word accepted these terms by letter dated November 3.

4. On April 8, 1983, Courtesy filed a further Request For Special Temporary Authority to operate DPLMRS facilities on the frequencies previously authorized to Pass Word. Several oppositions have been filed by the other applicants who are electrically mutually exclusive with the Courtesy application.

Discussion

5. Since the release of our *Order*, we have received eight additional applications for the Pass Word facilities. There have been ongoing settlement discussions among certain of the applicants; however, more time is needed to resolve outstanding differences. In light of these latest developments and since service can be otherwise maintained, it would not be in the public interest to grant Courtesy's STA request. The applicants will reach a settlement or all of the mutually exclusive applications will be evaluated comparatively by hearing or selected by a lottery pursuant to our *Second Report and Order*, Gen. Docket No. 81–760, FCC 83–114, adopted March 31, 1983.

6. With respect to the continuing operation of Pass Word's facilities, we have been informed that the number of units being served has declined from 1,866 to 532. Since subscribers are still being served, it would not be in the public interest to cause cessation of service now. Continuing operation of service shall cease within the next 180 days from the date of release of this *Memorandum Opinion and Order*. This authorization is conditioned upon Pass Word filing the following with the Commission: (a) a complete accounting of all monies received from November 3, 1982, to the present; (b) a

[1] *See* Order, released November 3, 1982, nn. 3, 5 and 6.

complete accounting of all disbursement of monies received from November 3, 1982, to the present; (c) a copy of a notification to all present customers that Pass Word will no longer be providing them any services, effective 180 days of the release date of this *Order*; and (d) an acknowledgement from the designated charity or charities that they have in fact received money and the amount of the money. This information shall be filed within thirty days from the release of this *Order* and in intervals of thirty day periods thereafter. Failure to comply with these requirements shall result in the institution of our forfeiture procedures.[2]

7. ACCORDINGLY, IT IS ORDERED, That the Pass Word, Inc. and Rodney J. Bacon, d/b/a Couer d'Alene Answering Service are granted a 180 day period of time to continue their operations, conditioned upon complying with the provisions of paragraph 6 of this *Order*, or until a permanent successor is selected, whichever occurs first.

8. IT IS FURTHER ORDERED, That the "Request for Special Temporary Authority" filed by Courtesy Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

[2] The conditions imposed by Memorandum Opinion and Order, CC Docket No. 20939, FCC 82-484, released November 3, 1982, para. 5 still remain in effect.

Declaratory Ruling
Separations Procedures
Settlement

Commission adopted Order preempting State actions requiring carriers to accept the use of seven-day periods for actual use measurements in connection with calculating the division of interstate toll revenues. Such State actions are inconsistent with Federal statutes and the policies and authority of the Commission.
–*Southern Bell Telephone & Telegraph Co.*

FCC 83–180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983 Released: May 10, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

1. The Commission has before it an Emergency Petition for Declaratory Ruling filed on December 3, 1982, by the Southern Bell Telephone and Telegraph Company (Southern Bell). The Petition requests the Commission to (1) declare that the Florida Public Service Commission (Florida PSC) exceeded its lawful authority by ordering Southern Bell to make certain retroactive and prospective interstate toll settlement payments to General Telephone Company of Florida (GTE of Florida) based upon seven calendar day studies of holding time minutes of use carried out by GTE of Florida; and (2) issue an order preempting the action taken by the Florida PSC. For the reasons set forth in this Opinion and Order, we are granting the Petition.[1]

[1] We do not intend here to reach the merits of the question whether seven-day studies are the most appropriate actual use measurements for separations and interstate settlements. Our only concern here is to define the parameters of Federal and State authority in these areas. We also emphasize that this Order does not affect State authority regarding intrastate toll settlements.

I. BACKGROUND

2. In January 1969, Southern Bell and GTE of Florida entered into a settlements agreement for the division of interstate toll revenues between the two companies. Southern Bell acts as a clearinghouse for a number of Florida telephone companies, collecting toll revenues and distributing shares of these revenues to the companies that are parties to the settlements agreements. The share of interstate toll revenues to which each company is entitled is calculated in accordance with the Standard Procedures for Separating Telephone Property Costs, Revenues, Expenses, Taxes, and Reserves (*Separations Manual*) published by the National Association of Regulatory Utility Commissioners and incorporated by reference in Part 67 of the Rules of the Commission, 47 C.F.R. §67.1.

3. Section 11.2 of the *Separations Manual* requires generally that separations will be made on the basis of "actual use" measured "in studies of traffic handled . . . during a representative period . . . ." The agreement between Southern Bell and GTE of Florida provided that a five-day period would constitute the "representative period" for purposes of calculating interstate toll revenue divisions between the two companies. In January 1970, Southern Bell and GTE of Florida entered into an agreement for the division of intrastate toll revenues between the two companies. Under this agreement also, a five-day measurement period was to be used for calculating the intrastate toll revenue divisions.

4. The two companies continued to adhere to the five-day measurement period provision in the intrastate and interstate agreements until December 14, 1981, the date on which GTE of Florida filed a petition with the Florida PSC requesting the Florida PSC to require Southern Bell to accept seven-day studies conducted by GTE of Florida for both intrastate and interstate toll revenue divisions between the two companies.

5. The Florida PSC ruled favorably on the petition filed by GTE of Florida. *In re Petition for Resolution of Toll Settlements Dispute Between General Telephone of Florida and Southern Bell Telephone & Telegraph Co.*, Docket No. 810474-TP, Order No. 10953 (July 1, 1982) (hereinafter cited as *Florida PSC Order*). The *Florida PSC Order* required Southern Bell to accept the seven-day studies on a prospective basis and also required Southern Bell to make certain retroactive payments to GTE of Flordia.[2] The Florida PSC subse-

[2] The amount of these payments was calculated by determining the amount of distributions that Southern Bell would have made to GTE of Florida under toll revenue divisions if the seven-day studies had been accepted by Southern Bell beginning on January 1, 1981. As of October 1, 1982, the amount of retroactive payments requried under the interstate agreement was approximately $29,825,000, and the amount under the intrastate agreement was approximately $2,745,000, for a total of approximately $32,570,000. Initial Brief of Southern Bell Telephone & Telegraph Co. filed in Supreme Court of Florida, Case No. 62,599, at 9

quently denied a petition for reconsideration and a petition for stay filed by Southern Bell. Docket No. 810474-TP, Order No. 11110 (Aug. 26, 1982).

6. Southern Bell then filed a petition for review in the Supreme Court of Florida and an action in Federal court seeking to overturn the Florida PSC action. The Federal action subsequently was dismissed without prejudice upon motion by Southern Bell. *Southern Bell Telephone & Telegraph Co. v. Florida Public Service Commission*, Case No. TCA 82-1143 (N.D. Fla. Dec. 16, 1982). The Florida PSC filed a motion in the Supreme Court of Florida requesting the court to remand the case to the Florida PSC for reconsideration. The Supreme Court of Florida granted the remand request and, on April 11, 1983, the Florida PSC reconsidered its earlier action and reversed its decision regarding application of the seven-day study requirement to interstate toll revenue divisions. The Florida PSC concluded that its previous action exceeded its authority under Florida statutes. It did not reach the issue of whether such action is preempted by Federal law. Docket No. 810474-TP, Order No. 11824 (April 11, 1983). As a result of this action, payments by Southern Bell under the interstate agreement no longer are at issue in the Florida proceeding.

7. In response to our Public Notice issued December 7, 1982 (FCC Mimeo No. 1212), comments or reply comments were filed by Southern Bell, GTE of Florida, American Telephone and Telegraph Company, the Florida PSC, Citizens of the State of Florida, the Reservation Telephone Cooperative, and the District of Columbia Public Service Commission. The Reservation Telephone comments were filed on behalf of Reservation Telephone and nine other Independent telephone companies located in North Dakota and South Dakota. GTE of Florida also filed additional comments, together with a motion requesting the Commission to accept additional comments. A summary of the comments is contained in the Appendix.

II. DISCUSSION

A. *Issuance of Declaratory Ruling*

8. Before we address the substantive issues raised in this proceeding, we first address procedural issues raised by several commentors. GTE of Florida, the Florida PSC, and Citizens of the State of Florida all suggested in their comments that we should deny the Petition filed by Southern Bell because the Florida PSC was

(undated) (incorporated as Attachment D of the Emergency Petition for Declaratory Ruling).

reconsidering its *Order* and such reconsideration made it unnecessary for us to render a declaratory ruling.[3] We do not find this argument persuasive. The Commission is specifically authorized to render declaratory rulings to "remove uncertainty . . . ." 5 U.S.C. §554(e) (codified as section 1.2 of the Rules of the Commission, 47 C.F.R. §1.2); *see Telerent Leasing Corp.*, 45 FCC 2d 204, 213, *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *Telerent*).

9. We find that recent and potential State actions have tended to create uncertainty regarding the scope of State authority to impose requirements that affect both the separations process and processes for making interstate toll settlements, and that it is not premature to address these issues at this time.[4] That the Florida PSC has reconsidered its initial *Order* does not alter this conclusion. In the *Preemption Order* in CC Docket No. 79–105, we stated:

> [T]he purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required . . . . In this case, it appears necessary to issue such a ruling to clarify for the state commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies.

Amendment of Part 31 (Preemption Order), Memorandum Opinion and Order, CC Docket No. 79–105 at para. 43 (released Jan. 6, 1983), *appeal docketed sub nom. Virginia State Corp. Comm'n v. FCC*, No. 83–1163 (4th Cir. Feb. 11, 1983) (citation omitted) (hereinafter cited as *Amendment of Part 31*). Similarly, in this case the disposition of the *Florida PSC Order* on reconsideration cannot dispel the uncertainty created by these other States' actions on a matter of such general concern, *i.e.*, the authority of States to act unilaterally in the area of jurisdictional separations. As we have noted, the disposition of the case on reconsideration was based on State statutory grounds and did not address issues of Federal preemption.

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[3] These comments were filed with this Commission before the Florida PSC took action upon reconsideration. See para. 6, *supra*.

[4] Kansas, Illinois, and Ohio have recently adopted seven-day studies as the appropriate actual use measurement for allocating costs between the interstate and intrastate jurisdictions. Illinois Bell Telephone Co., No. 81-0478 (Illinois Commerce Commission, May 26, 1982), *reconsideration*, No. 81-0478 (July 7, 1982); Southwestern Bell Telephone Co., No. 134,218-U (Kansas PSC, March 4, 1983); Ohio Bell Telephone Co., No. 81-1433-TP-AIR (Ohio PUC, Dec. 22, 1982); Cincinnati Bell Inc., No. 81-1338-TP-AIR (Ohio PUC, Jan. 7, 1983). One other State is now considering requests for the adoption of seven-day studies. Mountain States Telephone and Telegraph Co., No. 82-049-08 (Utah PSC, filed June 18, 1982).

B. *Preemption*

10. Having concluded that uncertainty exists regarding the relationship between the Federal regulatory scheme and the scope of State regulatory authority, we find it within our discretion to take such action as may be necessary, including the preemption of State action,[5] to dispel the uncertainty. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142–43 (1940); *Ringen v. American Telephone & Telegraph Co.*, 67 FCC 2d 848, 849 (1978); *Telerent*, 45 FCC 2d at 214; *see also Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 169 (1942) ("Nothing could be more fertile for discord . . . than a failure to define the boundaries of authority [between the Federal Government and the States]. . . .).

1. *General Rules; Statutory Framework*

11. The primary issue in preemption analysis is whether a national law enacted by the Congress should be deemed to override State laws.[6] The conclusion that preemption has occurred requires clear indication that the intention of the Federal enactment is to supersede State authority. "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202–03 (1952), *quoted in New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

12. The most direct manner of exercising this Federal supremacy occurs when the Congress states explicitly in the Federal statute that it intends to preempt State authority. The preemptive effect of a national law, however, may be implied even without such an express provision. *See Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942); *Savage v. Jones*, 225 U.S. 501, 533 (1912) ("[W]hen the question is whether a Federal act overrides a state law, the entire

[5] Although we recognize the principle that "[o]nly the [Federal] judiciary may decide preemption questions authoritatively", Combined Communications of Oklahoma, Inc. (KOCO-TV), 59 FCC 2d 48, 50 (1976), we conclude that this truism in no way detracts from the authority of the Commission to render declaratory rulings in the first instance regarding preemption; in making these rulings we are in a unique position to draw upon our expertise as a regulatory agency to determine whether national communications policies are adversely affected by conflicting State policies. We recently took such an action in Amendment of Part 31.

[6] The Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, §2. Hence, State actions that are in conflict with national statutes cannot have any force or effect. In order for preemption to be valid, the Federal policy must be "a command with the force of national law." Note, *A Framework for Preemption Analysis*, 88 Yale L.J. 363, 382 (1978).

scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed.") Whether such a preemptive effect may be implied "turns on the peculiarities and special features of the federal regulatory scheme in question . . . ." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973). Thus it is necessary to examine the "peculiarities and special features" of the regulatory scheme established in the Communications Act of 1934 (the Act) to govern the separations and interstate toll settlements process to determine the nature and extent of Federal authority.

13. This examination must begin with a review of the provisions of the Act taken as a whole. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *General Telephone Co. of California v. FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). In reviewing the text of the Act, we first note that its purposes are stated in broad terms to include the following:

> [M]aking available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication . . . .

Section 1 of the Act, 47 U.S.C. §151. Section 2(a) of the Act, 47 U.S.C. §152(a), authorizes the Commission to regulate "all interstate and foreign communication by wire", and Section 3(a) of the Act, 47 U.S.C. §153(a), defines "communication by wire" to include "all instrumentalities, facilities, apparatus, and services" that are incidental to transmissions by wire. Section 4(i) of the Act, 47 U.S.C. §154(i), which has been construed broadly by the judiciary,[7] provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

14. In assessing these general provisions of the Act, and before specifically addressing more closely the particular provisions of the Act that are at issue in this proceeding, we reach two general conclusions. First, it is evident that the Congress has imparted to the Commission broad, plenary authority for the regulation and administration of interstate and foreign communications. The language of Section 2(a) of the Act, 47 U.S.C. §152(a), is unequivocal in giving the Commission authority to regulate "all interstate and foreign communication . . . ." The Commission, in an early case, has noted that the common carrier provisions of the Act are comprehensive in scope and are intended to apply to facilities that are not exclusively

[7] *See* MTS and WATS Market Structure, CC Docket No. 78–72, Phase I, Third Report and Order, FCC 82–579, at para. 310 n.110 (released Feb. 28, 1983) (citing United States v. Southwest Cable Co., 392 U.S. 197 (1968); National Broadcasting Co. v. United States 319 U.S. 190 (1943)), *appeal docketed sub nom.* NARUC v. FCC, No. 83–1225 (D.C. Cir. March 1, 1983) (hereinafter cited as Access Charge Order).

interstate in nature. *Use of Recording Devices in Connection with Telephone Service*, 11 FCC 1033, 1047 (1947). We made a similar finding in the *Telerent* decision:

> That the Commission has plenary and comprehensive regulatory jurisdiction over interstate and foreign communications services and facilities of common carriers and all of the terms and conditions upon which such services and facilities are offered to the public is evident from the provisions of the Communications Act.

Telerent, 45 FCC 2d at 215. This reading of the Act also has been emphasized in judicial decisions. *See, e.g., California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698–700 (1st Cir. 1977); *North North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*).

15. Second, we conclude that a major objective of the Act is to grant the Commission sufficient authority to ensure that regulatory policies relating to common carrier services will be developed and administered in a uniform, consistent manner. As we have noted, a chief purpose of the Act is to make available a "rapid, efficient, Nationwide" communications service. Section 1 of the Act, 47 U.S.C. §151. The very notion of a nationwide system, as well as its efficient operation, must be based on the assumption that carrier facilities and services will not be subject to a plethora of overlapping and conflicting regulatory requirements. The court in *NCUC II*, in upholding the authority of the Commission to preempt conflicting State regulations in establishing its terminal equipment registration program, noted that:

> [I]t is recognized that FCC regulations must preempt any contrary state regulations where the efficiency or safety of the national communications network is at stake, [and] there can be little argument that FCC regulation of jointly used terminal equipment for the purpose of improving or expanding interstate communication services may not also displace conflicting state regulations. . . . [T]he FCC has full statutory authority to regulate joint terminal equipment to ensure the safety of the national network, [and] we can discover no statutory basis for the argument that FCC regulations serving other important interests of national communications policy are subject to approval by state utility commissions.

NCUC II, 552 F.2d at 1046–47. The court thus recognized that the Commission effectively would be stripped of authority to establish and enforce uniform, nationwide rules and requirements applicable to terminal equipment interconnection with the national telephone network if the States had authority to take contrary action. Similarly, it has been held that the Commission has authority to regulate foreign exchange and common control switching arrangement facilities[8] even though these facilities are located entirely

[8] Foreign exchange (FX) service is a local exchange service provided to a customer through a central office of an exchange other than the exchange in which the

within single States. *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). The court noted that "[w]e agree with the Commission that . . . inconsistent state regulations could frustrate the congressional goal of developing a 'unified national communications service.'" *Id.* at 86 (quoting *American Telephone & Telegraph Co. & Associated Bell System Cos.*, 56 FCC 2d 14, 20 (1975)). This statutory objective calling for uniformity in the regulation of nationwide communications service forms an important element in the process of determining whether it is appropriate to preempt particular State actions and policies.

16. We now turn to a closer examination of the provisions of the Act which bear directly on the authority of the Commission in the separations and settlements areas. The authority of the Commission in the separations area is derived from Section 221(c) of the Act, 47 U.S.C. §221(c), and Section 410(c) of the Act, 47 U.S.C. §410(c). Section 221(c) authorizes the Commission to classify carrier property and determine the portion of carrier property which "shall be considered as used in interstate or foreign telephone toll service." Classifications by the Commission may be made only after hearings, with notice to the carrier involved, the States in which property of the carrier is located, and other interested persons. We have construed the language of Section 221(c) as "mak[ing] clear the primacy of Federal jurisdiction with respect to property clearly used to provide interstate and intrastate services and facilities." *Telerent*, 45 FCC 2d at 216. Thus, the plenary authority of the Commission regarding interstate communications services and facilities also applies directly in the separations field and relates to property used in connection with both interstate and intrastate services and facilities.

17. We have noted in a previous decision that regulatory uniformity is an important goal of Section 221(c):

> It is urged . . . that a fundamental principle to be observed in making jurisdictional separations is the need for uniformity in the procedures applied by both Federal and State authorities for ratemaking purposes. We subscribe fully to this objective, as we have in the past. Such uniformity obviates the danger that certain amounts of plant investment and expenses may be assigned to more than one jurisdiction to the detriment of ratepayers. Equally important, it obviates the risk that certain amounts of plant and expenses will be recognized in neither jurisdiction, to the economic detriment of the company and its owners.

American Telephone & Telegraph Co. & Associated Bell System Cos., 9 FCC 2d 30, 90–91 (1967). Thus, the general goals of the Act

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customer is located. American Telephone & Telegraph Co., *Telecommunications Glossary* 30 (1982). Common control switching arrangements (CCSA) is an intercity private line switching network service; the service is provided for the exclusive use of the customer but the switches used to provide the service may also be used to serve other customers. *Id.* at 11.

regarding the uniform regulation of national communications services are carried forward as specific objectives of the separations procedures embodied in Section 221(c).

18. In order to safeguard the plenary authority of the Commission and to achieve the objective of regulatory uniformity, it is necessary to conclude that actions taken in accordance with the Section 221(c) procedures are binding upon the States. This conclusion arises for two reasons. First, as we have noted, decisions of the Commission under Section 221(c) may be made only after the Commission has conducted a hearing in which affected States are permitted to participate. It has been held that the Congress, in establishing hearing requirements, generally intends that affected parties will be bound by decisions resulting from the hearings:

> The [Interstate Commerce] Commission is not only authorized but "directed" [by the statute] to give the hearing and make the determination requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board.

Shields v. Utah Central Railroad Co., 305 U.S. 177, 182 (1938) (Hughes, C.J.); *see Crowell v. Benson*, 285 U.S. 22 (1932); *Cameron v. United States*, 252 U.S. 450 (1920). Second, the Congress, in establishing the authority of the Commission in Section 221(c), made no attempt to insulate the States from Commission decisions resulting from the exercise of this authority. There is no language in Section 221(c) that suggests that the States are not bound by Commission determinations.[9]

19. Procedures applicable to separations decisions were affected by an amendment to the Act enacted in 1971.[10] Section 410(c) of the Act, 47 U.S.C. §410(c), which was added by the amendment, provides that the Commission "shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations . . . to a Federal-State Joint Board." The Joint Board is comprised of three members of the Commission and four State commissioners, with the Chairman of the

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[9] The approach taken by the Congress in Section 221(c) contrasts with the manner in which it chose to protect State interests in Section 221(a) of the Act, 47 U.S.C. §221(a). Section 221(a) authorizes the Commission to certify proposed telephone company consolidations, thus exempting the transactions from Federal statutes which otherwise would make the transactions unlawful. Section 221(a), recognizing the interests of the States, requires a public hearing with notice to the States, and also provides that "[n]othing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies." No similar provision protecting the authority of the States is contained in Section 221(c), leading to the conclusion that State authority is subject to, and limited by, Commission actions under Section 221(c).

[10] Federal-State Communications Joint-Board Act, Pub. L. No. 92-131, 85 Stat. 363 (1971) (codified at 47 U.S.C. §410(c)).

Commission (or another member of the Commission designated by the Commission) serving as Chairman of the Joint Board. Section 410(c) provides that the Joint Board shall prepare recommended decisions regarding separations matters "for prompt review and action by the Commission." Thus, the Commission is given ultimate authority to adopt decisions under Section 410(c). State members of the Joint Board are provided with an opportunity to participate in Commission deliberations regarding recommended decisions of the Joint Board, but the State members are not entitled to vote in these Commission proceedings. We recently have indicated that, as a result of the enactment of Section 410(c), "[t]he Commission was given the ultimate authority with respect to [cost] allocations [between Federal and State jurisdictions], further solidifying its superintendency over common carrier communications." *Amendment of Part 31*, CC Docket No. 79–105, at para. 39. The plenary authority of the Commission under Section 410(c) also has been judicially affirmed. *See NCUC II*, 552 F.2d at 1046 (describing "the recognition by Section 410(c) of federal supremacy in rate base allocation"); *NCUC I*, 537 F.2d at 795.

20. The effect of Section 410(c), in part, is to expand the role of the States beyond that which was established for them in Section 221(c) of the Act, 47 U.S.C. §221(c). In recognition of the interests of States that are affected by separations policies, the procedure created in Section 410(c) enables States to be involved in the initial formulation of these policies. It must be noted, however, that Section 410(c) does not cede any unilateral authority to the States. Language included, for example, in Section 221(a) of the Act, 47 U.S.C. §221(a),[11] to protect State authority does not appear in Section 410(c). In describing the procedures of Section 410(c), we have recognized that "separations procedures are binding on carriers, the states, and ourselves . . . ." *American Telephone & Telegraph Co. (Manual and Procedures for Allocation of Costs)*, 84 FCC 2d 384, 391 (1981), *aff'd sub nom. MCI Telecommunications Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982) (hereinafter cited as *ICAM Proceeding*). The plenary authority of the Commission and the binding effect of Commission decisions under Section 410(c) "provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment." *Amendment of Part 31*, CC Docket No. 79–105, at para. 39.

21. The authority of the Commission in the settlements area is derived from Section 201(a) of the Act, 47 U.S.C. §201(a), which requires carriers "to establish . . . divisions of . . . charges" and further provides that such action by carriers shall be "in accordance with the orders of the Commission, in cases where the Commission,

[11] See n.9, *supra*.

after opportunity for hearing, finds such action necessary or desirable in the public interest . . . ." Section 201(a), by its terms, applies to "every common carrier engaged in interstate or foreign communications . . . ." Section 201(a) permits carriers to reach private agreements for the division of interstate toll revenues, but if they fail to do so (or if they do so in an inequitable manner), then this section "empowers the Commission to prescribe divisions of charges, after opportunity for hearing, where it finds such action necessary or desirable in the public interest . . . ." *United Telephone Co. of the Carolinas*, 54 FCC 2d 289, 290 (1975), *aff'd sub nom. United Telephone Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977). It is evident from the face of Section 201(a) that the Commission has exclusive power to provide for the division of interstate toll revenues, and that the States have no authority to establish division of revenue requirements applicable to interstate toll revenues.

2. *Regulatory Framework*

22. We find that issues relating to the jurisdictional separation of telephone company costs are subject to a comprehensive and pervasive Federal regulatory scheme. It is not necessary to look beyond the provisions of the *Separations Manual* to determine that the Commission, acting under its statutory authority, has established a pervasive regulatory framework in the separations area. The *Manual* is intended to serve as a comprehensive system of procedures for allocating property costs, revenues, expenses, taxes, and reserves to the Federal and State jurisdictions designed to meet the need for "a uniform method of separations, acceptable to the state and federal regulatory bodies. . . ." *Forward* to *Separations Manual* at 5 (Feb. 1971 ed.). The *Manual* has been incorporated in the rules of the Commission, with procedures established by the Congress for adopting any changes to it. These procedures, set forth in Section 410(c) of the Act, 47 U.S.C. §410(c), must be viewed as the exclusive means for making any such changes. *See Jurisdictional Separations of Telephone Cos.*, 16 FCC 2d 317, 331 (1969); *American Telephone & Telegraph Co. & Associated Bell System Cos.*, 9 FCC 2d 30, 111 (1967).

23. Focusing upon the separations issue specifically involved in this proceeding, we make the following observations. First, the *Separations Manual* does not mandate any particular time period for making actual use measurements in connection with jurisdictional cost allocations.[12] The *Manual* instead requires that actual use measurements be made during "representative" periods, leaving to the carriers the determination of what time periods actually will be used. *See Reservation Telephone Coop. v. American Telephone & Telegraph Co.*, Order by Acting Deputy Chief, Common Carrier

[12] See para. 3, *supra*.

Bureau, FCC File No. E-81-5, Mimeo No. 2037, at 3 (released July 17, 1981) *petition for review filed* (FCC, Sept. 11, 1981) (hereinafter cited as *Reservation Telephone*). Second, if carriers are not able to agree upon appropriate time periods for actual use measurements they do not have any recourse outside the framework of Section 410(c) of the Act, 47 U.S.C. §410(c), to seek the imposition of a specific time period. *See id.* at 4.

24. The issue of appropriate time periods for actual use measurements presently is under consideration by a Federal-State Joint Board established under Section 410(c) of the Act, 47 U.S.C. §410(c). *See Amendment of Part 67*, 89 FCC 2d 1 (1982), *appeal docketed sub nom. MCI Telecommunications Corp. v. FCC*, Nos. 82-1237 & 82-1456 (D.C. Cir. March 4, 1982) (hereinafter cited as *Amendment of Part 67*). In the *Reservation Telephone* proceeding, the complainants asked the Commission to construe the provisions of the *Separations Manual* and to require the defendants to accept the use of seven-day studies for actual use measurements. The Order, however, noted that:

> The fundamental issue raised by the complainants is . . . being considered in a forum which will benefit from the participation of a large segment of the telephone industry. Because of this and because matters of this general nature are ordinarily considered within the context of a Joint Board, we believe it appropriate to dismiss the complaint and leave the resolution of the underlying issues to the expertise of the Joint Board.

Reservation Telephone, FCC File No. E-81-5, at 4.[13] It can be seen, then, that there are substantial grounds for concluding that the *Separations Manual* will be amended to address specifically the question of the appropriate period for actual use measurements.

25. Finally, the absence of any Federal rule defining the appropriate period for actual use measurements does not automatically free the States to roam unfettered across the separations terrain. The governing consideration is whether permitting the States to control activities potentially subject to Federal regulation will create too great a danger of conflict with national policy. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). For example, in determining whether a Federal statute regulating equipment used on railroad locomotives had preempted State laws the Supreme Court stated:

[13] The Joint Board has found that evidence introduced in its proceeding "is heavily supportive of the adoption of seven-day usage studies." Amendment of Part 67, CC Docket No. 80-286, Order Requesting Further Comments, at para. 227 (released Nov. 15, 1982). Substantially all the parties submitting comments on this issue in response to the Joint Board's Order Requesting Further Comments were in favor of adopting the seven-day study proposal. The Joint Board adopted its final recommendations on April 15, 1983. A full text of the Joint Board's recommendations was not yet available at the time of the adoption of this Opinion and Order by the Commission.

> It is . . . urged that, even if the [Interstate Commerce] Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, . . . if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power.

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 613 (1926).

26. In a case involving facts analogous to those presented in this proceeding, the court held that the Commission could preempt State ratemaking authority over allegedly intrastate communications services regardless of whether the Commission was prepared to substitute its own tariff for the displaced State rates. *New York Telephone Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980) (hereinafter cited as *New York Telephone*). The New York Public Service Commission had required New York Telephone to file a tariff with the State commission allocating a share of the costs of local exchange facilities to interstate FX and CCSA private line users. The court began its inquiry by noting that "there is no doubt that the NYT surcharge on interstate FX/CCSA users, ranging up to 1600% higher than the charge for comparable service to intrastate users, substantially affects the conduct or development of interstate communication and encroaches upon FCC authority." *New York Telephone*, 631 F.2d at 1066. The court then rejected the argument advanced by the carrier that the Commission could assert jurisdiction only if it substituted its own tariff for the State rates. Unconvinced by the argument that "only a federally-approved tariff can constitute regulation," *id.* at 1067, the court concluded:

> In what is evidently an attempt by the [New York] PSC to force changes in national separations procedures, which the FCC already contemplates revising and which will be the subject of investigation and rulemaking, the PSC has put NYT in a difficult position, to be sure, but also has forced the FCC to act to protect interstate FX/CCSA users from discrimination.

Id. The finding of the court in *New York Telephone* that the Commission did not have to take direct regulatory action through the imposition or approval of a tariff in order to protect its jurisdictional prerogatives buttresses our conclusion that the present absence of specific Federal rules regarding time periods for actual use measurements does not clear the path for unilateral State actions.

27. In the interstate toll settlements area, as we have noted,[14] the Commission has exclusive regulatory authority under Section 201(a) of the Act, 47 U.S.C. §201(a). The Commission recently exercised this authority to establish a uniform, nationwide system of access charges to replace the existing scheme of access compensation arrangements. *See Access Charge Order*, CC Docket No. 78–72. This

[14] See para. 21, *supra*.

plenary Commission authority under Section 201(a) also eliminates State authority to serve as an alternative forum for the resolution of disputes relating to the division of interstate toll revenues. Consequently, we reject the argument advanced by GTE of Florida in its Reply Comments that the decision in *United Telephone Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977) (hereinafter cited as *United Telephone*) supports such a view of State authority in circumstances in which the Commission has not exercised its authority under Section 201(a) to resolve a particular dispute. In *United Telephone*, the Commission had refused to impose a formula for the division of charges because the petitioners had not shown existing division of revenues rules in the contract between the parties to be unreasonable. The appellate court agreed that the petitioners "failed to allege that the result reached under the present division of charges formula does not actually compensate them for their costs." *Id.* at 723 (footnote omitted). There was no suggestion by the court, however, that inaction by this Commission somehow empowered the States to prescribe division of revenues formulas as a remedy in the case before the court. The court in fact suggested a quite different remedy:

> Although the Commission refused to increase United's and Carolina's share of the revenues from the joint venture, leaving them with an unsatisfactory economic choice, it is not forcing them to continue in the enterprise . . . . United and Carolina are free to remove their interconnection with Southern Bell and thereby also remove themselves completely from the jurisdiction of the Commission.

Id. at 723–24 (footnote omitted). Since the issue of State authority regarding the division of interstate revenues was never raised in *United Telephone*, and since the court upheld the refusal by the Commission to prescribe division of charges formulas without suggesting that this approval opened the way for State action in the area, we conclude that *United Telephone* cannot serve as a foundation for constructing an argument that the absence of specific Commission requirements regarding the use of seven-day studies for actual use measurements creates a vacuum that may be filled by unilateral State actions.

3. *Nature of Subject Matter Affected by State Action*

28. The nature of the regulated subject matter at issue in a preemption case heavily influences whether it is appropriate to exercise Federal preemption. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Federal Power Commission v. Transcontinental Gas Pipe Line*, 365 U.S. 1, 19–20 (1961). The regulated subject matter with which we are concerned in this proceeding is the jurisdictional allocation of costs, expenses, revenues, taxes, and reserves, and the subsequent division of revenues carried out in connection with the separations process. The process of jurisdictional separations, first recognized as necessary in *Smith v.*

Illinois Bell Telephone Co., 282 U.S. 133 (1930), is applicable to telephone property used in common for both intrastate and interstate services and to expenses incurred in the delivery of these services. The fact that this common use of telephone property ignores political boundaries creates the need for "a uniform method of separations, acceptable to the state and federal regulatory bodies . . ." *Forward* to *Separations Manual* at 5 (Feb. 1971 ed.) This need for uniformity was addressed by the Congress in enacting Section 410(c) of the Act, 47 U.S.C. §410(c).

29. The uncertainty that would follow in the wake of any diminution of this uniformity was recognized by this Commission when we addressed the issue of interconnection of subscriber equipment:

> There is nothing in the Communications Act or its legislative history which supports the position . . . that Section 2(b) and/or 221(b) reflects a Congressional intent that where common exchange plant is used to provide both exchange and other intrastate services as well as interstate services, a State may, in effect, determine the terms and conditions upon which such common plant is to be used for interstate service. It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services is beyond Federal jurisdiction and that subscribers can be subjected to a melange of regulations, determined by each of 50 separate jurisdictions, as to the terms and conditions upon which they shall have access to and use of the telephone network for interstate services. If each State were to be free to establish its own rules governing interconnection for the purposes of intrastate services, uniform nondiscriminatory interstate service throughout the country would be rendered difficult if not impossible.

Telerent, 45 FCC 2d at 219–20. Further, as a general matter it has been held that all the provisions of the Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole." *General Telephone Co. of California v. FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). We conclude that the nature of the separations process and related settlements procedures makes it particularly appropriate to find that State policies that conflict with the federally established separations and settlements framework should be preempted.

4. *Conflicting State Actions*

30. In a case in which Federal and State regulations relate to the same subject matter, "[t]he test of whether both federal and state regulations may operate, or whether the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . ." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). It must be determined "whether, under the circumstances of [a] particular case, [a State] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v.*

Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted); *see Head v. New Mexico Board of Examiners of Optometry*, 374 U.S. 424, 432 (1963). It is a fundamental principle of constitutional law that State laws "must yield to the law of congress. . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824). Justice Frankfurter has cogently presented the basis for this principle:

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law . . . . [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (Frankfurter, J.); *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Perez v. Campbell*, 402 U.S. 637, 651–52 (1971); *Farmers Educational & Cooperative Union v. WDAY*, 360 U.S. 525, 535 (1959); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

31. In the communications common carrier area, as we have noted, the courts generally have held that State policies must yield to the exercise of Federal authority.[15] *See, e.g., New York Telephone*, 631 F.2d at 1066; *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). Most recently, the United States Court of Appeals for the District of Columbia Circuit, in holding that the Commission had acted properly in preempting the State tariffing of customer premises equipment, noted that:

> Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.

Computer & Communications Industry Association v. FCC, 693 F.2d 198, 214 (D.C. Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3614, 3615 (U.S. Feb. 9 & 10, 1983) (Nos. 82–1331 & 82–1352) (footnote omitted); *see NCUC II*, 552 F.2d at 1046; *NCUC I*, 537 F.2d at 793.

32. We now turn to an examination of the nature and extent of the conflict between State action and Federal authority presented in this proceeding. Action of the type taken by the Florida PSC requiring carriers to accept the use of seven-day studies in connection with actual use measurements has two effects. First, it imposes division of interstate revenues procedures upon carriers in the absence of carrier agreements. Such action by a State, as we have seen, is in direct conflict with the statutory mandate of Section 201(a) of the Act, 47 U.S.C. §201(a), and with the exercise of Commission authority under Section 201(a).[16] The Florida PSC now

[15] See para. 15, *supra*.
[16] See paras. 21, 27, *supra*.

has determined that it does not have authority under Florida statutes to take such an action.[17] We conclude that such action would be a direct and substantial encroachment upon the authority of this Commission.

33. A division of revenues requirement of the type that the Florida PSC decision imposed on Southern Bell also affects the jurisdictional separations process by attempting to allocate a greater amount of costs to the interstate jurisdiction. That this result is intended is acknowledged by the Florida PSC. *See Florida PSC Order* at 2 ("We recognize that our decision will result in a shift of costs from local exchange to toll . . . .") This effect upon jurisdictional separations is in direct conflict with the *Separations Manual*, the provisions of which are binding upon the States. *See ICAM Proceeding*, 84 FCC 2d at 391; *Jurisdictional Separations of Telephone Cos.*, 16 FCC 2d 317, 331 (1969); *American Telephone & Telegraph Co. & Associated Bell System Cos.*, 9 FCC 2d 30, 111 (1967). The *Separations Manual* provides no mechanism by which States may unilaterally construe provisions of the *Manual* and impose these constructions upon carriers. The appropriate method for making changes in the jurisdictional separations process is through action of a Federal-State Joint Board under Section 410(c) of the Act, 47 U.S.C. §410(c). *See Reservation Telephone*, FCC File No. E-81-5, at 4. A Federal-State Joint Board is, in fact, currently considering the issue of appropriate time periods for actual use studies.[18]

34. Action of the type taken by Florida also conflicts with Federal policy regarding use of the subscriber plant factor (SPF) for allocating costs between the interstate and intrastate jurisdictions. The *Florida PSC Order*, in imposing seven-day time studies, would have permitted GTE of Florida to increase its interstate SPF for purposes of calculating the division of revenues and for purposes of allocating costs between the interstate and intrastate jurisdictions. The *Order* thus placed an obstacle squarely in the path of effectuating separations and settlements policies established by this Commission. This Commission has acted to bar increases in interstate SPF on an interim basis. Because any growth in SPF would result in the inequitable treatment of interstate users, we have concluded that "[i]t is important to maintain the allocative factor for [non-traffic-sensitive] plant at current levels until we can implement a final plan." *Amendment of Part 67*, 89 FCC 2d at 6. The only changes to SPF permissible under this Commission ruling are changes to which

[17] See para. 6, *supra*. The pertinent Florida statute provides that "[t]he commission is authorized to review intrastate toll settlement agreements and disapprove any such agreement if such agreement is detrimental to the public interest . . . . The commission is also authorized to adjudicate disputes among telephone companies regarding intrastate telecommunications settlements." Section 8 of Chapter 80-36, Laws of Florida, §364.07, Fla. Stat. 1981.

[18] See para. 24, *supra*.

carriers agree for division of revenue purposes. *Id.* at 14, 16–17. This decision, however, does not permit any changes in SPF in the absence of agreement on the part of the carriers involved. State action of the type taken in the *Florida PSC Order* directly contravenes the treatment of SPF we have established.

35. In assessing these conflicts between the Federal and State policies at issue in this proceeding, we first must remember that the Congress has given this Commission statutory authority in the separations and settlements areas in order to ensure a uniform regulatory framework for this subject matter. Because separations and settlements processes require a balancing of the interests of interstate and intrastate carriers and ratepayers, inconsistencies resulting from regulatory fragmentation can produce inequitable treatment of these carriers and ratepayers. The risk of such fragmentation is at the nub of this proceeding. The Joint Board procedures established in Section 410(c) of the Act, 47 U.S.C. §410(c), would be largely nullified, and the plenary authority of the Commission in the separations and settlements areas would be effectively undermined, if we were to accept the view that States have independent authority to impose changes in interstate settlements practices and separations procedures. If each State were to have unilateral authority to reach its own conclusion regarding appropriate time periods for actual use measurements, and to impose that conclusion upon carriers subject to its jurisdiction, then the goal of national regulatory uniformity would be endangered, the authority of the Commission under the Act would become hollow, and the established statutory procedures for making changes in the *Separations Manual* would become an empty exercise. In order to avoid these results, we must preempt State actions of the type taken by the Florida PSC in this proceeding.

5. *Scope of Preemption*

36. We emphasize that the preemption announced in this Opinion and Order reaches only the specific type of State action at issue in this proceeding, namely the prescription of time periods for use in connection with actual use measurements and the imposition of these time periods upon carriers.[19] We find it unnecessary at this time to take broader preemptive action. Since the dispute presented here does not strike at the center of our concerns regarding the division of regulatory authority between the Commission and the

[19] We reject the argument that there has not been sufficient notice of the issues we are addressing and that, therefore, it is premature for us to dispose of these issues in this proceeding. The Southern Bell petition makes it abundantly clear that the relief sought is the preemption of those portions of the Florida PSC Order that conflict with Federal authority. Southern Bell Emergency Petition for Declaratory Ruling at 7, 10, 11. Thus, parties have had sufficient opportunity to address this issue throughout the entire course of this proceeding either in their comments or reply comments.

States in the separations and settlements areas, we believe it would be inappropriate to do more than resolve the issue before us. The conflicting State action at issue in this proceeding does not suggest widespread State efforts to wrest jurisdiction from the Commission in the separations and settlements areas.

37. The alternative of broad subject matter preemption would preclude the States from developing concurrent regulations even if these regulations were not in conflict with Commission policies. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 241–46 (1959). We do not see a need at this juncture to preempt complementary State regulations in the separations and settlements areas. *Cf.*, Brief for Respondents in *NARUC v. FCC*, No. 81–1556, at 27 n.20 (D.C. Cir., filed Feb. 23, 1983) (complementary State regulation that does not conflict with Commission policy is permissible). We hope that the adoption of this narrow preemption order will foster cooperation between the Commission and the States by minimizing any disruption in the existing regulatory scheme. If conflicting State policies regarding separations and settlements develop in the future, then we will dispose of these policies in the manner and to the extent we deem necessary to protect our plenary authority and to maintain a uniform, nationwide regulatory framework. We leave for another day the issue of whether conflicting State policies in these areas have become so substantial that a broader exercise of our preemption authority has become necessary.

III. CONCLUSION

38. In our review of the Emergency Petition for Declaratory Ruling filed by Southern Bell we conclude that this Commission has specific statutory authority to render a declaratory ruling in the circumstances presented by this proceeding. We also find that it is appropriate for the Commission to exercise this authority in this proceeding because uncertainty regarding the relationship between Federal and State authority has been created by the *Florida PSC Order* and by the actions and potential actions of other States.

39. In addressing the preemption issues raised in this proceeding, we conclude that the Act has given the Commission broad, plenary authority to regulate interstate and foreign communications and that a primary objective of the Act is to ensure a uniform, nationwide system of regulation in the communications common carrier field. We find that Sections 201(a), 221(c), and 410(c) of the Act, 47 U.S.C. §§201(a), 221(c), 410(c), the provisions specifically involved in this proceeding, empower this Commission with plenary authority in the separations and settlements areas, thus promoting the statutory goal of creating a uniform regulatory framework in these areas. Acting in accordance with our statutory authority, we have established in the *Separations Manual* a comprehensive and pervasive regulatory scheme in the separations and settlements

areas. The absence of specific provisions in the *Separations Manual* regarding time periods for actual use measurements does not open the way for the States to establish these time period requirements and impose them upon carriers.

40. We find that the specific subject matter of this proceeding, the jurisdictional allocation of common carrier costs and the subsequent division of interstate toll revenues, uniquely requires a uniform, nationwide regulatory scheme. Because of this need it is particularly appropriate for us to preempt State laws found to be in conflict with this uniform regulatory scheme. We find that such a conflict has been created by actions of the type taken in the *Florida PSC Order*. In seeking to impose interstate settlements requirements upon Southern Bell, that *Order* would have directly encroached upon the authority of the Commission under Section 201(a) of the Act, 47 U.S.C. §201(a). State action of the type taken in the *Florida PSC Order* [20] also alters federally established separations procedures in a manner that is in direct conflict with the congressionally established process for making such alterations. Such State action also upsets our decision in *Amendment of Part 67* to bar further increases in SPF on an interim basis. For all these foregoing reasons, we must preempt State actions of the type taken in the *Florida PSC Order*. The scope of our preemption order is expressly limited to the specific type of actions taken by the Florida PSC. We have concluded that it would be inappropriate and unnecessary at this juncture to give a broader sweep to our preemptive authority in the separations and settlements areas.

41. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201(a), 221(c), and 410(c) of the Communications Act of 1934, 47 U.S.C. §§151, 154(i), 201(a), 221(c), 410(c), Section 554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), and Rule 1.2 of the Rules of the Commission, 47 C.F.R. §1.2., That the Emergency Petition for Declaratory Ruling filed by the Southern Bell Telephone and Telegraph Company IS GRANTED to the extent reflected herein.

42. IT IS FURTHER ORDERED, That the motion to accept additional comments made by the General Telephone Company of Florida IS GRANTED.

43. IT IS FURTHER ORDERED, That the motion to accept reply comments made by the District of Columbia Public Service Commission IS GRANTED.

[20] We wish to emphasize that this Order preempts two types of State action. First, any action that requires the use of a particular time period in connection with actual use measurements for interstate toll settlements. Second, any action that requires the use of a particular time period in connection with such measurements for purposes of cost allocations between the interstate and intrastate jurisdictions.

44. IT IS FURTHER ORDERED, That the Secretary shall cause this Order to be published in the Federal Register.

45. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Order to be served on each State commission.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX

Summary of Comments

1. Southern Bell, in its Emergency Petition for Declaratory Ruling, argues that the *Florida PSC Order*, in attempting to prescribe new interstate toll settlements arrangements between Southern Bell and GTE of Florida, is in direct conflict with the authority and previous orders of the Commission. Southern Bell maintains that authority over interstate toll settlements rests with the Commission under Section 201(a) of the Act, 47 U.S.C. §201(a). By enacting Section 201(a), asserts Southern Bell, the Congress has occupied the field, thus preempting State law under the Supremacy Clause of the United States Constitution. Southern Bell argues that all State laws and regulations have been preempted, regardless of whether they complement Commission policies or are in conflict with Commission policies.

2. Southern Bell also maintains that the prescription of seven-day studies of holding time usage in the *Florida PSC Order* allows GTE of Florida to increase its interstate SPF, since SPF is based in part upon such studies. Southern Bell asserts that this result of the *Order* is in conflict with the prohibition of increases in SPF adopted by the Commission in *Amendment of Part 67*, CC Docket No. 80-286. Southern Bell argues that the *Order* also conflicts with the Federal-State Joint Board process established in Section 410(c) of the Act, 47 U.S.C. §410(c), and notes that a Joint Board currently is considering the issue of the appropriate time period for holding time usage. Southern Bell maintains that the Common Carrier Bureau decision in *Reservation Telephone* buttresses its argument that the *Florida PSC Order* should be preempted because it conflicts with the Joint Board proceeding, since the Bureau dismissed the complaint in *Reservation Telephone* primarily on the grounds that the issue of time periods for holding time usage was before the Joint Board.

3. GTE of Florida asserts that the Commission should dismiss the Petition filed by Southern Bell on the grounds that the Florida PSC is reconsidering its *Order* and there is no final order affecting interstate toll settlements. GTE of Florida also argues that Southern Bell has failed to demonstrate that an emergency exists and that the Commission would be acting within its discretionary authority if it refused to issue a declaratory ruling. GTE of Florida maintains that the *Florida PSC Order* merely requires the payment of money by Southern Bell to GTE of Florida, and Southern Bell will get back these payments if the Florida PSC ultimately reverses its decision. GTE of Florida cites *Combined Communications of Oklahoma, Inc. (KOCO-TV)*, 59 FCC 2d 48 (1976) in support of the proposition that the Commission should refrain from issuing a declaratory ruling because only the judiciary may rule authoritatively regarding preemption issues. GTE of Florida asserts that Southern Bell has failed to meet traditional stay criteria in its petition and that the Commission should elect not to make a ruling because the State proceedings have not been shown to be clearly inadequate and, therefore, should be allowed to continue.

4. GTE of Florida argues that neither fact nor precedent supports the conclusion that the Commission has exclusive jurisdiction over traffic study methodology. GTE of Florida maintains that, although Section 201(a) of the Act, 47 U.S.C. §201(a), gives the Commission authority regarding the division of toll revenues, the Commission is not required to exercise this authority and in fact has not taken any specific action

regarding the issues involved in this proceeding. GTE of Florida asserts that, if there is a dispute over the meaning of "representative period" as used in the *Separations Manual*, then this is a question of contract for the appropriate State agency or court to decide. GTE of Florida argues that the Commission's SPF "freeze" decision does not bar the Florida PSC action for two reasons: (1) the Commission action assumed a validly calculated SPF, which requires seven-day studies; and (2) the Commission allowed exceptions to the freeze by agreement of the parties and the purpose of this exception would be defeated if one party could unreasonably withhold consent to seven-day studies. GTE of Florida maintains that the Florida PSC action does not alter Federal regulations, but merely interprets a broad general term used in the regulations.

5. AT&T asserts that the Commission should issue a declaratory ruling granting Southern Bell's Petition in order to preserve Federal-State uniformity in the separations field, which is a fundamental principle and in the public interest. AT&T argues that separations uniformity has been placed in jeopardy, citing State court and State commission decisions stating that no legal requirement obligates them to adhere to Commission-prescribed separations procedures. AT&T maintains that inconsistent State regulation regarding separations and settlements threatens the financial viability of telephone utilities and undermines the access charge plan approved by the Commission. Separations "adjustments" ordered by the States deny the utilities the recovery of costs incurred in joint interstate-intrastate operations. This denial of recovery would force the utilities to place a surcharge on access charges applicable to interstate users in States in which State commissions had "allocated" costs to interstate operations. A denial of these surcharges by the Commission would be an unconstitutional confiscation of carrier property.

6. AT&T asserts that the prescription of separations procedures by the Commission preempts inconsistent State procedures. AT&T cites Section 221(c) of the Act, 47 U.S.C. §221(c), as giving the Commission express authority to establish jurisdictional separations procedures. AT&T argues that the Congress intended the State to be bound by Commission actions under Section 221. AT&T cites *Shields v. Utah Idaho Railroad Co.*, 305 U.S. 177 (1938), for the proposition that the Congress intends an agency decision to have binding effect if the decision is rendered after a hearing required by the statute. AT&T maintains that the Congress must have intended decisions of the Commission under Section 221(c) of the Act to be binding because Section 221(c) contains a hearing requirement. AT&T asserts that Section 221(a) of the Act, 47 U.S.C. §221(a), is further evidence that the Congress intended Commission decisions under Section 221(c) to be binding on the States, because Section 221(a) contains language stating that its provisions do not affect the power of the States to regulate telephone companies, but Section 221(c) contains no such language.

7. AT&T argues that Section 410(c) of the Act, 47 U.S.C. §410(c), is further evidence that the Congress intended the Commission's separations decisions to bind the States. AT&T maintains that the Congress, in enacting Section 410(c), did not alter the authority of the Commission under Section 221(c) but merely established a Federal-State Joint Board mechanism to recommend decisions regarding separations to the Commission, thus retaining Federal superintendence in the separations area. AT&T asserts that State authorities cannot practicably regulate in the separations field and, citing *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), argues that the desirability of uniform Federal regulation in the separations area is clear and that State authority in this area must be preempted. AT&T maintains that the Commission, in prescribing separations procedures, intended to preempt State authority because of the need for uniformity in separations procedures. AT&T asserts that actions taken by the Commission in the separations area have manifested an intention to bind the States. AT&T cites the SPF freeze order in *Amendment of Part 67*, CC Docket No. 80-286, as an example of this intention and then argues that the *Florida PSC Order* would violate the SPF freeze. AT&T maintains that the *Florida PSC Order* must be regarded as a nullity with regard to the interstate division of

revenues because Section 201(a) of the Act, 47 U.S.C. §201(a), gives the Commission exclusive authority in this area.

8. The Florida PSC asserts that it recognizes the potential jurisdictional infirmity of its *Order* as it relates to the disposition of interstate toll revenues. The Florida PSC argues that its action upon reconsideration may render Southern Bell's Petition to this Commission moot.

9. Citizens of the State of Florida (Citizens) maintains that there no longer is a controversy before the Commission sufficient to raise a question of Federal preemption because the Florida PSC is reconsidering its *Order*. Citizens asserts that the Commission should refrain from taking any action because many States would be potentially affected by a declaration of Federal preemption, but they are not represented in this proceeding. Citizens argues that it is not appropriate to address such significant constitutional questions as Federal preemption when only one State is involved in the proceeding, only two weeks have been allowed to address the matter, and the factual situation giving rise to the emergency petition no longer exists.

10. Reservation Telephone maintains that there is no emergency requiring immediate action by the Commission. If Southern Bell ultimately prevails before the Florida PSC it will have adequate means to recover any interstate settlement payments it has made to GTE of Florida. Reservation Telephone asserts that the *Florida PSC Order* does not conflict with Federal authority because it is consistent with the *Separations Manual* requirement that representative periods be used in determining actual holding time minutes of use for separations purposes. Reservation Telephone argues that the Commission's SPF freeze should not be construed as barring an Independent telephone company from correctly calculating its 1981 SPF factor through the use of representative seven-day studies.

11. Southern Bell, in its Reply Comments, maintains that the issues before the Commission are not moot because Southern Bell remains at risk in Florida for the payment of statutory penalties. Southern Bell asserts that interference by other State commissions with the separations and settlements authority of the Commission is another reason for the Commission to act promptly in this proceeding. Southern Bell argues that the assertions of Reservation Telephone regarding the appropriateness of seven-day studies under the *Separations Manual* go beyond the scope of this proceeding because this proceeding is concerned only with jurisdictional issues and does not reach the validity of seven-day studies on the merits.

12. Southern Bell maintains that Reservation Telephone overlooks entirely the jurisdictional issues raised in the *Florida PSC Order* by ignoring the fact that the *Order* prescribes interstate settlement arrangements and requires the use of seven-day studies in the absence of carrier agreements. Southern Bell asserts that GTE of Florida is wrong in suggesting that a declaratory ruling should not be issued because Southern Bell has not demonstrated irreparable harm; Southern Bell argues that irreparable harm need not be shown in order for the Commission to issue a declaratory ruling and that the time now is ripe for the Commission to rule on the scope of its preemptive authority. Southern Bell maintains that it is not appropriate for the Commission to abstain from action in this proceeding in view of the fact that several States have taken or are planning to take action that contravenes the Commission's authority in the separations field. Southern Bell cites the Commission action in *Amendment of Part 31*, CC Docket No. 79-105, as a recent example of the assertion of preemptive authority in connection with the Commission's depreciation rules. Southern Bell asserts that GTE of Florida is wrong in suggesting that interstate settlement arrangements are matters of contract that may be settled by State commissions; interstate revenue divisions are the exclusive province of the Commission. Southern Bell argues that GTE of Florida is wrong in urging that the failure of the Commission specifically to prescribe representative periods for actual use measurements permits State commission usurpation in this area; the SPF freeze order

in *Amendment of Part 67*, CC Docket No. 80-286, allows only carriers to agree to modifications in the time studies used for actual use measurements. Southern Bell maintains that the Commission ruling should apply retroactively in order to afford Southern Bell the protection it requires from the retroactive application of the *Florida PSC Order*.

13. GTE of Florida, in its Reply Comments, argues that AT&T's comments are an improper attempt to broaden the scope of the declaratory ruling sought by Southern Bell. GTE of Florida maintains that AT&T has incorrectly stated the issues in this proceeding, and that the correct framing of the issues is as follows: (1) Is there any longer a controversy ripe for Commission resolution? (2) May the Commission leave to non-federal forums the initial response to the issues raised in this proceeding? (3) Has the Commission so completely occupied the field as to preclude the States from interpreting, as a matter of contract between carriers, a term used in a Federal rule? GTE of Florida asserts that the Florida PSC has not "adopted" seven-day studies, but merely has interpreted the phrase "representative period" as used in the *Separations Manual*. GTE of Florida argues that State actions accepting seven-day studies are not deviations from Federal authority unless they distort traffic estimates, and no one has made a showing of any such distortion in this proceeding. GTE of Florida maintains that AT&T's concerns that use of seven-day studies will lead to a "no-man's land" in which Southern Bell will be unable to recover costs in the interstate or intrastate jurisdictions are properly addressed in rate hearings and should not be raised in this proceeding.

14. GTE of Florida asserts that, although AT&T is correct in arguing that States should abide by Commission-prescribed separations procedures, the fact remains that the Commission has not asserted exclusive jurisdiction over traffic study methods. GTE of Florida argues that AT&T is wrong in arguing that the Commission has exclusive authority under Section 201(a) of the Act, 47 U.S.C. §201(a), to resolve carrier disputes regarding interstate toll revenue divisions. GTE of Florida maintains that this reading of the statute would compel the Commission to hear every dispute involving a settlements contract, and cites *United Telephone Co. of the Carolinas v. FCC*, 559 F.2d 720 (D.C. Cir. 1977), for the proposition that the Commission is free to decline to exercise its authority under Section 201(a). GTE of Florida asserts that this inaction by the Commission enables the Florida PSC to interpret division-of-revenue agreements under State contract law.

15. GTE of Florida, in its Additional Comments, argues that there is no basis for Southern Bell's reliance on the Commission's decision in *Amendment of Part 31*, CC Docket No. 79-105, because in that proceeding the Commission had actually prescribed depreciation rules whereas in this proceeding the Commission has not prescribed any specific time periods for actual use measurements. GTE of Florida cites the recent action taken by the Public Utilities Commission of Ohio in prescribing seven-day studies and maintains that the Ohio Commission action was consistent with the general guidance of the *Separations Manual*.

16. The Public Service Commission of the District of Columbia, in its Reply Comments, asserts that the District of Columbia PSC has discretionary authority to make independent appraisals of the appropriateness of Commission determinations regarding jurisdictional separations. The District of Columbia PSC argues that Commission preemption in the separations area is not mandated by the Act, the legislative history of the Act, or the nature of the jurisdictional separations process. The District of Columbia PSC argues that the Congress did not intend that Commission decisions regarding separations affect intrastate ratemaking decisions. The District of Columbia PSC maintains that the allocation of intrastate and interstate costs for ratemaking purposes is not an area that has been preempted by the Commission, because of the nature of the subject matter involved.

Common Carrier, Interconnection, Customer-Provided Equipment
Rulemaking, Notice of Proposed
Telecommunications Services for Deaf

Notice of Proposed Rulemaking adopted designed to implement the requirements of the Telecommunications for the Disabled Act of 1982, Pub. L. 97–410. The rulemaking solicits comments from interested parties.
–*Telecommunications Equipment*
CC Docket No. 83–427

FCC 83–176

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Access to Telecommunications Equipment by The Hearing Impaired and Other Disabled Persons	CC Docket No. 83–427

NOTICE OF PROPOSED RULEMAKING

(Adopted: April 27, 1983; Released: May 4, 1983)

BY THE COMMISSION: COMMISSIONER JONES ABSENT.

1. On January 3, 1982, the President signed into law the Telecommunications for the Disabled Act of 1982, Public Law 97–410 (Disabled Act).[1] *See* Appendix A for relevant text. The Act is designed to promote access to telephone service by the hearing impaired. It is also designed to enable telephone companies to accommodate the needs of persons who by reason of a speech, hearing, sight or mobility impairment require the use of specialized customer premises equipment (CPE) to access communications services. The Act directs this Commission to "complete rulemaking actions required by this section and issue specific and detailed rules and regulations resulting therefrom within one year after the date of enactment of the Telecommunications for the Disabled Act of 1982." Disabled Act, §610(f). This Notice of Proposed Rulemaking is intended to comply with the provisions of the Act.

[1] The Act encompassed House substitute language for the language of S.2355, which would have amended the Communications Act of 1934 to provide reasonable access to telephone service by the hearing impaired. *See* S. Rep. No. 97–503, 97th Cong., 2d Sess. (1982). The Senate language was sufficiently different from the House version to make the Senate Report of little use in interpreting the Disabled Act. There was no Conference Report.

2. Notice is hereby given that the Commission will amend, modify or create additional provisions in Part 68 and other appropriate sections of the rules to carry out Congress' purpose. Comments are solicited on the issues indicated below. Based upon these comments we will promulgate final rules necessary to implement the provisions of the Disabled Act. In particular, we will issue final rules to ensure that the hearing impaired have available reasonable access to telephone service. We shall require that essential telephones be made hearing-aid compatible. In addition, the Commission will adopt or approve technical standards necessary to enforce the Act as well as establish labeling requirements on equipment packaging to inform consumers of the hearing-aid aid compatibility of telephones. Moreover, Congress has mandated that we issue rules to permit common carriers to offer specialized CPE needed by disabled persons.[2]

I. *BACKGROUND*

3. A significant minority of the population of the United States suffers from different degrees of hearing, sight, speech or mobility impairment. Congress stated that

> Hearing impairments affect a large number of Americans in all age groups. The [Committee] has determined that 10.8 million citizens have sufficiently impaired hearing to require the use of a hearing aid. Four hundred thousand are totally deaf, while twice that number cannot understand any speech that is not amplified to a level that is medically dangerous. One of the most frustrating aspects of hearing impairment and deafness is the inability to use telecommunications media on which modern life has grown so dependent. Persons with normal hearing may be unable fully to appreciate the pervasiveness of the telephone both in commercial transactions and personal contacts. The inability to use this instrument, except through an interpreter, is not only a practical disability but a constant source of dependency and personal frustration. Conversely, the ability independently to use the telephone may enable persons with other severe handicaps—such as paralysis or blindness—to lead self-sufficient lives in regular contact with society. The Committee believes that making the benefits of the technological revolution in telecommunications available to all Americans, including those with disabilities, should be a priority of our national telecommunications policy.

[2] We intend the term "CPE" to be synonymous with the term "terminal equipment" which is used in the Disabled Act. By a separate order decided today in CC Docket 78–50, *Telecommunications Services for the Deaf and Hearing Impaired*, FCC 83–177 (adopted April 27, 1983) (Docket 78–50 Order), we terminate a proceeding which explored and provided a national forum for views on various issues related to the telecommunications needs of the deaf and hearing impaired. Although the major focus of that Notice of Inquiry proceeding concerned the adequacy of terminal equipment utilized by those with total hearing losses, additional questions regarding other types of telephone service as well as the compatibility of telephones to hearing aids were also raised. As stated in that order, several of the issues, which are addressed in the Disabled Act, will be considered in the current proceeding, based upon updated information requested in this Notice of Proposed Rulemaking. Other issues raised in that Notice of Inquiry are resolved in the Docket 78–50 Order.

House Report No. 97–888, 97th Cong., 2d Sess., at 4–5 (1982) (House Report).

4. The specialized CPE needed by disabled persons is often more expensive than equipment needed by nondisabled persons, and some is so expensive as to be unaffordable for most disabled persons without some form of financial assistance. In enacting the Disabled Act, Congress made the determination that a competitive environment may not always be the most effective means for assuring the availability of specialized equipment for the disabled. The House Report stated:

> The detariffing of terminal equipment will cause competition to drive prices to costs and will effectively prevent the State commissions from regulating the price and other terms under which the consumer obtains terminal equipment. The Committee believes that, as applied to disabled persons, such a policy could lead to substantial price increases and reductions in the access to the nationwide network which persons with disabilities currently enjoy. It is the purpose of this legislation to increase the access of the physically impaired to new technologies and not allow the level of service currently available to deteriorate.

Id. at 13.

5. The Telecommunications for the Disabled Act of 1982 modified the Commission's decision in Computer II[3]. Computer II required, among other things, that all CPE be offered on a detariffed basis. The Act creates an exception to Computer II for telephone companies' provision of specialized CPE needed by disabled persons to communicate. Disabled Act, §2610(g). In response to the requirements of the Act, and in response to two waiver petitions, one filed by AT&T and one filed by the Organization for the Use of the Telephone, we granted a waiver of the Computer II requirements in order that no disruption in service to disabled persons or telephone companies would occur before we could implement the Disabled Act. *See American Telephone & Telegraph Co.*, FCC 82–580 (released January 25, 1983) (*Disabled Waiver Order*). The waiver permits, but does not require, telephone companies to offer under tariff specialized CPE needed by disabled persons and permits the Bell Operating Companies (BOCs) to offer such equipment without forming a separate subsidiary.

6. The Act goes farther with respect to the communications needs of the hearing impaired, the largest group of disabled persons. The Act requires that we issue regulations that will ensure reasonable access by the hearing impaired to "telephone service." The legislative history of the Act defines telephone service to include specialized CPE and transmission service. House Report at 8. In

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3614, 3615 (U.S. February 9, 10, 1983) (Nos. 82–1331, 82–1332).

addition, the Act requires that we make all "essential telephones" compatible with hearing-aids which have telephone switches. *See* para. 19, *infra*. The enforcement of those regulations must be delegated to state public utility commissions once they adopt these regulations. Therefore, Congress has determined that in its nationwide scheme for promoting access to the telephone network by the hearing impaired, states should play an integral role in implementing the Act through enforcing regulations adopted by this Commission. To effectuate these provisions, the Commission is also required to adopt or approve technical standards to assure hearing-aid compatibility of telephones. Although we will be the primary enforcers of the technical standards to be adopted pursuant to the Act under our Part 68 registration program, as a practical matter, state commissions will also play a significant role in enforcing those technical standards due to their responsibilities to implement the hearing-aid compatibility provisions of the Act. Further, the Commission is to adopt labeling requirements to inform consumers whether CPE they may purchase is hearing-aid compatible.

II. *ISSUES ON WHICH COMMENTS ARE SOUGHT*

7. The provisions of the Act which should be addressed in this rulemaking proceeding fall into five major categories: (1) ensuring reasonable access by the hearing impaired to telephone service, (2) making essential telephones hearing-aid compatible, (3) adopting technical standards necessary to implement the policies covered in the first two issues outlined above, (4) establishing labeling requirements for the packaging of hearing-aid compatible equipment, and (5) providing specialized CPE needed by disabled persons to communicate.

8. Interested parties are invited to propose specific language for rules to be adopted by this Commission pursuant to the Disabled Act. Two general issues affect all rules contemplated by the legislation. First, any rules or regulations issued must be framed with consideration given to the costs and benefits implicated by particular rules. Disabled Act, §610(e). Thus, commenting parties should address the quantitative and qualitative costs and benefits to be expected from the implementation of any particular proposal which telephone users in general, including those who have hearing or other impairments, will incur. Second, any regulations should encourage the use of currently available technology and not discourage or impair the development of improved technology. Comments should consider this goal. *Id.*

A. *Access to Telephone Service by the Hearing Impaired*

9. The Disabled Act is intended in part to implement an important aspect of this Commission's general obligation "to make available, so far as possible, to all the people of the United States a

rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. §151. Subsection (a) requires the Commission to adopt regulations to ensure reasonable access to telephone service by the hearing impaired. The House Report reads:

> This subsection directs the attention of the Commission to the special problems of persons with impaired hearing. The mandate of the Commission to ensure reasonable access to telephone service is limited to regulations and technical standards that ensure the availability of terminal equipment and transmission service for persons with impaired hearing and that govern the use of such equipment and its interconnection with telephone services for the transmission of voice or data.

House Report at 8. "Telephone service" potentially includes not only CPE provided for individual, rather than public, use and access to telephone lines, but also other incidental services, including operator and directory assistance, recorded message services, information services and the like.

10. Incidental transmission services are potentially included within the definition of "telephone service." In particular, information services with respect to the types of CPE or components of CPE which are needed for a hearing impaired individual to access the network may be included. For instance, AT&T has established Telecommunications Centers for Disabled Customers in various locations throughout the country which serve as information centers to inform customers of the types of equipment needed for them to effectively access telephone lines. *See* Petition for Waiver filed by American Telephone and Telegraph Co., October 22, 1982.

11. Deaf individuals may also require other specialized transmission services, such as TTY activated operator and directory assistance services, and other dial-up services incidental to transmission services. Currently, AT&T operates centers providing business office and directory assistance services for deaf TTY users. Access to AT&T's operator assistance services is provided through a nationwide toll free number, (800) 855–1155, equally available for use by both Bell customers and customers of independent telephone companies. Commenting parties are encouraged to address the issue of whether these services should be expanded to include other types of services and to other carriers. Comments are solicited as to those incidental transmission services which should be included within the definition of "telephone service." Commenting parties should describe the services to be included and the extent to which they are already available from carriers or otherwise.

12. At first glance, the inclusion of access to specialized terminal equipment contained in subsection (a) potentially overlaps with the provisions of subsection (b), which mandates that the Commission require all "essential" telephones to be made hearing-aid compatible. The legislative history states that the Commission may not generally

designate residential telephones as "essential" telephones. *See* paras. 20, 21, *infra*. Thus, we conclude that the provisions of subsection (a) relating to reasonable access to telephone service apply to terminal equipment provided for private use and does not apply to telephones provided for public use.

13. Subsection (a) grants this Commission the discretion as to how to ensure reasonable access to the CPE necessary to access communications service. Persons with less than total hearing loss may require special hearing-aids containing "telephone switches" to use otherwise available voice communications services. *See* para. 19, *infra*. A second, often less desirable alternative to hearing-aid compatible telephones is CPE with an amplified hearing handset, which can produce sufficient volume to permit persons who are hearing impaired but do not have hearing aids to use the telephone. Amplified hearing handsets can be attached to many models of telephone sets to enable the hearing impaired to hear more effectively. Amplified hearing handsets, however, do not reduce hearing aid feedback or minimize background noise.

14. We solicit comments with respect to how this Commission should ensure reasonable availability of specialized terminal equipment. One way to provide such access would be to require carriers to provide either a hearing-aid compatible telephone or a telephone with an amplified hearing handset upon request. An alternative would be for this Commission to require carriers to make available devices which can be installed on or in a telephone to make that CPE hearing aid compatible. Commenting parties are urged to suggest other methods to implement reasonable access to specialized CPE.

15. The Act contemplates that this Commission should not impose on manufacturers the responsibility of complying with the legislation. House Report at 11. The responsibility to comply could be provided in a variety of ways. One way of making equipment available is pursuant to section 610(g) of the Disabled Act by which carriers can tariff specialized CPE needed by the disabled, including the hearing impaired, and by which state public utility commissions may establish programs whereby the costs of such specialized CPE can be financed through funds received from rates for communications services. Alternatively, we might prohibit any equipment from being registered in the future under part 68 of the our Rules unless it is hearing-aid compatible. Another option would require a carrier to provide hearing-aid compatible CPE and amplified hearing handsets upon customer request. Still another possibility would be to require carriers only to inform customers where specialized CPE may be obtained. Interested parties should provide comments concerning whether the rules to be adopted should provide flexibility to states as to how reasonable access should be ensured.

16. For the severely hearing impaired, or those who are totally deaf, visual output telecommunications devices for the deaf (TDDs or

TTYs) can be employed to permit direct communications with other TDDs. Most have a "soft" display which uses light emitting diodes and are connected to the telephone network through the use of an acoustic coupler or registered data coupler. Several manufacturers offer TDDs under various arrangements, some through local telephone companies. In addition, personal computer, terminals may be useful to permit the deaf to communicate.

17. Commenting parties should describe how the provision of TTYs for the deaf should be treated. Should one of the foregoing approaches be used for TTYs or is some other alternative necessary? One aspect of promoting access by the deaf to telephone service concerns the compatibility of TDDs and TTYs with other services for the hearing impaired. As described in the Docket 78–50 Order, older TTYs employed the five bit Baudot code with a half duplex modem while most of the newer devices, as well as personal computer terminals, utilize the eight bit ASCII format with a full duplex modem. Some of the newer TDDs contain a switch which enables those terminals to communicate with either Baudot or ASCII devices. Commenting parties should address whether there is any action this Commission should take in implementing the Disabled Act to rectify any incompatibility problems between Baudot and ASCII devices. Compatibility would primarily be accomplished through dual capability devices capable of communicating in both ASCII and Baudot formats.

18. Any rules which we adopt pursuant to subsection (a) must be framed with a concern for the costs incurred and benefits achieved by the rules. In order to evaluate the costs and benefits we must have data as to what carriers and manufacturers presently do for the hearing impaired. We request that carriers and manufacturers describe the ways in which they presently accommodate the needs of the hearing impaired and, particularly, state the percentage of CPE which is presently hearing-aid compatible or which is equipped with amplified hearing handsets. In addition, carriers and manufacturers should state the percentage of telephones that are hearing-aid compatible which are presently being provided or which will be provided in the future. Other interested parties are encouraged to comment on present and future carrier or manufacturer accommodations to the communications needs of the hearing impaired.

B. *Essential Telephones*

19. Section 610(b) of the Act provides that the Commission shall require that "essential" telephones contain internal means for effective use with hearing aids. Congress noted:

> Most hearing aids have a built-in telephone pickup, or "telecoil," which is activated by a switch on the hearing aid. When this switch is placed in the "telephone" position, the microphone is turned off and the hearing aid can be used at full volume without feedback and with minimal background noise. Unless

this type of hearing aid becomes technologically obsolete at some future time and disappears from popular use, it will be considered "specially designed for telephone use." Currently, these hearing aids are activated by the strong magnetic field generated by some 90 percent of all telephone receivers, such as the Western Electric 500 set.

The legislation focuses on those "essential telephones" to which the hearing impaired must have access if they are to function effectively in modern society. Companies are free to manufacture and to market non-compatible telephones, and businesses and consumers may purchase these instruments for use by persons who do not have hearing impairments.

House Report at 8–9. The Act contemplates that the Commission's rules implementing this subsection will preempt inconsistent state requirements. *Id.* at 10. In order to achieve the purposes of the Act in this regard the Commission is required to define the meaning of "essential" telephones. *Id.* at 8–10. The Act defines three classes of essential telephones: (1) coin-operated telephones; (2) telephones provided for emergency use; and (3) other telephones frequently needed by persons with hearing aids.

20. The legislative history describes these categories of essential telephones as follows:

"Coin-Operated Telephones"

The term "coin-operated telephone" includes any telephone which is operated with coins, whether it is located on public property or in a "semipublic" location (such as a drug store, gas station, or private club). Since significant electrical power is required to accept coins, compatibility is now economical and should continue to be so in the future. Although the requirement that coin-operated telephones be retrofitted is universal in application, the overwhelming majority of coin phones are already hearing-aid compatible.

"Telephones Provided for Emergency Use"

The definition that the rulemaking adopts for "telephones provided for emergency use" must enumerate the types of locations in which access to a telephone may save persons from serious bodily injury, theft, or a life-threatening situation. The Committee intends that the term be defined to include voice-carrying devices in elevators, mineshafts, and other places where a person with impaired hearing might be isolated in an emergency. The term must also include telephones specifically installed to alert the police, fire department, or other emergency authorities; typically such a telephone cannot reach other persons on the network. Finally, the Commission should prescribe specific guidelines for telephones provided to avoid life-threatening situations in hospitals and other situations in which persons with impaired hearing may be confined.

"Telephones Frequently Needed by Persons with Impaired Hearing"

The third group of essential telephones to be defined by rule, those "frequently needed by persons with impaired hearing," must be hearing-aid compatible, but the legislation specifically prohibits the Commission from requiring equipment installed prior to the effective date of the Act to be retrofitted. This class includes any telephone that a carrier makes available for public use that is not either coin-operated or provided for emergency use. For example, after the date of enactment, new "Charge-a-Call" phones (or at least a reasonable number at each location) must be compatible with hearing aids unless they are in the proximity of compatible phones providing the same range of service. The Committee

intends that the Commission employ a common-sense approach; if a usable pay phone is nearby and readily available, the incompatible instrument is not "needed by the hearing impaired."

The Committee further intends that the Commission include essential telephones operated by persons other than carriers in this category after a detailed examination of the costs involved and of the benefits that the hearing-impaired and those with whom they communicate will realize. The definitions must be specific and provide detailed guidance as to the locations where such telephones must be available.

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Places of Business.—In the absence of extraordinary costs of implementation, persons with impaired hearing should be confident that they can effectively use any telephone made generally available to invitees in a place of business or in a public building, including phones restricted to local calling areas or to internal extensions.

Workplaces.—The Committee is also concerned that inability to use telephones should not impair the productivity of persons using a hearing aid in their place of work. An employee with impaired hearing should have access to at least one compatible telephone unless his duties would not involve the use of such a telephone if it were available. Regulations must be sufficiently specific to enable employers to comply without undue risk of an unexpectedly adverse interpretation in a subsequent proceeding for compliance.

Hotels and Motels.—The Committee observes that current law allows the Commission directly to regulate the offering of telephone service by hotel and motel owners. See *Ambassador, Inc. v. United States*, 325 U.S. 317 (1944). The legislation does not, however, impose costly requirements on these businesses. As an alternative to providing compatible telephones in every room, a hotel may set aside a reasonable number of rooms (under a formula that the regulations will specify) for the hearing impaired. Alternatively, the hotel owner may maintain a supply of compatible instruments and install them at the request of a guest who uses a hearing aid . . . .

House Report at 9–10.

21. It appears that residential telephones cannot be defined as "essential." Congress has stated that

> "Under no circumstances may the Commission designate as an essential telephone any residential telephone or any other telephone if all persons who would normally use it do not have hearing impairments."

Id. at 9. Comments from telephone companies and other interested parties are solicited as to the extent various classes of essential telephones are already hearing-aid compatible.

22. In addition, comments on the classes of equipment to be designated essential are solicited. Proposed definitions should specify the places and types of telephones to be included for each class of essential telephone and, as required with other provisions of the Act, an evaluation of the costs and benefits of the inclusion of particular locations within such definitions. Special attention should be directed to the timetable and means by which implementation of any proposed rules should be achieved.

C. *Technical Standards*

23. As indicated, the Act envisions that the Commission will establish or approve technical standards for compatibility between hearing aids and telephones. These standards would consist primarily of a definition relating to the magnetic field emanating from telephone handsets. The legislative history to the Act states that The Committee chose not to specify that telephones necessarily use this method, known as "inductive coupling," in order to encourage any new technology which is at least equal to the quality of use that inductive coupling currently provides.[4] A telephone that couples inductively (without the use of a portable adapter) would, however, satisfy this requirement to provide internal means for effective use with hearing aids specially designed for telephone use.[5] Subsection (b) does not require telephones to include internal amplifers; these devices, which are available in some public telephones, enhance use of the telephone by some persons with impaired hearing, whether or not their hearing aids are specially designed for telephone use.

House Report at 8. The Report continued:

> The Committee intends the Commission to rely on the development of standards by industry, but this section also gives the Commission authority to set such standards in the absence of industry agreement or in the event consumers establish that the standard fails to provide satisfactory results.
>
> The Committee does not intend technical standards to freeze technology by specifying a permissible design and excluding potentially superior alternatives . . .
>
> . . .
>
> The Committee intends that any standard established by the Commission (or developed by industry and approved by the Commission) should be nationally uniform, and that States be preempted from establishing conflicting technical standards. With the exception of this subsection and subsection (b), nothing in the legislation changes the division of jurisdictional responsibility between the Commission and the State commissions or in any other way diminishes the rights and authorities of the States as they existed on the date of enactment.

Id. at 11 (footnote omitted). Within these general guidelines we solicit proposed technical standards for hearing-aid compatible telephones.

24. The Commission has received a letter from the Electronic Industries Association (EIA) stating that its members are actively

[4] Although the additional costs of making telephones that are compatible with hearing aids are not now significant, it is possible that improvement in the network—such as a reduction in power levels—may increase this differential in costs.

[5] Persons with impaired hearing have complained that external adapters are too bulky to carry conveniently, draw attention to an apparent disability that has been overcome in all other situations, are susceptible to loss and damage, and require replacement of batteries after 90 hours of use (potentially at an inconvenient time). Western Electric has announced plans to introduce a newly designed adapter that will mitigate some of these inconveniences.

working on an industry-wide standard for telephone handset compatibility with hearing aids. Letter from EIA to Chief, Common Carrier Bureau, dated January 11, 1983. The EIA has requested that this technical issue be separated from other issues in this rulemaking so that its study group can continue its work outside the rulemaking process with Commission staff participation. We believe that the rulemaking process offers the best means by which all rules related to hearing-aid standards, including technical compatibility, can be developed. Accordingly, all interested persons and groups, including EIA, should submit proposed technical standards within the time frame and procedures established in this Notice.

25. In previous rulemakings involving technical issues we have found it useful to convene informal meetings of industry representatives and other interested persons under the aegis of the Commission, for the purpose of discussing and achieving agreement on the technical issues involved. *See, e.g., Common Carrier Interconnection Rules, Notice of Proposed Rulemaking*, 72 FCC 2d 330 (1979), *First Report and Order*, 76 FCC 2d 246 (1980). We believe that because the bulk of regulatory responsibility in relation to technical standards involves engineering matters that can in large measure be resolved by discussion in a group forum, this procedure would also be useful here. In addition, given that any rules required by the Disabled Act must be adopted by the end of 1983, those meetings should prove more expeditious than other procedural alternatives. Accordingly, we delegate to the Chief, Common Carrier Bureau authority to convene, conduct, participate in and schedule meetings of interested persons and groups in order to specify and resolve technical issues necessary to recommend to the Commission a proposed hearing-aid compatibility standard.[4] Reasonable notice of any public meeting shall be provided by Bureau Order. On the basis of the data provided at these meetings and other materials presented in the comments, the Commission will determine the appropriate standards that can best achieve the mandates of the Act.

D. *Labeling*

26. The Act also provides that the Commission establish requirements for the labeling of packaging for CPE offered for sale or lease to inform consumers whether such equipment is hearing-aid compatible. Disabled Act, §610(d). The legislative history provides:

> Subsection (d) directs the Commission to develop requirements for packaging materials that explain, in a clear understandable manner, whether and how persons with impaired hearing may use such equipment effectively. Although the legislation does not specifically require manufacturers to label telephone equipment, the Committee observes that it would be desirable for persons using hearing

[4] To permit any necessary judicial review of these meetings, minutes will be taken and placed in the public file.

aids to be able to identify noncompatible telephones whenever traveling outside their homes.

Id. at 12. Interested parties should make recommendations as to the specific content of such labeling and whether hearing-aid compatibility data should be provided with all telephones, only certain telephones, or even for certain registered equipment other than telephones.

27. In addition, although not required by the Disabled Act, comments are solicited with respect to whether labeling placed directly on CPE should reflect whether a particular piece of equipment is hearing-aid compatible. One way in which such labeling could be accomplished would be to place a letter, such as an "H", in a standard conspicuous location on all compatible devices. Commenting parties are requested to propose alternatives, and to identify the costs involved in labeling such equipment.

E. *Specialized CPE for Disabled Persons*

28. In addition to requiring that the Commission take steps to ensure access to telephone service and essential telephones for the hearing impaired, the Disabled Act creates an exception to our Computer II decisions by permitting carriers to provide specialized CPE needed by persons whose speech, vision, hearing or mobility is impaired. The statute also permits state public utility commissions to allow carriers to recover the reasonable and prudent costs of providing such equipment in the tariff rates for communications services. Disabled Act, §610(g).

29. The Act's scheme of promoting access to specialized CPE by disabled persons was described by Congress as follows:

> Reliance on the private sector to provide access to telecommunications is particularly appropriate in times of fiscal austerity and contraction of government. Ensuring the availability of specialized equipment may enable handicapped individuals to support themselves, and in many cases to avoid institutionalization. The Committee is particularly interested in promoting devices that enable the elderly and the disabled safely to lead independent self-supporting lives. For the paralyzed veterans, "hands-off" telephone equipment may mean the difference between being able to live at home and work in an office or leading a life of constant surveillance in a hospital. Recently, radio devices have been developed that alert a patients' doctor if he fails to signal periodically that he is not in need of medical assistance. The Telecommunications for the Disabled Act allows these various devices to be offered at affordable rates, whether or not a patient is institutionalized, thereby reducing hospital costs and encouraging more economic treatment of the physically impaired as outpatients.

House Report at 5.

30. There now exist a variety of programs, mostly at the state level, which promote access to telecommunications equipment by those with impaired sight, hearing, speech or mobility. For instance, a California statute orders its state public utility commission to design a program to require telephone companies to provide a deaf

TTY/TDD at a cost not to exceed the basic exchange rate. *See Calif. Pub. Util. Code* §2831. New York and Michigan have similar statutes. In addition, certain telephone companies have voluntarily provided CPE for the disabled at the customer's request. In some states, subsidies to manufacturers of equipment needed by the disabled are provided so that the cost of such equipment may be reduced.

31. As mentioned previously, pursuant to this legislation and on an interim basis, we waived the Computer II rules to permit telephone companies to provide under tariff specialized CPE needed by disabled persons to communicate. *Disabled Waiver Order*, para. 18. In addition, the BOCs were permitted to offer such equipment without first establishing a separate subsidiary for providing CPE. We did not decide the question of whether the states could, consistent with the legislation, require carriers to offer specialized equipment under tariff. *Id.* at paras. 18–19.

32. Neither the Act nor the legislative history specifically defines the term "specialized terminal equipment needed by" disabled persons. The House Report stated

> Examples make clear the limited scope of the statutory exception. Speakerphones may be vital to a person with impaired mobility; to a businessman they are a mere convenience. This subsection would only authorize a subsidy directed exclusively at the disabled. In the case of equipment for non-voice communications by the disabled, the State commission could extend a subsidy to non-handicapped persons who require such equipment regularly to communicate with the disabled.

House Report at 13. During the debates concerning the Act, the House sponsor to the bill stated that this Commission had the discretion to define "specialized CPE." 128 Cong. Rec. H9484 (Daily Ed., December 13, 1982) (comments of Rep. Wirth). For interim purposes, we defined that term in the *Disabled Waiver Order*, to include "CPE which has as at least one of its important purposes specialized application enabling disabled persons to communicate." *Disabled Waiver Order*, para. 15. We also included "special assemblies" which comprise special configurations of CPE necessary to meet the telecommunications needs of a disabled customer. Nevertheless, we stated that the term "specialized equipment" did not include basic equipment, such as push button telephones or telephones with lighted dials which may be incidentally useful to disabled persons in communicating over the nationwide telephone system. *Id.* Interested parties are invited to submit comments on the definition of the term, "specialized terminal equipment," as used in the Act. Should the definition contained in the *Disabled Waiver Order* be used? Should the term be restricted to equipment which is specifically designed for use by disabled persons?

33. The statutory language apparently leaves to the carrier the initial decision whether or not to tariff specialized equipment for the disabled. Although the legislation is silent on the question, the

legislative history of the Disabled Act makes clear that "the Commission cannot interfere with the State's decision to tariff such equipment and to allow the recovery of reasonable and prudent costs not charged directly to the user in tariffs for regulated services." 128 Cong. Rec. H984 (Daily Ed., December 13, 1982) (remarks of Rep. Wirth). Therefore, in our view, the Disabled Act contemplates that this Commission should leave to carriers and state commissions the decision whether or not specialized equipment will be tariffed, although this Commission will determine what specialized equipment falls within the meaning of the statute.

34. In developing such a program, however,

> The State commission may allow only reasonable and prudent costs to be included in any tariff. The Committee intends that any excessive costs resulting from discriminatory procurement practices would not be considered reasonable and prudent. To allow recovery in excess of reasonable and prudent costs would severely distort the nationwide market for terminal equipment.

House Report at 14.

35. In addition, the House Report to the Disabled Act states that "[i]n light of the record of voluntary cooperation by the industry, the Committee found it unnecessary specifically to address the possibility of a 'recalcitrant carrier' that might decline to participate in a program of subsidized offerings sanctioned by the state commission. . . . These matters may be considered, if necessary, in formulating the required modifications to *Computer II*." House Report at 14. Because the Disabled Act contemplates that state commissions shall for the most part enforce the regulations issued pursuant to the Act, *see* Disabled Act, §610(h), we believe that state commissions should determine, in a manner which is consistent with their state statutes and the Disabled Act, whether to require a carrier to participate in a program of subsidized equipment offerings.

III. *REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS*

36. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §601, *et seq.*, the Commission issues the following regulatory flexibility initial analysis:

A. *Reason for Action*

37. This Notice of Proposed Rulemaking was prompted by the Telecommunications for the Disabled Act of 1982, Pub. L. 97-140, (to be published at 47 U.S.C. §610). Through this proceeding, the Commission seeks to comply with the congressional purposes contained in that legislation.

B. *Objective*

38. The purpose of this Notice of Proposed Rulemaking is to initiate a rulemaking and seek public comment on the method by

which this Commission can assure reasonable access to telephone service by the hearing impaired and to establish regulations for making essential telephones compatible with hearing aids designed for telephone use. This rulemaking would also establish or adopt technical and labeling standards for hearing-aid compatible telephones. In addition, this rulemaking would define the circumstances under which specialized equipment needed by the hearing impaired and other disabled persons may be provided pursuant to state public utility commission regulations.

C. *Legal Basis*

39. The legal authority for seeking comment on these policies is sections 1 and 4(i) of the Communications Act of 1934, as amended (47 U.S.C. 151, 154(i)) and the Telecommunications for the Disabled Act of 1982, Pub. L. 97–410 (to be published at 47 U.S.C. §610).

D. *Description, Potential Impact and Number of Small Entities Affected*

40. The primary impact of the rules which would be issued pursuant to this Notice of Proposed Rulemaking would be on the nation's telephone companies, 935 of which have annual operating revenues of under one million dollars. One of the purposes of this rulemaking is to discover the dollar impact which could potentially befall all telephone companies, including those which are small entities. Nevertheless, normally the types of costs which would be incurred under the rules required by the legislation are recoverable by telephone companies in the amounts paid by ratepayers for communications services. Thus, the potential impact on these small entities should be slight. Furthermore, small manufacturers of equipment or component parts of equipment which enable disabled persons to more effectively communicate over the nationwide telephone network may be affected by the rules which are adopted. The extent of such an effect and whether the rules will be beneficial or adverse to those small manufacturers will not be known until comments are received in this proceeding.

E. *Recording, Recordkeeping and Other Compliance Requirements.*

41. The rules to be issued pursuant to this proceeding should not increase to any measurable degree recordkeeping or other reporting requirements of small entities over and above that which is presently required. Telephone companies will have to comply with the rules issued pursuant to this rulemaking proceeding.

F. *Federal Rules Which Overlap, Duplicate or Conflict With These Rules.*

42. The only federal rule which may overlap or conflict with the

rules is contained in a Commission *Memorandum Opinion and Order*, FCC 82-580 (released January 25, 1983). That order will be superseded and amended by the rules which are issued pursuant to this rulemaking proceeding.

G. *Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives*

43. Any alternatives which minimize the impact on small entities and which would remain consistent with stated objectives will be considered during the course of this rulemaking proceeding.

H. *Comments are Solicited*

44. Written public comments are requested on the Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the balance of the Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act (5 U.S.C. §601, *et seq.*).

IV. *PROCEDURE*

45. For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a Public Notice is issued stating a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments and pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, 47 C.F.R. §1.1231.

46. Pursuant to applicable procedures set forth in section 1.415

of the Commission's rules, interested parties may file comments by June 15, 1983, and reply comments by July 15, 1983. All relevant and timely comments and reply comments will be considered by the Commission before further action in this proceeding is taken.

47. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a written summary indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. In accordance with the provision of section 1.419 of the Commission's rules, an original and five copies of all comments, replies or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also desire that each Commissioner receive a personal copy of the comments may file an additional six copies. Members of the general public who wish to express their interest by participating informally in this proceeding may do so by submitting one copy of their comments, without regard to form, provided that Common Carrier Docket No. 83- is specified in the heading. Such informal participants who desire that responsible members of the staff receive a personal copy may file an additional five copies. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room (Room 239) at 1919 M Street, N.W., Washington, D.C. Further information concerning this proceeding may be obtained from Greg Vogt, (202) 632–4890.

V. *ORDERING CLAUSES*

48. Accordingly, it is hereby ORDERED, pursuant to sections 4(i), 4(j) of the Communications Act of 1934, as amended (47 U.S.C. §§154(i) and 154(j)), and pursuant to the Telecommunications for the Disabled Act of 1982, Pub. L. 97–410 (to be published at 47 U.S.C. §610), that a rulemaking proceeding IS HEREBY INSTITUTED in the above-captioned matter.

49. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j) and 5(d) of the Communications Act of 1934, as amended (47 U.S.C. §§154(i), (j) and 155(d)), with respect to the establishment of technical standards discussed herein, that the Chief, Common Carrier Bureau IS HEREBY DELEGATED AUTHORITY to: (1) by order convene such meetings as may be necessary for the conduct of this proceeding; (2) direct any such meetings; (3) schedule a formal pleading cycle; and (4) issue such further orders as may be necessary for the conduct of this proceeding. To the extent necessary to allow Commission staff to attend and participate in these meetings, Subpart H of Part 1 of the Commission's rules, 47 C.F.R. §§1.1201, *et seq.*, IS HEREBY WAIVED.

50. IT IS FURTHER ORDERED, that pursuant to 47 U.S.C.

§§154(i), 154(j), and 5 U.S.C. §553, NOTICE IS HEREBY GIVEN of proposed rule changes in Part 68 of the Commission's Rules and Regulations, 47 C.F.R. §68.1 *et seq.*, §64.702 (47 C.F.R. §64.702) and other relevant sections of the Rules in accordance with the discussion and deliniation of issues set forth herein.

51. IT IS FURTHER ORDERED that the Secretary shall cause this Notice of Proposed Rulemaking to be published in the Federal Register.

52. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (5 U.S.C. §601, *et seq.* (1980)).

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO *Secretary*

APPENDIX A

The Telecommunications for the Disabled Act of 1982, Pub. L. 97-410, 97th Cong., 2d Sess. (to be published at 47 U.S.C. §610), provides in relevant part:

Sec.2. The Congress finds that—

(1) all persons should have available the best telephone service which is technologically and economically feasible;

(2) currently available technology is capable of providing telephone service to some individuals who, because of hearing impairments, require telephone reception by means of hearing aids with induction coils, or other inductive receptors;

(3) the lack of technical standards ensuring compatibility between hearing aids and telephones has prevented receipt of the best telephone service which is technologically and economically feasible; and

(4) adoption of technical standards is required in order to ensure compatibility between telephones and hearing aids, thereby accommodating the needs of individuals with hearing impairments.

Sec. 3 "Telephone Service for the Disabled"

SEC. 610(a). The Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.

(b) The Commission shall require that essential telephones provide internal means for effective use with hearing aids that are specially designed for telephone use. For purposes of this subsection, the term "essential telephones" means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids.

(c) The Commission shall establish or approve such technical standards as are required to enforce this section.

(d) The Commission shall establish such requirements for the labeling of

packaging materials for equipment as are needed to provide adequate information to consumers on the compatiblity between telephones and hearing aids.

(e) In any rulemaking to implement the provisions of this section, the Commission shall specifically consider the costs and benefits to all telephone users, including persons with and without hearing impairments. The Commission shall ensure that regulations adopted to implement this section encourage the use of currently available technology and do not discourage or impair the development of improved technology.

(f) The Commission shall complete rulemaking actions required by this section and issue specific and detailed rules and regulations resulting therefrom within one year after the date of enactment [of] the Telecommunications for the Disabled Act of 1982. Thereafter the Commission shall periodically review such rules and regulations. Except for coin-operated telephones and telephones provided for emergency use, the Commission may not require the retrofitting of equipment to achieve the purposes of this section.

(g) Any common carrier or connecting carrier may provide specialized terminal equipment needed by persons whose hearing, speech, vision, or mobility is impaired. The State commission may allow the carrier to recover in its tariffs for regulated service reasonable and prudent costs not charged directly to users of such equipment.

(h) The Commission shall delegate to each State commission the authority to enforce within such State compliance with the specific regulations that the Commission issues under subsections (a) and (b), conditioned upon the adoption and enforcement of such regulations by the State commission.

Application, Amendment of
Misrepresentation, Character Qualifications
Remand
Site Availability

Review Board remands applications for new FM station on newly added site availability, Section 1.65, and misrepresentation/lack of candor issues.
–*Valley FM Radio*
BC Docket No. 80–379

FCC 83R-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of VALLEY FM RADIO Taft, California	BC Docket No. 80–379 File No. BPH-790308AH
Louise E. Mann t/a MANN BROADCASTING CO. Taft, California	BC Docket No. 80–380 File No. BPH-790730AA
For Construction Permit for a new FM Station	

MEMORANDUM OPINION AND ORDER

(Adopted: April 27, 1983; Released: May 2, 1983)

BY THE REVIEW BOARD:

1. Once again the Board has been compelled by "newly-discovered evidence" to reopen the record and remand a case for further hearing after the release of a thorough Initial Decision which resolved all the designated issues. See *George E. Cameron Jr. Communications*, 89 FCC 2d 1270 (Rev. Bd. 1982); *Peoria Community Broadcasters*, FCC 83R-26, released April 20, 1983. Both the Commission and this Board are reluctant to grant such posthearing petitions for relief, but in some cases there is no other choice. See, *e.g.*, *WMOZ, Inc.* v. *FCC*, 344 F.2d 197 (D.C. Cir. 1965). *New Continental Broadcasting Co.*, FCC 83–159, released April 13, 1983. This appears to be another unfortunate case in which "a little neglect may breed great mischief" for the best comparative applicant. Country Broad-

casting Co., 53 RR 2d 293, 294 (Rev. Bd. 1983). In his Initial Decision, FCC 82D-82, released January 3, 1983, Administrative Law Judge Harrison selected Valley FM Radio as the best comparative applicant for a new FM station in Taft, California. Exceptions were filed, and on February 15, 1983, Mann Broadcasting Co., the other applicant, requested that the Board either dismiss Valley's application or enlarge the issues and remand the proceeding for further hearing on transmitter site availability, Section 1.65, and misrepresentation issues against Valley. For the reasons set out below, we will add appropriate issues and remand the proceeding for further hearing and preparation of a Supplemental Initial Decision.

2. The proposed site is currently leased by Kenneth Aitken, who is willing to sublease it to Valley if Chevron U.S.A., Inc. will give its consent. Mann's petition is based on two recent letters from T.W. Rabey, a representative of Chevron, which owns the land upon which Valley proposes to construct its antenna and transmitter. Rabey's first letter dated January 24, 1983, indicates that Chevron once considered the possibility of allowing an FM radio station to operate under the Aitken license agreement but rejected the idea as unfeasible and not in the best interests of Chevron. His second letter, dated February 2, 1983, states that Valley was informed of this fact on March 19, 1982. Mann points out in her petition that Steven Fuss, the sole proprietor of Valley, testified on February 10–12, 1981, with respect to a financial issue specified against it, that the Chevron location was available to Valley. Subsequently, in its proposed findings, filed June 25, 1982, Valley again represented that it would have use of the Chevron site. Significantly, the March 1982 letter indicating otherwise was never reported to the Commission by Valley. Mann argues that Valley's application should be dismissed because it no longer has a transmitter site, citing *Midwest St. Louis, Inc.*, 79 FCC 2d 519, 48 RR 2d 95 (1980). If the application is not dismissed outright, Mann urges the Board to add against Valley transmitter site availability, failure to report (Section 1.65), and misrepresentation issues.

3. Valley responds that Mann's petition should be summarily dismissed because the allegations are unverified and untimely. Valley also argues that the petition should be denied on the merits. It attaches a statement by Fuss, in which he says that he contacted Rabey shortly after receiving the March 1982 letter, discussed the potential problems in using the Chevron site, and concluded that the site would be available to Valley. Fuss further states that he has had discussions with Chevron subsequent to Mann's petition and remains confident that the site will be available.

4. At the outset, we note that the lack of notarization of the Rabey letters is not a procedural barrier since the authenticity of at least one crucial letter has been implicitly conceded in Valley's opposition. Mann's allegations, and Valley's response have been

considered on the merits because together they raise questions of decisional significance and substantial public interest importance. *See* Section 1.229(c), 47 CFR §1.229(c). Valley's application was granted on the bases that the applicant possesses the requisite qualifications to be a Commission licensee and that it had demonstrated at hearing that it was comparatively superior to Mann. The Rabey letters, in our view, undermine these bases and raise substantial question as to whether Valley in fact has reasonable assurance of a transmitter site for its proposed facility. Thus, even though Valley has submitted a statement by Fuss that he has discussed the problem with Chevron and remains confident that the site is still available to Valley, we are unable to resolve this matter in Valley's favor in the absence of adequate supporting documentation from the owner of the proposed site. An appropriate issue will be specified. Mann's reliance on *Midwest St. Louis, Inc., supra*, for its request to dismiss Valley's application outright is misplaced and will be rejected. Dismissal of the application involved in *Midwest* occurred only after the applicant had ample opportunity under a specified site availability issue to amend its application to show that it had a transmitter site. See also *Shoblom Broadcasting, Inc.*, FCC 83R-27, released April 22, 1983.

5. A section 1.65 reporting issue is also warranted here since it appears that Fuss must have realized in March 1982 that the Chevron site was unavailable to Valley, and this important fact should have been timely reported to the Commission. *See Midwest St. Louis, Inc.*, 61 FCC 2d 203, 206–07, 38 RR 2d 569, 573–74 (Rev. Bd. 1976). Section 1.65, 47 CFR §1.65, requires an applicant to report changes which may be of decisional significance. The apparent loss of a transmitter site is obviously of decisional significance. And as we indicated in *Shoblom, supra*, at n. 4, the existence of letters from the owner of a proposed transmitter site refusing to make the site available vitiates the "reasonable assurance" the applicant must have to specify the site. Moreover, the loss of the site here could be relevant not only to the financial issue specified against Valley, since its costs were predicated on the use of the Chevron site, but also to the comparative coverage aspect of the standard comparative issue, under which Valley received a significant preference. A Section 1.65 issue will therefore be specified against Valley. Finally, a lack of candor or misrepresentation issue will also be added against Valley based on its post-March 1982 affirmative representation in its proposed findings that the Chevron site was still available to it.

6. ACCORDINGLY, IT IS ORDERED, That the Petition to Dismiss Application of Valley FM Radio or For Enlargement of Issues Against Valley FM Radio filed February 15, 1983, by Mann Broadcasting Co. IS GRANTED to the extent indicated above; and that the issues in this proceeding ARE ENLARGED by the addition of the following issues:

1. To determine whether Valley FM Radio has reasonable assurance of the availability of its proposed transmitter site, and in light thereof, whether Valley possesses the basic qualifications to be a Commission licensee.

2. To determine whether Valley FM Radio has violated Rule 1.65 by failing to notify the Commission of the unavailability of its transmitter site, and if so, to determine in light thereof and in light of the previous Rule 1.65 issue specified against Valley, the effect on the applicant's basic or comparative qualifications.

3. To determine whether Valley FM Radio was lacking in candor or misrepresented facts or information regarding the availability of Valley's proposed transmitter site, and if so, to determine the effect thereof upon the applicant's basic or comparative qualifications.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the above issues SHALL BE upon Mann Broadcasting Co., and the burden of proof SHALL BE upon Valley FM Radio; and that the proceeding IS REMANDED to the presiding Administrative Law Judge for the adduction of evidence on the issues specified above and for the preparation of a Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO *Chairman, Review Board*

FCC 82D-82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of VALLEY FM RADIO Taft, California	BC DOCKET NO. 80–379 File No. BPH-790308AH
Louise E. Mann t/a MANN BROADCASTING CO. Taft, California	BC DOCKET NO. 80–380 File No. BPH-790730AA
For Construction Permit for a New FM Station	

Appearances

Thomas Pace, David Tillotson and *Marilynn Sonn* on behalf of Valley FM Radio; *Morton L. Berfield* and *Roy W. Boyce* on behalf of Mann Broadcasting Co. and *Arthur Steinberg* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF

ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued: December 23, 1982; Released: January 3, 1983)

Preliminary Statement

1. This is a comparative proceeding involving the captioned mutually-exclusive applications of Valley FM Radio (Valley) and Louise E. Mann t/a Mann Broadcasting Co. (Mann) for a construction permit for a new FM station on Channel 280 at Taft, California. The applications were originally designated for hearing by Designation Order issued by the Chief, Broadcast Bureau under delegated authority released July 28, 1980. The Designation Order found the parties basically qualified and specified the standard comparative issue. However, since Mann proposes to duplicate on the FM station the programming of Station KTKR (AM), Taft, California, which Mann presently owns, and Valley proposes independent program service evidence concerning the benefits if any would be admissible under the standard comparative issue for the limited purpose of offsetting the inherent inefficiency of duplication (Paragraph 2 of the Designation Order). Additionally, since significant differences exist in the areas and populations which would receive service under the Mann and Valley proposals, the Designation Order specified that

evidence as to the areas and populations that would receive 1 mV/m service from each proposal, together with evidence as to the availability of other primary aural services, would be admissible for the purpose of determining whether either applicant should receive a preference for its proposed coverage under the standard comparative issue (Paragraph 3 of the Designation Order).

2. By *Memorandum Opinion and Order* released November 18, 1980 (FCC 80M-2331), the presiding Administrative Law Judge added the following two issues concerning Valley:

> To determine: (a) the full costs of construction and operation of Valley FM Radio's proposed station; (b) the funds available to the applicant; and (c) in the light thereof whether Valley FM Radio is financially qualified to construct and operate the proposed station.
>
> To determine whether Valley FM Radio has violated Section 1.65 of the Rules by failure to report a change in its financial proposal and its integration proposal.

3. The following issue was added with respect to Mann by *Memorandum Opinion and Order* (FCC 81M-1591) released May 20, 1981:

> To determine whether Mann has operated Station KTKR at Taft, California in violation of Section 73.93(a) of the Rules, and if so, to determine the effect thereof on its basic and comparative qualifications to be the licensee of a FM Station.[1]

4. An additional issue was specified against Valley by *Memorandum Opinion and Order* (FCC 81M-1552) released May 19, 1981 as follows:

> To determine whether Valley FM can reasonably rely on the availability of the remote control point specified in its application and in light of the evidence adduced on this issue, the effect on Valley FM's basic and comparative qualifications to be a Commission licensee.

5. The following issues concerning Valley were added by *Memorandum Opinion and Order* (FCC 81M-2190) released July 16, 1981:

> To determine the facts and circumstances relating to the presence of Steven Fuss on the premises of Station KTKR on May 10, 1981, and whether the conduct of Steven Fuss constituted an attempt to harass, coerce, and intimidate Mann.
>
> To determine whether Mann has made any misrepresentations to the Commission in connection with its Petition to Enlarge Issues filed May 22, 1981 and Reply to Opposition filed June 18, 1981.
>
> To determine whether Valley FM has made any misrepresentations to the Commission in connection with its Opposition to the Petition to Enlarge Issues filed June 4, 1981.
>
> To determine in light of the evidence adduced pursuant to the above issues whether Mann or Valley FM possess the basic and/or comparative qualifications to be a Commission licensee.

6. The Presiding Judge further enlarged the issues concerning

[1] The cited rule has been renumbered 73.1860.

Valley as follows by *Memorandum Opinion and Order* (FCC 81M-2635) released August 24, 1981:[2]

> To determine whether Steven Fuss and/or Valley FM Radio have concealed, failed to disclose, been lacking in candor, filed a false affidavit, or otherwise misrepresented facts or information regarding Rowland Communications.
>
> To determine in the light of the evidence adduced on the foregoing issue, the effect upon Steven Fuss and/or Valley FM Radio's character and other qualifications to be a Commission licensee and/or upon their comparative qualifications.

Hearings on the original issues and the Financial and Section 1.65 issues were held in Washington, D. C. from February 10 through 13, 1981 and hearings on the remaining issues were held in Washington, D. C. from December 7 through 11, 1981. A final hearing session was held in Washington, D. C. on February 23, 1982 and the record closed on that date. The parties applicant, after several continuances filed proposed findings of fact and conclusions of law on June 25, 1982 and reply findings and conclusions on July 9, 1982. The Bureau did not file any proposed findings and conclusions. Discussion of the basic, potentially disqualifying issues, will precede discussion of the comparative issues.

Findings of Fact

The Financial Issue

7. The financial issue was specified against Valley for two reasons. First, it appeared that Valley's cost estimates were unreasonable on their face and it appeared that Valley originally was planning to use the same $20,000 to finance the construction and operation of both its Taft and Weed, California proposals. Shortly after the financial issue was specified, Valley amended its application to provide further information as to its cost estimates and to reflect that the Commercial Bank of California had agreed to lend Valley $50,000 to finance construction and operation of its Taft station. This amendment was granted by *Order* released February 10, 1981 (FCC 81M-393). Thereafter, Valley sought a summary decision on the financial issue which was denied as there appeared questions remaining which could best be resolved in the hearing (*Memorandum Opinion and Order*, FCC 81M-394, released February 10, 1981). By Valley Exhibit 12, the bank subsequently revised its commitment to provide that the $50,000 loan could be used to finance Valley's Weed station as well as the one it proposes to construct at Taft.

[2] All parties were put on notice that should the record establish such misrepresentation, it would also serve as a basis for determining whether or not there has been a violation of Section 1.246 of the Commission Rules.

Valley's Construction Costs - Taft

8. Valley states that it has on hand most of the broadcast equipment that it will need to construct the Taft station. Much of this equipment is used (Valley Exhibits 3, 4, 6, 13; Tr. 113–26, 343–45, 385–86, 389–90, 398–404, 413–25). A question arose as to the usability of the Valley equipment on hand as some of it was stored in Mr. Fuss' home, some in a storage area and some outside in the weather but under tarpaulins (Tr. 125) and the proposed transmitter was of a type designed by RCA back in the 1940's and was not built after the mid-1950's (Tr. 147).

9. Valley called as its witness Mr. Donald Wilson (Wilson) who is the Chief Engineer of non-commercial educational station KPFK(FM), Los Angeles, California. Mr. Wilson has had extensive experience in selecting, adapting, repairing and maintaining broadcast equipment on a limited budget which is owned and operated by the licensee of KPFK, Pacificia Foundation (Valley Exhibits 6 and 13). Wilson inspected Valley's on-hand equipment on two occasions for the purpose of evaluating whether the equipment was adequate and suitable for use at Valley's proposed FM station at Taft (Valley Exhibit 6; Tr. 117–18, 123–26, 132–93 and Valley Exhibit 13). Based upon the two Wilson inspections, Wilson testified that he estimated it would cost Valley $7,450 to repair and refurbish the on-hand equipment so as to be suitable for use as a broadcast station and to acquire the additional items not on hand (Valley Exhibit 13; Tr. 132–86, 208–16).

10. In addition to the Wilson estimate to place the on-hand equipment in operating condition and purchase any missing items ($7,450), Valley estimates that the additional costs for construction and operation will be as follows:

Legal costs	$10,300
Engineering costs	700
Installation costs	300
Operating costs for three months	9,795
	$21,295

(Valley Exhibits 3 and 4).

No question was raised in this proceeding as to the reasonableness of Valley's estimated legal costs. It should be noted, however, that the bank loan discussed *infra*, is not available to Valley to meet expenses incurred in efforts to obtain the construction permit. Thus, the bank loan cannot be depleted by legal costs until after Valley received the construction permit (Valley Exhibits 4 and 12). The cost estimates identified as "Engineering Costs" relate to the preparation of the initial engineering for the application and the comparative coverage hearing exhibit. Valley represents that such costs were billed and paid for prior to the hearing (Tr. 482–83).

11. Employee salaries are estimated by Valley to be $5,820. It is the Valley proposal to operate the station with four full-time employees - two salaried and one on commission. The fourth employee will be Mr. Fuss, the 100% owner of Valley who states he will draw no salary for the first three months of operation but rather will live off of his savings. Fuss proposes to contract with a telephone answering service to provide remote control service so that it will not be necessary to have an employee on duty at all times during operation of the station (Valley Exhibit 3; Tr. 319–35, 484–90). Mr. Fuss had originally estimated that the telephone answering service type of remote control point could be obtained for $70 per month based upon an estimate obtained from the Rowland Communications, Inc. (RCI) (Tr. 488–89). Much evidence is contained in the record on the use of RCI as a remote control point which will be considered, *infra*. However, for the purpose of consideration of the financial issue against Valley, it appears that the RCI monthly cost could be as much as $600 (Tr. 797–807, 838).

12. Valley's payroll taxes ($600), telephone ($300), power ($600) are based upon the applicable tax rates and tariffs for the public utilities involved (Valley Exhibit 3). Items such as studio rent ($450) is based on advice Fuss received from a Taft real estate agent (Valley Exhibits 3 and 9; Tr. 298–99, 480–81, 495) and the Broadcast Phone Lines ($200) is based upon the rates quoted by the Continental Telephone Company and the cost of the necessary additional equipment (Valley Exhibit 3).

13. The transmitter site rent which includes space on a tower is stated by Valley to be $150 per month which payments will be deferred until after Valley has been in operation for six months (Valley Exhibit 3; Mann Exhibit 1; Tr. 227–55, 432–36).[3]

14. It is Mr. Fuss' testimony that he presently owns sufficient records and tapes to implement his proposed programming and that this equipment will be provided at no cost to Valley (Valley Exhibit 3; Tr. 308). Likewise, Mr. Fuss claims no cost will be involved for office supplies and equipment in that he appears to have entered into trade-out agreements for such supplies in exchange for advertising on the station (Valley Exhibit 3; Mann Exhibit 2; Tr. 308–12). Valley also proposes to have an emergency power generator which will be leased at a cost of $75 based on an oral agreement with the Topa Corporation and Valley has also allowed $400 for contingencies (Valley Exhibit 3).

15. Some dispute developed in the record as to the Valley cost to

[3] The transmitter and tower site lease is from a Mr. Aitken who in turn leases the site from the Chevron Oil Company. At the present time, Mr. Aitken is operating a two-way radio facility on the site. Should Aitken, for any reason, fail to carry out his commitment to Valley, Valley can lease from Chevron at $100 per month and it would cost approximately $3,050 for Valley to construct its own facilities (Tr. 436–40; Valley Exhibit 8).

install the station. It is Mr. Fuss' testimony that it will cost $500. Fuss bases this on the fact that he has had previous experience in such installations and he will do the work himself with the assistance of a few friends, all without any professional help. Fuss stated that the previous station installation (Station KNVR at Paradise, California) was done in this same way at a cost of $200 which $200 represented out-of-pocket costs for wiring (Tr. 425–27, 456–59, 461–63).

16. It will be recalled that Mr. Fuss had engaged the services of a Mr. Wilson to estimate the usability of the Fuss second-hand equipment and the costs to repair this equipment. It was Mr. Wilson's testimony that it would cost $2,000 for Valley to install the station which is considerably in excess of the Fuss $500 estimate. However, Wilson states that his estimate is based upon the cost to hire people to do the job at prevailing hourly rates, which people Fuss states he will not need. Wilson's opinion is that the station could be installed by anyone with previous experience (Tr. 189–90, 217–18).

17. At the time of the hearing, Valley had a loan commitment of $50,000 for the construction of the instant station at Taft and a station at Weed, California. The Weed station has proposed construction and operation costs (3 months) of $12,800. In addition to the $50,000 loan, Fuss shows that he has paid $8,300 of the expenses for his Taft and Weed stations and he has $2,000 in cash. Thus, the total available funds for both stations including cash on hand, the loan and prepaid expenses is $60,300 (Valley Exhibit 4). Based upon the estimated cost of the station at Taft as shown in Valley Exhibits 3 and 4 of $21,295 to which must be added the $7,450 Mr. Wilson estimates for the cost of either placing on-hand equipment in workable condition and purchasing certain additional required equipment, the total cost for construction and operation of the proposed Taft station will be $29,045. To this must be added the $12,800 shown in the Weed application for its proposed construction and operation costs for a total cost of $41,845. To meet such costs, Valley has shown that the Commercial Bank of California has agreed to lend Valley $50,000 to finance the construction and operation of both stations (Taft and Weed). Such loan is secured by a $50,000 certificate of deposit which is pledged by Arthur James (Valley Exhibits 5 and 12). As previously noted, the $50,000 loan is not available until the construction permit is secured. The loan is for a period of six months with interest payable at the end of the six months period. The loan is renewable by its terms and is secured by a Certificate of Deposit from Mr. Arthur James, who has agreed to pledge the Certificate of Deposit for the loan (Valley Exhibits 4, 5 and 12).

18. Taking into account the $50,000 loan and the fact that Valley has shown $8,300 already paid of its projected expenses, the total

funds available to Valley, including the loan and prepaid expenses, total $60,300. These available funds exceed Valley's aggregate cash requirement of $41,845 for the construction and operation (3 months) of its proposed Taft and Weed stations by $18,455.[4]

The Section 1.65 Issue

19. This 1.65 issue was added by *Memorandum Opinion and Order* released November 18, 1980. It appears that subsequent to the application filed by Valley for Taft, California, Valley also filed an application for a new FM station at Weed, California and further the Wyoming Ninety-Five Corporation, in which Valley had a 50% interest, filed an application for a new FM station at Laramie, Wyoming. The Section 1.65 issue was added to this proceeding to determine whether Valley's financial and integration commitments as contained in the Weed and Laramie applications were consistent with the financial and integration proposals contained in the Valley Taft application, and, if not, whether Valley had violated Section 1.65 of the Rules by not amending the Valley application to specify its financial and integration proposals in view of the filing of the Weed and Laramie applications. It should be noted that the Section 1.65 issue under consideration does not involve elements of misrepresentation and concealment since Valley did voluntarily amend its Taft application to reveal that the other two applications were filed (*Memorandum Opinion and Order*, FCC 80M-2331, released November 18, 1980).

20. In response to Question 27, Section IV-A, Valley represented that Fuss would work full-time at the proposed Taft station as its general manager (Valley Exhibit 3, para. 7; Tr. 551). In the Weed application, Valley represented in response to Question 27, Section IV-A, that "Steven Fuss, President, will establish the overall operating policy of the station and will be employed by Valley FM Radio on a full-time basis for the general management of its broadcast operations" (Mann Exhibit 3; Tr. 552). In the Laramie application in which Fuss through Valley will be a 50% owner, it was represented in response to Question 27, Section IV-A that: "Steven Fuss, Corporate Secretary, will establish the overall operating policies of the station and will be employed by Valley FM Radio (50% stockholder) on a full-time basis for the general management of its Broadcast operations."

21. According to the Fuss testimony, Fuss intends to move to and reside in Taft, California and be, in fact, the full-time manager of the Taft station. From this new home base in Taft, California, according

[4] Mann argues in its proposed findings that Valley failed in its proof on the financial issue since it provided no justification for the $12,800 estimate of construction and operation costs for the Weed station. Mann did attempt to go into this issue at the hearing, however, the Bureau's objection to such inquiry was sustained (Tr. 356–57).

to the Fuss testimony, Fuss would carry out only policy-making and supervisory functions, which could include infrequent trips to Weed and Laramie (Tr. 555, 562–64). Fuss states that he did not intend the responses to the integration proposal to reflect that he would be a full-time manager of the Weed and Laramie stations. In fact, according to Fuss, this is why provision was made at both the Weed and Laramie stations for the hiring of a general manager who would carry out the Fuss-made policies (Tr. 553, 554; Valley Exhibit 3, para. 7).

22. In the Weed application, Valley indicated that it had $20,000 available for construction and operation which is the same $20,000 indicated in the Taft application (Mann Exhibit 3 and Valley Exhibit 3). Further, in the Laramie application, Valley indicated that it would subscribe to $1,000 worth of stock. The Valley Taft application was not amended to show that the $20,000 as shown in the Taft application was also to be used for the Weed construction and operation plus the $1,000 stock subscription at Laramie. It is Fuss' testimony that when the costs as originally proposed for the Taft and Weed construction and operation costs is added to the $1,000 subscription agreement for Laramie, the $20,000 then available was only $1,500 short of the actual cash required for all three proposals. Fuss regarded this $1,500 shortfall as insignificant and thus he did not believe it necessary to amend the Taft application to show that the $20,000 available for Taft was also to be used for the other two proposals (Valley Exhibit 3, para. 6; Tr. 551). As previously noted, Valley did amend the Taft proposal to advise of the filing of the Weed and Laramie proposals but failed to mention anything about the integration and financial proposals for all three (Valley Exhibit 3, para. 6; Tr. 551).

The Remote Control Point Issue and Misrepresentation Lack of Candor Issue

23. The control point issue was added by *Memorandum Opinion and Order* released May 19, 1981 (FCC 81M-1552) when it appeared that Valley's proposal to locate a remote control point on the premises of RCI may not be realistic since RCI is not interested in having a broadcast facility as a part of a telephone answering service. There also appeared to be considerable confusion on RCI's part as to just what would be involved in providing a remote control point for a broadcast service.

24. By *Memorandum Opinion and Order* released August 24, 1981 (FCC 81M-2635) an issue was added to determine "whether Steven Fuss and/or Valley FM Radio have concealed, failed to disclose, been lacking in candor, filed a false affidavit, or otherwise misrepresented facts or information regarding Rowland Communications, Inc." The addition of the issue was based on a request for admission filed by Mann on Valley on June 4, 1981. Mann requested

Valley to admit that neither Valley nor Steven Fuss had any agreement with RCI to serve as a remote control point for Valley or to provide any technical or other services for Valley in connection with Valley's proposed FM station. On June 18, 1981, Valley filed a denial of the requested admission. The denial was based upon an affidavit of Fuss which stated his basis for a belief that he, in fact, did have an agreement for RCI to serve as the remote control point. Mann then sought the addition of the issue added by the August 24, 1981 *Memorandum Opinion and Order* in which Mann made a *prima facie* showing that Fuss had failed to reveal in his response to the request for admission that Fuss had received a notice from RCI dated February 25, 1981 which declared the February 5, 1981 contract between RCI and Valley null and void as of March 25, 1981 and that Fuss failed to reveal this fact in his response to the Mann request for admission. Further, since Fuss failed to disclose the February 25, 1981 notice of termination of the RCI contract which rendered the contract between RCI and Valley null and void as of March 25, 1981, Fuss should have revealed that new negotiations between Fuss (Valley) and RCI were subject to specific conditions set forth in the Larry Rowland affidavit dated May 4, 1981.

25. RCI appears to be a telephone answering service at Taft, California that provides terminal facilities for two-way radio facilities and alarm circuit facilities. RCI is a corporation with two directors and officers - Larry Rowland and Rita Rowland, his mother (Tr. 743). Larry Rowland controls the board of directors and makes all final decisions on behalf of RCI (Tr. 835).

26. RCI entered into a contract with Fuss[5] dated February 5, 1981 in which RCI agreed to provide remote control service for Valley at a monthly charge of $75 (Valley Exhibit 10). The contract was executed on behalf of RCI by Floy Hill, its manager. This contract is a standard form of contract (Tr. 819).

27. Mr. Fuss chose to negotiate with RCI because it was already operating a telephone answering service and functioned as an alarm center for several large oil companies. RCI has nine employees in its telephone and radio communications section which hold the restricted broadcast license. It also has a total of 26 employees (including the nine mentioned above) not including Larry and Rita Rowland and it had been recommended to Fuss as a reliable institution (Tr. 818, 833, 817, 1358–59).

28. Mr. Fuss first became aware that there was a question whether RCI would serve as a control point for his FM station in February or March, 1981, when his attorney, David Tillotson, telephoned and advised that Mann was seeking an issue based upon a letter from Rita Rowland stating that she was not willing to serve

[5] Since Fuss is the 100% owner of Valley, it is clear that whenever Fuss negotiates matters involved in this proceeding, it is on behalf of Valley.

as a remote control point for Valley (Tr. 1363–64). Thereafter, during March and April, 1981, both Fuss and his Washington communications counsel tried unsuccessfully on a number of occasions to contact Larry Rowland and secure an affidavit that RCI would serve as a control point. Larry Rowland would not provide such an affidavit but it did appear that Larry Rowland took an oral position that he would negotiate with the prevailing applicant with respect to RCI's services as a control point (Valley Exhibits 14 and 15; Tr. 979–98, 1372–75, 1623–25).

29. According to the Fuss testimony, after the numerous unsuccessful attempts to obtain an affidavit from Larry Rowland, both Fuss and his attorney decided in late April, 1981 to abandon the RCI control point proposal and seek another remote control point (Tr. 1384–85, 1390–93, 1652–53).

30. On May 7, 1981, Valley filed a supplement to its opposition to the Mann Petition to Enlarge Issues and provided a handwritten (but not notarized) note from Larry Rowland affirming his willingness to serve as a remote control point.

31. However, Larry Rowland had sent a notarized letter to Tillotson dated May 4, 1981 which advised of the RCI February 25, 1981 notice to Fuss that the RCI-Fuss contract of February 5, 1981 was null and void within 30 days of February 25, 1981 and that Larry Rowland would be willing to discuss a new contract for control point services providing certain conditions could be satisfied. Fuss received a copy of the May 7, 1981 Rowland affidavit and Fuss discussed it by phone with Tillotson. During the discussion, there was an agreement between Fuss and Tillotson that Rowland's May 4, 1981 affidavit still lacked the firm RCI commitment to Fuss which had been previously, though unsuccessfully, sought. Further, by this time, Fuss had given up on the RCI control point and had been successful in obtaining another control point. While the Rowland May 4, 1981 letter was addressed to Tillotson, it was mailed to Fuss and Fuss did not send the letter to Tillotson at this time (Tr. 1401 and Mann Exhibit 19).

32. The Rowland May 4, 1981 notarized letter as received by Fuss did note that RCI would negotiate for a remote control point with the successful applicant, subject to two conditions being met which concerned rules of this Commission. Fuss, did have access to a library which contained copies of the rules cited by Rowland and reviewed the rules and decided that the rules cited by Rowland in the May 4, 1981 affidavit had no bearing on the service Fuss was seeking from RCI (Tr. 811, 1406).

33. The more serious part of the Rowland May 4, 1981 affidavit was the statement that Fuss had been sent a contract termination notice on February 25, 1981, effective March 25, 1981. This is particularly important, since Fuss responded to the Valley request for admissions on May 7, 1981, with the claim that he still was

relying on the February 5, 1981 contract with RCI. Based on testimony in the record, it developed that the RCI February 25, 1981 so-called termination of contract notice addressed "to whom it may concern" was not mailed to Fuss or his attorney (Tr. 823, 1363). Larry Rowland testified in this proceeding and stated that the reference in his May 4, 1981 affidavit to the February 25, 1981 notification was "a miswording on my part." (Tr. 827)[6]

34. There still remains the facts to be explored as to Fuss' failure to mention the so-called RCI February 25, 1981 termination of contract notice which, as now established in the record, was first brought to Fuss' attention on May 4, 1981. Thereafter, Mann filed the request from Fuss to admit that he had no contract with RCI which was filed by Mann on June 4, 1981.

35. Thus, the factual question remains, in spite of the false statement in the Rowland May 4, 1981 affidavit, why Fuss responded to the Mann request for admissions that he still had a contract for the remote control point with RCI.

36. It is the testimony of Fuss that the response to the Mann request for admissions was prepared by another attorney while Tillotson was on vacation who was not aware of the telephone call between Fuss and Tillotson in which was discussed the so-called February 25, 1981 termination of contract notice from RCI to "to whom it may concern" which Fuss admits knowledge of from May 4, 1981. It should be explained at this point that while the February 25, 1981 termination of contract notice was received by Mr. Fuss on May 4, 1981, it was addressed to Mr. Tillotson in care of Mr. Fuss. As previously found, the May 4, 1981 document was discussed by phone by Mr. Fuss with Mr. Tillotson, but the associate in Mr. Tillotson's law office prepared the affidavit which, after a few minor corrections by Mr. Fuss, was executed by him. That affidavit failed to note at least the RCI position that the RCI-Fuss contract of February 5, 1981 was null and void. As far as Mr. Tillotson's law office associate was involved in the draft of the Fuss affidavit, she was unaware of the telephone discussion between Fuss and Tillotson because the letter was not sent to the law office and Fuss did not tell the associate about the matter. Before the affidavit was prepared for Fuss in response to the request for admission there was a telephone conversation between Fuss and Tillotson's associate in which Fuss discussed the basis for his belief that a contract still existed between Fuss and Rowland (Tr. 1397–99). It is clear that Fuss did not mention

[6] This development in the proceeding is most unfortunate in terms of additional time and money required from all parties. It was the May 4, 1981 affidavit of Larry Rowland which made reference to a contract termination notice of February 25, 1981 and the failure of Fuss to mention such notice in his response to the request for admission that prompted the addition of the issue. It is not clear why Larry Rowland made the false statement in his affidavit of May 4, 1981, but the problems caused by the false statement are most clear.

the Rowland May 4, 1981 letter (Mann Exhibit 10) because, according to Fuss, he did not think of it at the time (Tr. 1399, 1661). It is further Fuss' testimony that when he executed the affidavit in response to the Mann request for an admission that there was no existing contract between Fuss and RCI, he did have Larry Rowland's May 4, 1981 affidavit in mind. Rather, Fuss states his thoughts were related to his repeated unsuccessful attempts to a definite confirmation from RCI and the fact that if necessary, Fuss was prepared to seek enforcement of the February 5, 1981 contract (Tr. 1602, 1653–54, 1396–1410). However, the record also shows that Fuss did not entirely put the Rowland May 4, 1981 notarized letter out of mind. The Rowland letter placed conditions on any future agreement from RCI to serve as a control point for the successful applicant. Such conditions were based on a specific Commission Rule (Section 90.385). Mr. Fuss was concerned enough with the cited rule that he undertook on his own to go to a library and check the rule which resulted in Mr. Fuss concluding that the cited rule had no bearing on the use of the RCI facilities as a control point (Tr. 1661–62, 811).

The Unattended Operation Issue

37. An Unattended Operation Issue was added to this proceeding by *Memorandum Opinion and Order* released May 20, 1981 (FCC 81M-1591). By way of background, the Commission had issued an Official Notice of Violation to Mann's AM station at Taft, California (KTKR) on February 19, 1980 (Official Notice Item A). Among other violations, Mann was cited for violation of Section 73.93(a) of the Rules. This rule requires that the licensee have at least one licensed operator on duty and in actual charge of the transmitter either at the transmitter site or an authorized remote control point equipped with extension meters. The Commission's violation notice stated that on the date of inspection (November 27, 1979) the KTKR transmitter was unattended for 23 minutes (Official Notice Item A).

38. The Commission's Official Notice of Violation was resolved by the response of Mrs. Mann in which she stated that in the future there would be close observation to see that Section 73.93(a) of the Rules is complied with in all respects by all KTKR operators. Her response to the Commission's notice also mentioned that the past violation of the cited rule was caused by "our problem with picking up the mail is now solved in other ways" (Official Notice Item A). The mail problem had reference to a past practice of KTKR when Jerry Mann, Mrs. Mann's son, had left the station unattended in order to pick up the mail (Tr. 1720–24).

39. It is the testimony of Mr. Fuss that he visited the station on three occasions in December, 1978 and January, 1979 when it was apparent to him that no one was present at the station while the station was on-the-air. Fuss stated that he drove to the station

(KTKR) on December 28, 1978 and saw no cars were in the driveway. He also knocked on the door and looked through the glass entry door to the station control room and saw no one. Fuss then states he walked around the station building and saw no one, knocked on the door again and then sat in his car in front of the station for about one-half hour, during which time the station was broadcasting spanish language programming (Tr. 1501–04). Fuss described similar trips to the station with the same results on January 13, 1979 and January 26, 1979 (Tr. 1503–05). A Valley motion to produce the station logs for the three dates (December 28, 1978 and January 13 and 26, 1979) was filed but the logs for those dates were missing, although logs for the days before and after the days in question were available. No explanation is provided as to why these logs were missing (Tr. 1691, 1830, 1833).

40. The next incident related in the testimony of Mr. Fuss on the unattended operation issue took place on April 3, 1981. Fuss was driving through Taft listening to Station KTKR on his car radio. While he was listening, the program ended and the sound of the record's run-out groove kept repeating itself. At about this same time, Fuss noticed Jerry Mann driving his car in front of him. Fuss followed Jerry Mann to Station KTKR. Fuss states that when they arrived at the station, there were no cars there other than those of Jerry Mann and Fuss (Tr. 1496–97, 1499). The Fuss testimony continues to relate that he observed Jerry Mann get out of his car, grabbed a pile of mail, unlock the front door of the station and enter. Fuss followed Jerry Mann into the station. Fuss' testimony continues to relate that Jerry Mann put the mail down, walked into the control room, where he took the needle off the record, aired the station identification and put on another record. Fuss then asked Jerry Mann if anyone else was at the station. Jerry Mann then walked quickly through the station with Fuss following. Mann and Fuss looked into the program director's office, walked through the lobby, turned the door knob on the manager's office, walked into the UPI room and looked out the back window through an open venetian blind for about 30 seconds (Tr. 1497–99). The KTKR weather station instruments were visible from the back window. Based upon this inspection of the premises by Jerry Mann and Fuss, Jerry Mann replied to Fuss' question that there was nobody there (Tr. 1497–98). Fuss then states he went to his car, spent three or four minutes making notes of the events that had transpired, looked around and drove away (Tr. 1499).

41. At the time the addition of the unattended operation issue was under consideration, both Louise and Jerry Mann provided affidavits dated April 28, 1981 which were attached to the Opposition to Petition to Enlarge Issues filed by Valley on May 5, 1981. The Louise and Jerry Mann affidavits relate that when Jerry Mann departed the station on the morning of April 3, 1981, Louise Mann

was in the back of the station getting a current temperature reading from the weather station back of the station and she had also paused to pick some weeds "growing near the back entrance of the station" (Valley Exhibits 46 and 50; Tr. 1675–88, 1760, 1764–65). Fuss also filed an affidavit in connection with the then-pending petition to enlarge issues in which Fuss stated that Jerry Mann had looked out of the back window of the station in the UPI room on April 3, 1981 and then advised Fuss that he had seen no one behind the station (Official Notice Item D).

42. Mrs. Mann testified that the weeds she was pulling were in an area immediately behind the control room (Tr. 1767) which is on the side of the storage area away from the back entrance of the station and in an area which would not be visible to someone looking out the rear UPI room window (Mann Exhibits 14 and 20; Valley Exhibit 24).

43. Returning briefly to Mrs. Mann's April 28, 1981 affidavit filed in opposition to the Fuss petition to enlarge issues, the affidavit relates that Mrs. Mann went out the back door of the station to obtain a weather reading and information for the next station newscast, following "Country Cross Roads". The program following "Country Cross Roads" at about 10:00 A.M. on April 3, 1981 was not a newscast or weather report. It should be noted here that the Jerry Mann affidavit of April 28, 1981 relative to this same incident was modified to strike the word "newscast" from the description of the program which followed "Country Cross Roads" and substituted "a 5 minute Public Affairs Program". Mrs. Mann testified that she never interjects headlines or weather during KTKR's programming without putting them on the program log (Tr. 1761–62). It is Mrs. Mann's testimony that she expected that Jerry Mann would return to the station on April 3, 1981 by the time "Country Cross Roads" ended about 10:00 A.M. (Tr. 1841).

44. The weather station behind the KTKR station building contains two thermometers (Valley Exhibit 16, Roll 1, Frame 24). Mrs. Mann said she was only interested in the current temperature when she went to the weather station at about 10:00 A.M. on April 3, 1981 (Tr. 1764–65).

45. According to Louise and Jerry Mann, Jerry Mann had signed KTKR on-the-air shortly before 8:00 A.M. as both the announcer and operator on duty. Louise Mann had accompanied Jerry Mann to the station that morning in Jerry Mann's car as her car would not start, because of the theft of her car battery. Louise Mann went to the station to do some paper work. At about 9:33 A.M., Jerry Mann started the half-hour program "Country Cross Roads". Shortly thereafter, Jerry Mann asked his mother to attend the board for a few minutes while he ran some errands. Mrs. Mann states she did so and was in the station except for a period of less than ten minutes when she went to the weather station in the back of the KTKR

building, made a reading and then pulled weeds behind the control room to the right of the storage room near the rear entrance to the station (Tr. 1676–78, 1758–67; Mann Exhibit 20).

46. According to Jerry Mann, he went to the local post office, then to his motion picture theater, returning to the station around 10:00 A.M. Both Messrs. Fuss and Mann agree that when Jerry Mann returned to the station, Fuss was following in his car and followed Mann into the building. Mann also agrees with Fuss that Fuss asked where his mother was and Mann indicated he did not know. Mann further agrees that Fuss accompanied or followed Mann through several locations in the station and looked through the station's exterior windows. It is not possible to see the location where Mrs. Mann states she was pulling weeds while looking out a station window (Tr. 1501–21, 1526–28, 1532–33, 1641, 1689–94, 1752–54).

47. There is also testimony in the record that the reason Mrs. Mann stopped to pick weeds on April 3, 1981 was because it had rained recently and the ground was soft and the weeds easy to pull. She also testified that if it had not rained recently, the ground would have been baked hard (Tr. 1796–97). The record shows that the most recent rain prior to April 3, 1981 was March 26, 1981 - eight days earlier (Official Notice Item B). Item B for Official Notice shows that 0.36 inches of rain fell at Taft on March 26, 1981.

48. It is clear from the facts on April 3, 1981 that Mrs. Mann was not actually in the control room of the station when Jerry Mann returned about 10:00 A.M. (Tr. 1497, 1499, 1745–49). Further, Mrs. Mann could not have heard the monitors in the control room from the weather station (Tr. 1837). Even if Mrs. Mann could have heard the control room monitors from the back of the station, it is doubtful if she could have heard Jerry Mann give the station ID as she testified (Tr. 1801, 1841) because Jerry Mann would have to turn off the control room speakers before he opened the microphone to give the station ID in order to avoid acoustic feedback (Tr. 1872).

49. It is the testimony of both Louise and Jerry Mann that it was their practice to operate the station while they were outside the control room and in locations where the meters in the control room would not be visible. It is Mrs. Mann's belief that she can be away from the station control room meters, while she is the operator on duty, since the FCC Rules do not prohibit this practice (Tr. 1804, 1868–69).

The Harassment and Related Misrepresentation Issues

50. By *Memorandum Opinion and Order* released July 16, 1981 (FCC 81M-2190) issues were added to determine the conduct of Steven Fuss on the premises of Station KTKR on May 10, 1981 constituted an attempt to harass, coerce and intimidate Mann and to determine whether Mann or Valley made any misrepresentations to the Commission in connection with the Mann Petition to Enlarge

Issues or the Valley Opposition to the Petition and to determine the effect thereof on Mann's and Valley's basic and/or comparative qualifications. The affidavits which give rise to the misrepresentation issue are in the record as Valley Exhibits 37, 38 and 45.

51. Some background information is appropriate relative to Mr. Fuss' activities *vis a vis* Mann prior to his May 10, 1981 visit to the Mann station KTKR. Steven Fuss is a resident of Los Angeles and first went to the Taft, California area at the time he commenced work on the Valley application in the latter part of 1978. During this period, also appeared at the offices and studios of KTKR[7] some 15 to 20 times during the course of these proceedings.

52. On January 25, 1979, Fuss had heard that Mann also planned to file for the Taft FM frequency and he sent the following letter to Gerald Mann at KTRT (sic) Radio which reads in part as follows:

> "Therefore in order to save both you and myself needless expense and to save the Federal Communications Commission time and money, I would suggest that you consult your Communications Council (sic) as to your relative position in a comparative hearing for the Taft FM CP. I would suggest you refer your attorney to:
>
> 22 RR 2d Pg 1115
> 25 RR 2d Pg 385
> 44 RR 2d Pg 1163
>
> I believe that you may find it in the best interests of all parties to refrain from seeking the CP.
>
> Sincerely,
>
> (Signature)
> Steven Fuss
> Valley FM Radio"

(Tr. 1517, 1531, 1639; Mann Exhibit 17).

53. Fuss filed his Taft Valley application with the Commission on March 8, 1979 and again wrote to Jerry Mann on May 10, 1979 in part as follows:

> "Therefore, I hope that on my next visit to KTRT (sic) you will have these documents available and I hope that you will consult with your Communications Council (sic) as to see what relative position in a Comparative hearing you might have in regards to the above.
>
> Sincerely,
>
> (Signature)

[7] Station KTKR is Mann's AM station at Taft.

Steven Fuss
Valley FM Radio"

(Mann Exhibit 18).

It was Mr. Fuss' belief that such letters would put Mann on notice that should a competing application be filed with the Valley Taft application, Fuss intended to bring out these matters at the comparative proceeding. The Mann application was filed July 30, 1979 (Tr. 1539–41).

54. After the designation of these applications for hearing, Valley (Fuss) filed a petition against Mann which alleged unattended transmitter operation of KTKR. This Valley petition was based, in large part, upon the April 3, 1981 incident, when Fuss followed Jerry Mann to KTKR, entered the station building with Jerry Mann and asked Jerry Mann if Louise Mann was there. Based upon the affidavits supplied by both Fuss and the Manns (Mrs. Mann and Jerry Mann) at the time this Petition to Enlarge Issues was under consideration, it appeared necessary to consider this whole matter at the hearing and the Section 73.93(a) issue against Mann was added by *Order* released May 20, 1981 (FCC 81M-1591). This, however, did not conclude the matter. On May 10, 1981, which was a Sunday and Mothers Day, Fuss made another visit to KTKR. This visit by Fuss to the KTKR premises was prompted by a discussion between Fuss and his communications counsel to see if Fuss could obtain photographs of the premises to substantiate the statements made by him in his April 3, 1981 affidavit and which would demonstrate that Mrs. Mann's version of this event was, in effect, not true. There was no discussion between Fuss and his attorney relative to any Commission Rules or seeking the permission of or giving notice to the licensee of KTKR. It was agreed between Fuss and his attorney that the photographs should include both the outside and inside of the KTKR studio office building "if the opportunity presented itself" (Tr. 1412–13, 1542–46, 1551–52, 1559, 1658). For this purpose, Fuss traveled from Los Angeles to KTKR on May 10, 1981 with two cassettes of film with 24 exposures each (Tr. 1414).

55. Fuss arrived at the station about 3:45 P.M. on May 10, 1981 and immediately proceeded to take 48 photographs of the KTKR premises. After Fuss had taken two pictures outside the front of the station, Fuss was met by a man who came out of the station, later identified as Raymundo Carrillo, and asked Fuss who he was. Fuss identified himself. Fuss then asked Carrillo who he was but Carrillo refused to identify himself but did indicate that he was on duty at the station. Fuss then took a picture of Carrillo as he wanted a record of who he had talked to, although Carrillo objected to having his picture taken. Carrillo asked Fuss what he wanted to which Fuss replied that he wanted to take some pictures. Carrillo then told Fuss that Mrs. Mann was not there and if Fuss wanted to see her, he

would have to return the next day. Carrillo testified that he then asked Fuss to leave. Fuss testified that he was not asked to leave. Carrillo then went back inside the station (Tr. 1417–19, 861–64; Valley Exhibit 16, Roll 1, Frame 3).

56. Fuss then began moving in a clockwise circle from outside the front of the station towards the weather station and then back to the front of the station (Tr. 1416–17; Valley Exhibit 16, Roll 1, Frames 4–11).

57. The weather station is on property owned by KTKR but the actual weather station is owned by the State of California. The weather station is surrounded by a fence with a gate, customarily closed, to which is attached a sign which reads:

"STATE INSTALLATION

This Installation is Essential to
California Water
Development Program

Any Person Taking, Damaging or
Tampering with this Installation
will be Prosecuted to the
Full Extent of the Law

State of California
Department of Water Resources."

Fuss entered the fenced-in weather station area and opened the cabinet which housed weather instruments and took some pictures (Valley Exhibit 16; Tr. 1074–76, 1441–43, 1445–46, 1558–59).

58. In all, Fuss in his clockwise walk around the area outside the station building took some 11 pictures, including the ones in the weather station (Valley Exhibit 16) and then he entered the station through the front entrance which was not locked. Fuss then took some seven pictures inside the station building. After Fuss took the first pictures inside the station, Carrillo emerged from the station control room and spoke to Fuss in the vicinity of the doorway between the lobby and the program director's office. The one picture taken prior to this second meeting between Fuss and Carrillo was of Carrillo seated in the control room behind the station console. During this second encounter, there are different versions of what transpired. Mr. Carrillo testified that he asked Fuss to leave and escorted him to the front door. Fuss testified that Mr. Carrillo did not ask him to leave, that Mr. Carrillo said he was going to call Mrs. Mann and Fuss continued taking pictures inside the station and Fuss finally departed the station building by the front door unescorted (Tr. 864–66, 1429–30, 1570–72). Fuss stated that while he was inside the station he was neither asked to stop taking pictures nor to leave

the premises (Tr. 1458–59). While Fuss was in the station he saw no one in the station except Carrillo and the only people outside the station were some children playing and he took their picture through the front door (Valley Exhibit 27; Tr. 1422).

59. The testimony between Fuss and Carrillo continues to be conflicting. Mr. Carrillo testified that he had a third encounter with Fuss on May 10, 1981 which occurred inside the building and that he (Carrillo) again had to escort Fuss out the front door. Fuss testified that there was a third encounter with Carrillo, but it was outside the station building where Carrillo, according to Fuss, made a strong statement as to Fuss and his camera. Fuss continued his account of the so-called third encounter and related that he became apprehensive because there was a knife involved. Fuss, however, admitted that the knife was a pocket knife stuck in the ground near some small children playing some 10–15 feet away. There is also testimony that Fuss questioned Carrillo as to his operators license (Tr. 866–68, 1446, 1555–58, 1418–19).

60. During these events, Mr. Carrillo did telephone Mrs. Mann and informed her that Fuss was at the station taking photographs. It is Mrs. Mann's testimony that she had left the station around 2:00 P.M. on May 10, 1981 and returned to the station after Carrillo's call. Mrs. Mann states she was frightened by the events, so she locked the front door behind her and called her son Jerry. Mrs. Mann states that she saw Fuss at the weather station behind the radio station building. After, Mrs. Mann was in the station with the front door locked, Fuss appeared at the door and began knocking which because of the glass in the wood door makes a rattling noise when struck. During the time Fuss was at the front door, he knocked louder and in a loud voice repeated that he wanted to see Mrs. Mann. Rather than the third outside encounter between Fuss and Carrillo, Carrillo describes the third encounter as going to the door while Fuss was knocking on the door and demanding that Mrs. Mann come outside, and he told Fuss that Mrs. Mann did not want to talk to Fuss and Fuss did then subsequently leave the premises. Fuss denies knocking on the door and denies asking for Mrs. Mann (Tr. 869–73, 998, 1045–47, 1060–61, 1067, 1074, 1109–10, 1155, 1251–52, 1457–59).

61. Other conflicts in the testimony exist as to the events on May 10, 1981. Carrillo testified that there were four of his friends inside the station while Fuss was inside the station, namely, Mario Serna, Mario Serna's brother, Juan Salinas and Jose Isaguirre. According to Carrillo, his four friends had come with him in his car the morning of the 10th and sometime during the afternoon borrowed his car to get some lunch and had returned prior to Fuss' visit to the station. In fact, Carrillo states that it was Mario Serna and Jose Isaguirre who first informed Carrillo of Fuss' presence (Tr. 899–901).[8]

[8] The four friends of Carrillo were not witnesses in this proceeding.

62. Fuss states he saw no one at the station while he was inside the station building except Carrillo and the children who were outside the building (Valley Exhibit 27; Tr. 1422). The proof sheets of Mr. Fuss' two rolls of film he exposed the afternoon of May 10 (Valley Exhibit 16) show that Carrillo's four friends returned in Mr. Carrillo's car, driven by Mario Serna after Fuss had left the station building and that Carrillo's four friends were not in the station during any of the time Fuss was in the station. Likewise, Mrs. Mann does not recall seeing Carrillo's four friends in the station when she returned the afternoon of May 10, 1981 (Tr. 1127, 1133, 1134, 1224). It also appears that a trespassing complaint was filed by Mann against Fuss and the only witness identified in the police report is Carrillo (Valley Exhibit 36). There is also conflicting evidence as to the alleged Fuss loud knocking on the door as Carrillo testified he left the control room when he heard the loud knocking by Fuss yet Carrillo testified that the door to the control room was sound-proof and that he could not hear Fuss yelling, talking or knocking while he was in the control room (Tr. 892, 862, 104).

63. Mr. Carrillo resides in Bakersfield and works full-time as an auto mechanic. During the past 17 years, Mr. Carrillo has worked with one firm and for the past three years at a second location. He is a United States citizen and has a Commission radio telephone operators license. For the past seven years, Mr. Carrillo has also been associated with KTKR, broadcasting spanish language programming on Saturday and Sundays and participating, on a commission basis, in the revenue derived from these broadcasts. He estimates that some eight to ten percent of his total income comes from KTKR. Mr. Carrillo was aware that Fuss had filed a competing FM application, and Louise Mann had instructed Mr. Carrillo to keep Fuss away from the radio station on weekends (Tr. 856–59, 862–63, 876–77, 897, 1039–40, 1049, 1300–01).

The Comparative Issue

Valley FM

64. Valley is a California corporation formed in 1979 for the purpose of engaging in radio broadcasting. Fuss owns all (100 shares) of the Valley issued and outstanding stock. Fuss is the sole officer (President) and sole director of Valley (Valley Exhibit 1).

65. There are no outstanding subscriptions for the purchase of Valley stock. Fuss, however, has granted an option to Arthur James pursuant to which James has the right to purchase 49% of the Valley stock for the sum of $7,742 at any time between the first and second anniversaries of the date on which the Commission grants a construction permit to Valley for the proposed FM station at Taft, California. The consideration for the option granted to James was

the fact that James agreed to furnish collateral for a $50,000 loan to Valley (Valley Exhibit 1).

Other Media Interests of Valley

66. The other media interests of Valley, Fuss and James are as follows:

(a) Valley is the permittee of Station KSQU, a Class A FM station, authorized to operate on Channel 265 at Weed, California.

(b) Valley is an applicant for a construction permit for a new FM translator station which is to rebroadcast the signal of Station KSQU at Grenada, California.

(c) Valley and James each own 45% of the stock of Wyoming Ninety-Five, an applicant for a construction permit for a new Class C FM station to operate on Channel 236 at Laramie, Wyoming, and Fuss and James are each officers and directors of Wyoming Ninety-Five.

Except for the application of Valley in this proceeding and the applications and authorizations referred to immediately above, Valley, Fuss and James have no interests of any sort in any broadcast station, newspaper, cable television system or any other medium of mass communications (Valley Exhibit 1).[9]

The Valley Integration Proposal

67. Mr. Fuss was born in Los Angeles and now lives in the Los Angeles area. He is a college graduate with a Bachelor of Arts degree in communications received in 1974. His previous work experience is as a cashier for Harrah's Casino at South Lake Tahoe, Nevada (six months), a warehouse supervisor in the Los Angeles area until 1976. In the fall of 1976, he formed a corporation, North Valley Radio, of which he was a 50% stockholder for a new FM station at Paradise, California. A construction permit was issued to North Valley Radio (call sign KNVR) and Fuss states he assumed full responsibility for supervising and placing that station on-the-air in May, 1977 (Valley Exhibit 2). Fuss was KNVR's full-time general manager supervising all aspects of the station operation until November, 1977 when a creditor of the station succeeded in having a state court appoint a receiver to replace Fuss. With the court-appointed receiver, Fuss ceased to take any active role in Station KNVR and he formally relinquished all his interest in Station KNVR in October, 1979 in connection with the settlement of the litigation involving the station. Subsequent to appointment of the receiver for Station KNVR, Fuss

[9] At the time Valley Exhibit 1 was received into evidence, Valley's application for Station KSQU had not been granted and the application for the translator station had not been filed. Valley received a construction permit for KSQU on July 20, 1981 (BPH-800305AD) and it filed an application for the translator on February 22, 1982. Accordingly, Valley Exhibit 1 is supplemented herein as to KSQU and the translator station which matters are officially noticed.

states he has worked as a consultant in the field of purchasing and marketing. Fuss states that if Valley is awarded the construction permit in this proceeding, he will discontinue his consulting business and devote full-time to the construction of the station and will serve as its general manager (Valley Exhibit 2).

68. Valley proposes to install an emergency power generator at its Taft, California station to insure that the station will be able to remain on the air in the event of a public utility power failure (Valley Exhibit 1, p. 2).

Biographical Data on Mann

69. Louise E. Mann, an individual trading as Mann Broadcasting Company, is the applicant for the FM station at Taft (Mann Exhibit 7, p. 1).

70. Mrs. Mann resides at Taft, California and she has been a resident of Taft since 1959 where her late husband, Gerald K. Mann and Mrs. Mann acquired as equal co-owners standard broadcast station KTKR, operating on 1310 kilohertz, daytime-only, in Taft, California. Mr. Mann died in 1979 and upon settlement of his estate in 1981, Mrs. Mann became the sole owner of station KTKR (Mann Exhibit 7, p. 1).

71. Mrs. Mann was born April 26, 1906 in Kansas. The family moved to California with Mrs. Mann attending school and graduating from high school in Tulare, California in 1915. Between 1925–1959, Mrs. Mann resided in various California communities including Visalia and Tulare. Shortly after Mr. and Mrs. Mann acquired station KTKR, Mr. Mann suffered a heart attack. Therefore, from just about the time KTKR was acquired in 1959, Mrs. Mann has managed KTKR and has been involved in all phases of the station operation including programming, sales, personnel and business operations (Mann Exhibit 7).[10]

72. At some unknown time, Mrs. Mann was once the President of the Soroptimist Women's Service Club and she has also been a member of the Red Cross and American Women in Radio and Television. The record is not clear as to when or where she held such positions and memberships, or the degree of her involvement (Mann Exhibit 7). The record also shows that Mrs. Mann belongs to the Southern California Broadcasters Association and is a member of the Kern County Broadcasters Association and has served as a local news correspondent for United Press International and a Fresno newspaper, but, again there are no details of her activities for these groups (Mann Exhibit 7). In connection with Mrs. Mann's operation

[10] Subsequent to the receipt of Mann Exhibit 7, Mann's application was amended to reflect that she was the sole owner of KTKR. All parties were aware of Mr. Mann's death at the time of the hearing, and, [illegible] Mann would be the sole owner when the estate was settled.

of Station KTKR, she has had experience with providing radio service to various local groups and organizations (Mann Exhibit 7).

73. If Mrs. Mann is awarded the FM application she would continue full-time as the manager of KTKR(AM) and she would also be the full-time general manager in charge of the FM station. During the daytime hours that KTKR is on-the-air, the KTKR programming would be broadcast simultaneously over the FM station so that the simulcast programming carried by the FM station would constitute about two-thirds of the FM broadcast day (Mann Exhibit 7, p. 3). Nighttime operation of the Mann FM station would permit live broadcasts of city council meetings and local sports events (Tr. 609–10). It is Mrs. Mann's position that the service area of the station including the town of Taft (1970 population 4,285) has "limited advertiser potential" making "a joint AM-FM operation . . . the only viable way to bring FM service to Taft" (Mann Exhibit 7). To support this opinion of Mrs. Mann that the 1979 gross sales for KTKR as reported to the Commission on FCC Form 324 were just $36,951 (Valley Exhibit 11; Tr. 627). Mrs. Mann does not appear to have made significant efforts to solicit advertising support for KTKR (Tr. 612–14, 615–21).

74. Other than KTKR, Mrs. Mann has no other ownership interest in any media of mass communications (Mann Exhibit 7, p. 3). However, since receipt of this exhibit, counsel for Mann has advised that Mrs. Mann recently acquired a 50% ownership interest in a motion picture theater in Taft (letter from counsel dated June 11, 1982).

Comparative Coverage

75. There is a differential in the population within Valley's proposed 1 mV/m contour (66,101) and Mann's 1 mV/m contour (16,251). The area which would receive 1 mV/m service from Valley entirely encompasses the 1 mV/m service area of Mann's proposed station. Valley's station, in addition would bring a fourth primary nighttime aural service to an area of 109.5 square miles with a population of 346 persons and a fifth nighttime primary service to an area of 69 square miles with a population of 518 persons. The areas which would receive the fourth and fifth services from Valley would not receive service from Mann's proposed station (Valley Exhibit 7).

Conclusions of Law

Financial Issue

1. This issue was added against Valley because it appeared that the cost estimates were unreasonable on their face. However, it is concluded that Valley has established on the record that it can construct and operate as proposed for $28,745 based on the testimony of Fuss and Wilson. Wilson is a qualified engineer with experience in

the repair of broadcast equipment. Wilson has conducted a personal inspection of much of Fuss' second-hand equipment and provided estimates as to its condition and the cost to place it in operable condition for the intended broadcast use. In addition, there is the testimony of Mr. Fuss as to his past experience with construction of a station with volunteer help. Mr. Fuss has also substantiated his operating costs and provided quotations from prospective suppliers of equipment and services required. The record also shows that the cost to construct both the Taft and the Weed stations is $41,845. The Commerce Bank has agreed to lend $50,000 to finance the operation of both the Taft and Weed stations the loan commitment letters are sufficiently specific and complete to furnish "reasonable assurance" of the availability of the loan. See *Multi-State Communications, Inc.* v. *FCC*, 590 F 2d 1117 (D.C. Cir. 1978), *cert. denied sub nom*, *Western Communications* v. *FCC*, 441 U.S. 931 (1979); *Tel-Page Corp.*, 74 FCC 2d 370 (1979); *Scott & Davis Enterprises, Inc.*, 50 RR 2d 1251, 1254 (Rev. Bd. 1982).

2. In addition to the bank loan, the record establishes that Fuss already has paid $8,300 of his projected expenses and that Fuss also has $2,000 in cash on deposit. Thus, there is a total of available funds in the amount of $60,300 to meet the construction and operating costs of $41,485 for both the Taft and Weed stations.

3. Mann has urged in its proposed findings and conclusions that the Valley evidence of its financial qualifications is deficient in that this record provides no specific financial data of the costs to construct and operate the Weed station. First, it is clear that the construction and operating costs of Weed must be taken into account here as Valley is relying on the same sources of funds to construct both the Taft and Weed stations. See *David Ortiz Radio Corp.*, 47 FCC 2d 28 (1974). The record does show, as alleged by Mann, that total construction and operation costs for Weed are $12,800. The Presiding Judge, upon the objection of the Bureau, ruled at Tr. 356–57 that Valley, having estimated the total cost of construction and operation of the Weed facility at $12,800 did not permit Mann to proceed to develop on this record the entire justification for the $12,800 figure and Valley was not required to produce such evidence. Mann cites in its proposed findings and conclusions the case of *Swanee Broadcast Co.*, 3 FCC 2d 561 (1966) as supportive of Valley's obligation, in order to satisfy the financial issue, to provide complete financial data for both the Taft and Weed proposals. The *Swanee* case cites with approval the case of *Nelson Broadcasting Co.*, 4 RR 2d 87 (1964) as support for the requirement that the financial arrangements for all of the applicants' proposed broadcast stations be considered together to determine whether the applicant is financially qualified to construct and operate any of the proposed facilities. The *Nelson* case did discuss the specific breakdown of the various costs to construct and operate the proposed stations at issue in the

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proceeding (Kingston, New York). However, the *Nelson* case then notes that the total cost proposed by this same applicant to finance a proposal at Newburgh, New York was $16,339 and that there were insufficient funds shown by the applicant to finance both proposals. It thus appears that the *Nelson* case provided for the exact type of inquiry permitted in this case, i.e., the specifics of the Valley Taft proposed costs were inquired into on the record but the proposed costs of the Weed application were not considered beyond the total cost represented by the applicant. Accordingly, the Mann argument as to failure of proof as to the specific cost breakdowns of the Weed proposal are rejected. In summary, the financial issue against Valley is resolved favorably to Valley.

The Section 1.65 Issue

4. This issue was added against Valley to determine whether Valley's financial commitments to its proposed Weed and Taft stations and its integration proposals with respect to each of these two stations were consistent with the financial and integration proposals as contained in the Taft application, and, if not, whether Valley violated Section 1.65 of the Rules by not amending the financial and integration proposals in its Taft application (*Memorandum Opinion and Order*, FCC 80M-2331, released November 18, 1980). Fuss had represented in his Taft proposal that he would work full-time at Taft as the general manager of the station. Fuss had also proposed to supervise the management of the stations proposed in the Weed and Laramie applications. The Weed application indicated that Fuss would be available on a full-time basis for the general management of its broadcast operations. It appears clear on the record as now elaborated that Fuss will devote full-time to the general management of the Taft proposal and that it is his proposal to supervise the management of the stations in Weed and Laramie from his home base at Taft, making only infrequent trips to Weed and Laramie. It also appears clear that both the Weed and Laramie applications propose to employ a full-time general manager which lends support to the Fuss testimony that he will only set policy and supervise the non-Taft stations through a general manager other than himself. Accordingly, it is concluded that while Fuss should have been more clear as to his actual day-to-day involvement in the Weed and Laramie applications, the record is now clear what his role is to be with respect to each station and it cannot be found that Valley violated Section 1.65 of the Rules insofar as its full-time integration proposal for Taft.

5. The same 1.65 issue is examined with respect to the failure of Valley to report the use of the same funds for all three proposed stations (Taft, Weed and Laramie). It is the Fuss testimony here that, considering the Valley total financial commitments to all three stations, Valley was only $1,500 short of the required amount for all

three proposals. Valley (Fuss) then relies on that part of Section 1.65 of the Rules which does not require the reporting of minor changes in an application which are not of decisional significance in a Commission proceeding. Valley (Fuss) then urges that the $1,500 shortfall falls into this general class of minor changes which need not be reported pursuant to the requirements of Section 1.65 of the Rules. Valley (Fuss) then cites a number of cases to support this belief. However, Valley appears to place chief reliance on *Greenfield Broadcasting Corp.*, 22 RR 2d 497 (1971). In the *Greenfield* case, the applicant failed to report certain increased equipment costs, but, that applicant clearly had adequate funds to cover such unreported additional costs. Valley (Fuss) at the time in question did not have sufficient funds, but, rather was $1,500 short. The failure to report the total financial proposal which would have shown the $1,500 shortfall cannot be regarded as a matter of minor significance. An applicant's financial qualifications are a basic qualification to be established by an applicant.

6. Having concluded that Valley (Fuss) was required to report the complete financial proposal which involved joint financing for three applications and Valley's lack of adequate funds, there was a violation by Valley of Section 1.65 of the Rules. The issue thus becomes a determination whether this is enough to disqualify Valley, or whether some degree of comparative demerit should be assigned to Valley.

7. No conclusion can be made that Valley intended to conceal any information or deceive the Commission. Valley did amend its Taft application to disclose the filing of the Weed and Laramie applications which findings were made in the *Memorandum Opinion and Order*, FCC 80M-2331, released November 18, 1980. Thus, at most, only a possible comparative demerit can be considered. See *CBS, Inc.*, 50 FCC 2d 712 (Rev. Bd. 1975). A slight comparative demerit will be assessed against Valley for this 1.65 violation. In this respect, it is not possible to afford full credit to Fuss' explanation that $1,500 was a minor insignificant matter. As will be recalled, Fuss (Valley) has proposed a wide range of cost cutting measures, which while accepted, show the use of second-hand equipment, free labor, use of Fuss' private record collection all of which enabled Valley to hold its costs of construction and operation to an absolute minimum. The $1,500 shortfall when viewed in context with such testimony casts doubt on the Fuss testimony that $1,500 was of minor significance. In summary, no violation of Section 1.65 is found on the Valley integration proposal. However, a slight comparative demerit will be assessed for Valley's failure to report, pursuant to Section 1.65 of the Rules, its complete financial proposal.

Remote Control Issue and Misrepresentation/Lack of Candor Issue

8. Insofar as RCI would serve as a control point for Valley, there exists, based on the record, the reasonable expectation that RCI would provide such services to the winning applicant.[11] The 60% owner and director of RCI testified in this proceeding and made it clear that he would negotiate for such services. In this connection, it must be recognized that RCI is a two-person family corporation consisting of Larry Rowland (60%) and his mother Rita Rowland (40%). Thus, while the normal corporate formalities had not been followed prior to Larry Rowland's testimony such as a board of directors meeting authorizing Larry Rowland to make the commitment to negotiate in his testimony, such corporate authorization is not deemed either essential or detracts from the reasonable expectation that the RCI facilities will be available, based on Larry Rowland's testimony. Likewise, the conditions placed by RCI relative to the offering of a remote control station service to Valley and the rather substantial spread in the possible charges for such service ($75–600 per month)[12] are both matters for negotiation looking to the reasonable expectancy of a contract between Valley and RCI.

9. The misrepresentation or lack of candor issue against Valley arising out of the RCI matter as designated by *Memorandum Opinion and Order* released August 24, 1981 is a matter of concern to the Presiding Judge, since if Mr. Larry Rowland had been more accurate with the facts stated in an affidavit executed May 4, 1981 and filed with a Mann Petition to Enlarge Issues against Valley on June 26, 1981, the requested issue would not have been added. By way of background, Mr. Rowland's affidavit of May 25, 1981 stated that a notice had been given by RCI to Fuss (Valley) on March 25, 1981 which declared that the contract between RCI and Fuss of February 5, 1981 was null and void as of March 25, 1981. This affidavit of Larry Rowland assumes importance because Mann requested Valley (Fuss) on June 4, 1981 to admit, pursuant to 1.246 of the Rules, the following fact:

> That neither Valley FM Radio nor Steven Fuss has any agreement with Rowland Communications, Inc. (Rowland) for Rowland to serve as the remote control point or to provide any technical or other services for Valley FM in connection with Valley FM's proposed FM station at Taft, California.

Fuss responded to this request for admission with his affidavit which

[11] There is no evidence of record that Mann has any interest in a remote control point at RCI.

[12] Whether such charge is $75 or $600 or somewhere in between, Valley has been found financially qualified to pay such costs.

stated that a document of February 5, 1981 "Commits Rowland to serve as the Remote Control Point for Valley . . .".[13] Thereafter, Mann sought enlargement of the issues and attached the Larry Rowland affidavit stating that Fuss (Valley) was put on notice February 25, 1981 that the contract was null and void as of March 25, 1981.

10. It is clear from the record that Fuss (Valley) did not misrepresent facts to Mann in its request for admission. Larry Rowland did not provide any termination of contract notice to Fuss or Valley as stated in the Larry Rowland affidavit and he explains the matter in this record as a "miswording" on his part. Thus, this whole matter was far more aggravated than "litigation over trivia" discussed in the case of *Scott & David Enterprises, Inc.*, 50 RR 2d 1251 (Rev. Bd. 1982). It is litigation caused by a false affidavit in support of a Petition to Enlarge Issues.[14]

11. There is also evidence in the record that Fuss and his counsel had made repeated and unsuccessful attempts to obtain some more positive statement from RCI as to its use by Fuss for a remote control point and that Fuss had decided to seek another control point. Thus, with this background, Fuss failed to reveal in his request for admission that he had received a letter from Rowland indicating that RCI would discuss and negotiate a remote control point for the winning applicant. Fuss had discussed this letter with his attorney, but the matter was dismissed as of no significance since it was not particularly helpful insofar as the firm commitment Fuss was seeking from RCI. Thus, his response to the Mann Request for Admission did not mention this letter from RCI and while the RCI letter was sent to Fuss' attorney, it was actually sent to the attorney at Fuss' address and the attorney did not have a copy of the RCI letter when the affidavit responsive to the Mann request was prepared by another attorney in the office.

12. It is concluded that the evidence of record under this issue is neither grounds to disqualify Fuss (Valley) nor justify any comparative demerit against Valley.

13. A finding of misrepresentation requires proof of intent to deceive. *Washington Association for Television and Children* v. *FCC*, 665 F 2d 1264 (D.C. Cir. 1981) and *Lewell Broadcasting Inc.*, 86 FCC 2d 896, 911–12 (1981). At most, Fuss can be charged with an unintentional misrepresentation not made with any intent to deceive by his failure to reveal in response to the request for admission the receipt of a letter from Rowland which indicated an

[13] This document is in evidence as Valley Exhibit 10.

[14] The discussion here is in no way intended to reflect on counsel for Mann or the client. The Petition to Enlarge Issues was filed in good faith, based on an affidavit of a person not a party to this proceeding which certainly, if true, raised a legitimate issue.

agreement to negotiate a contract with the winner of this proceeding. An unintentional misrepresentation is not disqualifying. *The Thoms Broadcasting Companies, Inc.*, 52 FCC 2d 376 (Rev. Bd. 1975). Further, the record contains no evidence of a desire, motive or logical reason for Fuss to mislead the Commission, which is necessary to support a finding of misrepresentation or lack of candor. *Scott & Davis Enterprises, Inc., supra* at 1258–59. Fuss still had the February 5, 1981 contract with RCI and he had never been advised that this contract was null and void.

14. The difference between misrepresentation and lack of candor is discussed by the Review Board in *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132. The administrative remedy for a false statement of an objective fact intentionally made to deceive is disqualification. However, a failure to be completely forth-coming in the provision of information which could illuminate a decisional matter is a comparative demerit of the appropriate magnitude. The record shows that Fuss (Valley) did not suppress information which he knew to be pertinent to a decisional matter and Fuss (Valley) is not found to be guilty of either misrepresentation or lack of candor.

Unattended Operation Issue

15. As is evident from the hearing record, the testimony as to the alleged unattended operation of Mann's station KTKR rests on the credibility of the witnesses which often is in direct conflict.

16. Some facts of record can be accepted without dispute. Jerry Mann did leave station KTKR on the morning of April 3, 1981 while he was the operator on duty. Resolution of the issue then concerns the testimony of Mrs. Mann and Jerry Mann which indicates that during the absence from the station by Jerry Mann, Mrs. Mann was, in fact, the operator on duty and that she was, during part of that time, in back of the station building checking the weather station and picking some weeds. This in turn requires that a series of assumptions be made which cannot be accepted. One must assume that Mrs. Mann was on station property in back of the station building the entire time Fuss was on the premises on April 3, 1981; that neither Jerry Mann nor Fuss noticed Mrs. Mann in back of the station when each drove to the station in their own cars, even though the back of the station is visible from the road on which they approached the station; that Mrs. Mann believed she should take a temperature reading before 10:00 A.M. when the next scheduled weather report was not until 10:30 A.M. even though Mrs. Mann states she fully expected her son Jerry Mann to return to the station at about 10:00 A.M.; that Jerry Mann in the company of Fuss looked for his mother throughout the station but failed to look in back of the station when it was clear that Fuss was asking about his mother's presence at the station and Jerry Mann was worried that Fuss would believe the station was operating unattended. Jerry Mann also

testified that it was not unusual for his mother to go to the weather station and he assumed that if she was not in the station building, she was "more than likely" in back of the station. It also appears that some modifications took place of the facts given in Mrs. Mann's affidavit of the events on this date. The affidavit placed her pulling weeds "near the back entrance of the station" but at the hearing, she explained that this reference was intended to refer to an area behind the control room on the side of the storage area away from the back entrance. This change in location of exactly where Mrs. Mann was pulling the weeds so changes the location with respect to the window Jerry Mann and Fuss looked out that she would not be visible from the window. Lastly, there is the testimony that because it had rained recently, Mrs. Mann was able to pull the weeds. The official weather information for Taft shows that it had not rained for over a week.

17. Other testimony tends to place Mrs. Mann's presence and the station in doubt during Jerry Mann's absence on April 3, 1981. Mrs. Mann said she could hear the station broadcasting while she was outside even though there are no monitors outside the station and the control room is sound-proof. Mrs. Mann testified that she heard Jerry Mann give the ID following the "Country Cross Roads" program while she was in the back of the station although the operator on duty, Jerry Mann in this case, would have had to turn the control room monitors off while giving the station ID in order to prevent accoustic feedback. It was established on the record that while Mrs. Mann normally drove herself to the station and parked her car outside the station, her car was not at the station during the Fuss visit to the station on April 3, 1981. The record does explain the absence of the car in that her car would not start because of the theft of the car battery. It is possible that Jerry Mann drove Mrs. Mann to the station on the day in question, but, in view of all the other record evidence, it is not possible to determine when he drove her to the station and the total record evidence requires a finding that Mrs. Mann was not at the station during the time of the Fuss visit on April 3, 1981.

18. Having concluded that Mrs. Mann was not the operator on duty at the time of the Fuss visit to the Mann AM station on April 3, 1981, the question then is presented whether such unattended operation goes to Mann's basic or comparative qualifications to be a licensee. First, it is concluded that Section 73.93(a) of the Rules was violated on April 3, 1981. There is also evidence that the Commission issued a citation to the Mann AM station KTKR on February 19, 1980 for unattended operation of the transmitter for 23 minutes. This citation was resolved when Mrs. Mann answered the citation to the effect that she was "observing very closely" the requirements of 73.93(a) of the Rules to make sure it is being obeyed by all operators of Station KTKR (Official Notice Item A). The next clear violation of this section of the Rules occurred on April 3, 1981 which was after

the citation was issued by the FCC and after Mrs. Mann's response to that citation. To this extent, the record supports evidence of a pattern of conduct. Fuss attempted to link the unattended operation found on April 3, 1981 with three other violations Fuss claimed to have observed in December, 1978 and January, 1979. The record will not support Fuss' claimed violations in December, 1978 and January, 1979. Thus the pattern of conduct consists of one violation found by the Commission on November 27, 1979 and the second violation found on the basis of this record on April 3, 1981. To this must be added Mrs. Mann's commitment to the Commission after the November, 1979 violation that she would pay close attention to see that Section 73.93(a) of the Rules was complied with in all respects. On the basis of the two incidents of unattended operation, it can be concluded that a minimum showing of pattern of conduct has been shown which is insufficient, standing alone, to result in a disqualification of the Mann application. Such evidence, however, does demonstrate a lack of sufficient attention to Commission Rules as to warrant a moderate comparative demerit.

Issues Relating to the May 10, 1981 Incident at Station KTKR

19. Before considering this matter, some background facts need to be stated which have a bearing on the conclusions herein. On May 20, 1981, the Presiding Judge released a *Memorandum Opinion and Order* (FCC 81M-1591) which added an issue to determine if Mann had operated Station KTKR in violation of Section 73.93(a) of the Rules. The added issue was based on the events alleged to have occurred on April 3, 1981 when Fuss, while driving in the Taft area, heard the sound of a record run-out groove being broadcast by Station KTKR on his car radio and observing Jerry Mann in his car, Fuss followed Jerry Mann's car to the station. It is the opinion of Fuss that certain of the Mann responsive pleadings contained untrue statements as to the whereabouts of the Manns on April 3, 1981. Accordingly, Fuss, with some general guidance from his attorney, set out on May 10, 1981, some 10 days before the issue was added, to obtain evidence which would support the Fuss version of events on April 3, 1981 as opposed to the Mann version. Under the Commission's Rules (Section 1.311(b)) discovery is available to a party only with respect to matters relevant to a hearing issue. Since the unattended operation issue was not added against Mann until May 20, 1981, Fuss had no means of seeking discovery under the Rules until after May 20, 1981. Did the Fuss conduct on the premises of Station KTKR on May 10, 1981 constitute an attempt to harass, coerce and intimidate Mann? The leading case concerning this kind of conduct on the part of Fuss is *Chronicle Broadcasting Co.*, 40 FCC 2d 775 (1973). The Commission observed in the *Chronicle* case at 800 that a vigorous investigation of an opponent does not constitute harassment, coercion and intimidation so long as the investigation is

reasonably related to the subject matter of the proceeding and not carried out with an intent or in such an abusive manner as to discourage another applicant's participation in a Commission proceeding. See also *Sonderling Broadcasting Corp.*, 62 FCC 2d 303, 304 (1977), *Chapman Radio and Television Co.*, 59 FCC 2d 1069, 1070–71 (1976) and *Federal Broadcasting System, Inc.*, 62 FCC 2d 861, 868–69 (Rev. Bd. 1977). Both Mrs. Mann and Jerry Mann had given affidavits in response to the Fuss Motion to Enlarge Issues which Fuss believed not to be true. To this extent, when the Manns filed their affidavits in this proceeding, they had no right to expect that their testimony would be insulated from inquiries, investigation and impeachment by a competing applicant. Thus, it may be concluded that the subject matter of the Fuss investigation of the KTKR premises on May 10, 1981 was relevant to this proceeding, but, not as yet relevant to any issue in the proceeding.

20. Until such time as the unattended operation issue requested by Fuss was added, the possible impeachment of the Mann affidavits was not a matter for inquiry under the issues as then existing. Nevertheless, it has been concluded that the Fuss investigation was relevant to the subject matter of the proceeding. The question then becomes whether Fuss acted in such an abusive manner as to discourage another applicant's participation in the proceeding. In considering the Fuss May 10, 1981 conduct, other conduct must also be considered. Fuss wrote to Mrs. Mann's son Jerry on January 25, 1979, alleging Mann was engaging in certain rule violations and cited Commission precedent of litigation of such matters and concluded that: "I believe that you may find it in the best interests of all parties to refrain from seeking the CP." Again on May 10, 1979, Fuss wrote to Jerry Mann suggesting that Mann consult with communications counsel as to Mann's relative position in a comparative FM proceeding. Fuss also visited the Mann station some 15 or 20 times to view the public file. Taking all of the Fuss activities with respect to events both before and after the Mann application was filed leads to the conclusion that Fuss was attempting to harass and intimidate Mrs. Mann into either not filing the application which would be mutually-exclusive with Fuss' application and after the application was filed by Mann, Fuss' activities were designed to induce Mann to give up the fight for the FM station. Before the Mann application was filed, Fuss writes to Jerry Mann[15] that in effect if Mann did seek to file the competing application, Fuss would bring forth some matters of certain rule violations by the Mann AM station. He also cites some cases namely, 25 RR 2d 385 and 44 RR 2d 1163. The 25 RR 2d 385 citation is to the *Glenn West* decision where

[15] Fuss was apparently under the mistaken impression at this time that Jerry Mann was the owner of KTKR. Actually Mrs. Mann was, in effect, the sole owner although her ownership was contingent on the settlement of her husband's estate.

an FM application was denied for unattended operation of the station. The 44 RR 2d 1163 citation is to the *Bie Broadcasting Co.*, case where public file and misrepresentation issues were added against an applicant.[16] Clearly, Fuss is advising Mann in rather direct non-veiled language that Mann would be well advised to be content with her AM station license and not become involved in a hearing with Fuss where Fuss would seek to place the AM station's alleged violation on trial in an attempt to disqualify Mann. Matters did not stop here. After the Manns did file the application, Fuss made 15 to 20 calls on KTKR to view the public file. Fuss claims the repeated trips were necessary because he never was given all the material from the public file he wanted. While a public file should be complete and available for inspection, the repeated trips by Fuss from Los Angeles where he resides to Taft can only be viewed as an effort to further his attempts to harass and intimidate Mrs. Mann. In this connection, had Fuss been unable after one or two attempts to see all parts of the public file and he continued to have a need for such information notice of the type of missing documents should have been served on Mann so that Mann could either produce the alleged missing parts of the public file then or be prepared to produce it on a date certain. Had such efforts failed, Fuss could have requested an appropriate public file issue against Mann, which Fuss did not seek. Again, considering all the Fuss activities, it appears that Fuss was using the public file process to harass and intimidate Mann.

21. Next the events of April 3 and May 10, 1981 must be considered. After the April 3, 1981 visit by Fuss, he again went to KTKR, which involved his entry into both public and non-public areas of the station. The April 3, 1981 visit by Fuss to KTKR resulted in Fuss seeking an enlargement of issues to inquire into alleged unattended operation by Mann of Station KTKR. Based on the events observed by Fuss on April 3, 1981, he sought an enlargement of issues on April 13, 1981 to inquire into the alleged unattended operation of Station KTKR. It appears that Fuss believing the Mann opposition to his petition to enlarge issues was untruthful in some respects, went again to Station KTKR on May 10, 1981 to obtain information which Fuss could use in his reply to the Mann opposition. The Fuss activities on May 10, 1981 are a part of a pattern of conduct engaged in by Fuss both before and after the Mann application was filed to harass and intimidate Mann. The entire approach to the May 10, 1981 visit by Fuss to Station KTKR was an evidentiary expedition against Mann in furtherance of his

[16] Fuss also cited 22 RR 2d 1115 which appears to deal with the illegal practice of a non-commercial FM station promoting the sale of products or services. It is not apparent how Fuss thought this citation relevant.

plan to harass and intimidate with the ultimate goal of eliminating Mann as a threat to his application.

22. The conclusion having been reached that Fuss (Valley) did have a continuing plan to harass and intimidate Mann, the question then becomes whether such conduct on Fuss' part is either disqualifying or the basis for some degree of comparative demerit. At the outset, it is observed that the *Chronicle* case involved a far-reaching investigation which was not found to be a basis for disqualification. There were 1,426.5 hours of investigation which were admittedly conducted by subterfuge and misrepresentation including claims that there were unreasonable intrusion in the personal lives of principals which could dissuade them from further participation in the comparative hearing (see 40 FCC 2d at 79). The investigation in the *Chronicle* case did not result in any adverse conclusions on the applicant's qualifications to remain a licensee (40 FCC 2d 800). However, in this case, it is not an existing licensee whose conduct is at issue. Rather, it is an applicant for a new facility. As such, the Commission should be entitled to conclude that the new applicant in question gives a reasonable expectation that if the license is granted, he will abide by the letter and spirit of the rules and policies of the Commission. In this case, Fuss cannot be disqualified on the basis of the record. Rather, a moderate comparative demerit will be assigned. Such conclusion is based upon the latitude afforded to a relevant investigation as permitted in the *Chronicle* case, and the fact that while the Fuss activities of May 10, 1981 cannot be condoned, the more objectionable alleged acts of Fuss were not established on the record.

23. It is clear that Fuss was at Station KTKR on May 10, 1981 and entered both public and private areas both outside and inside the KTKR station premises. However, the Carrillo testimony cannot be wholly credited. The record will not support a conclusion that Mr. Carrillo physically ejected Fuss from the station building and thereafter Fuss reentered the building after being physically thrown out. It cannot be concluded that Carrillo's four friends were in the station during the Fuss visit. The Fuss photographs tend to support this conclusion. The claimed loud banging on the KTKR front door by Fuss and demanding to see Mrs. Mann cannot be credited based on the record. Had such matters been established, the disqualification of Fuss would have been warranted taking into account all the previous actions of Fuss *vis a vis* Mrs. Mann and Station KTKR.

The Possible Misrepresentation by Fuss and Mann

24. This issue was added since it appeared from the pleadings filed by both Fuss and Mann and the Petition to Enlarge Issues to inquire into the unattended operation by Mann. In this connection, Mr. Fuss submitted an affidavit in his opposition to the Petition to Enlarge Issues which appears to be at substantial variance with the

affidavit testimony of the Manns (Mrs. Mann and Jerry Mann) and the affidavit of Raymundo Carrillo. No disqualification or demerit will be afforded to either Mann or Fuss on this issue. The Mann version of events at the pleading stage on the Petition to Enlarge Issues was largely based on the Carrillo version of exactly what happened on May 10, 1981. Mr. Carrillo could not support the affidavit version of events on May 10, 1981 at the hearing. However, even though the Carrillo version of events as stated in his affidavit were not supported at the hearing, Mrs. Mann had a basis to make the representation to the Commission based upon the first-hand knowledge of her operator-on-duty, Mr. Carrillo. The Fuss affidavit on his activities of May 10, 1981 are credited as being closer to the facts as to the events on May 10, 1981 once when the many self-serving statements as to his intent and purpose for the May 10, 1981 visit are eliminated.

Comparative Issue

25. Since both applicants have been found qualified, the standard comparative issue is reached.

Diversification

26. The traditional guidelines for selecting between mutually-exclusive applicants for broadcast licenses are set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter referred to as *Policy Statement*). The leading comparative criterion set forth in the *Policy Statement* is diversification of control of the media of mass communication. *Id.* at 394. The Commission stated in the *Policy Statement* that other interests in mass communications media in the principal community proposed to be served by an applicant will normally be of the greatest significance. *Id.* at 394. The greaterr an applicant's interest in the particular medium in question, the greater the preference which is granted to the competing applicant. *Id.* at 395. If there are few outlets of mass communications of the same type (i.e., radio stations) in the community proposed to be served by the applicants, ownership of such a medium of expression by one of the applicants in the community proposed to be served will entitle the other applicant to a greater comparative preference. *Id.*

27. Mann is the 100% owner of KTKR, an AM station, which is the only radio station at Taft, California. Valley (Fuss) does not have any interest in any radio, television, CATV or any other medium of mass communications in the community of Taft, or in the area proposed to be served by the Fuss proposed FM station. Valley (Fuss) does have an interest in applications for stations at Weed, California and Laramie, Wyoming. Fuss is also an applicant for a translator station which would rebroadcast the signal of Station KSQU at

Grenda, California. However, applications for construction permits are irrelevant to the diversification issue.

28. In light of Mann's 100% ownership of the only radio station at Taft, California, Valley (Fuss) is entitled to an overwhelming comparative preference on the important diversification issue.

Integration

29. The second most important comparative criterion specified in the *Policy Statement* is full-time participation in station operation by owners (*Policy Statement* at 395). Valley's sole stockholder, Fuss, as well as Mann each propose to work full-time as the general managers of their proposed FM stations. Thus, neither applicant is entitled to a qualitative comparative preference under the integration criterion. Likewise, both Mann and Fuss have past broadcast experience. While Mann's is the more extensive in terms of length of time, any enhancement preference for Mann would be at best slight in view of the conclusion reached on the unattended operation issue. There also must be considered here the Fuss activities *vis a vis* Mann and the failure of Fuss to report in a timely fashion its complete financial proposal. Taking both these comparative demerits of Fuss and balancing them against the demerit assigned to Mann affords Mann but a slight preference for its integration proposal.

Comparative Coverage

30. Valley's (Fuss) proposed station would serve approximately twice as large as the area which Mann's proposed station would serve and the population which Valley's proposed station would serve is more than four times as large as the population which Mann's proposed station would serve. Also, Valley's proposed station would provide an additional primary nighttime service to areas and populations which presently receive fewer than five primary services at night whereas Mann's proposed station would not serve any areas which do not already receive at least five primary services. Valley is entitled to a significant preference on account of its substantial superior coverage. *Wolverine Radio Co., Inc.*, 49 FCC 2d 1038 (Rev. Bd. 1974); *Erway Television Corp.*, 8 FCC 2d 24 (Rev. Bd. 1967).

Program Duplication

31. Mann proposes in its application to duplicate all of the programming of Mann's AM daytime-only station at Taft. Thus, about one-third of the programming of Mann's proposed FM station would not be duplicated. This factor is important in this case because Mann's AM station is now the only radio station operating at Taft. Thus, a grant of the Mann application would offer Taft no additional daytime radio programming. Valley (Fuss) is entitled to a substantial preference as a result of the greater diversity of programming its station would offer. *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 117–119

(Rev. Bd. 1980); *Breeze 94, Inc.*, 49 FCC 2d 1064 (Rev. Bd. 1974) and *Lake Erie Broadcasting Co.*, 43 FCC 2d 886 (Rev. Bd. 1973).

Auxiliary Power

32. Valley is entitled to a moderate preference for its proposal to install an auxiliary power generator to ensure continued operation in the event of a public utility power failure. *Addendum to Policy Statement of July 28, 1965 on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

33. Based on a review of all of the comparative factors and the comparative preferences awarded to Valley and to Mann, it is concluded that on a comparative basis Valley's application is substantially superior to Mann's and that the public interest will be served by a grant of Valley's application and a denial of the Mann application.

34. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, the application of Valley (File No. BPH-790308AH) IS GRANTED and the application of Mann (File No. BPH-790730AA) IS DENIED.[17]

BYRON E. HARRISON *Administrative Law Judge*

☆ U.S. GOVERNMENT PRINTING OFFICE: 1983—421-692/04

SUMMARIES FOR 93 FCC 2d

November 1983–January 1984

The following are summaries of Commission's actions that have not been printed in full.

Common Carrier Matters

Report and Order adopted re amendments to Uniform System of Accounts for Class A and Class B Telephone Companies to clarify accounting for coin-operated or pay telephones, station apparatus and large private branch exchanges used by telephone companies in regulated business, and detariffing of intersystem wiring associated with PBX or key system. November 2, 1983, Docket 82-681, *48* FR *50534* (FCC 83-457)

Petition for reconsideration filed by Eagle Telecommunications, Inc. of denial of application for authority under Section 214 of Act to construct and operate a cable TV system in Eagle, Colorado and surrounding areas denied. Application for review denied. Union Springs, application granted. November 7, 1983 (FCC 83-459)

Memorandum Opinion and Order adopted affirming denial of request to change elected method of constructing 800 MHz trunked system. October 26, 1983 (FCC 83-472)

Application for review filed by Tampa Electric Company of Order which found pole attachment rates to be unjust and unreasonable under Section 224 of Communications Act dismissed. November 3, 1983 (FCC 83-498)

Motion for Stay filed by United States Satellite B/cing Co., Inc. of that portion of its grant of authority which allows GTE Satellite Corp. to offer direct-to-the-home b/c satellite service to its customer, USCI, denied. November 2, 1983 (FCC 83-499)

Application for review filed by Alabama Power Co. of Order which found pole attachment rates unjust and unreasonable under Section 224 of Communications Act denied. November 3, 1983 (FCC 83-500)

Further NPRM adopted re procedures for implementing detariffing of customer premises equipment and enhanced services. November 7, 1983, Docket 81-893, *48* FR *54668* (FCC 83-506)

Report and Order adopted terminating proceeding in deregulation of mobile customer premises equipment. November 7, 1983, Docket 83-372, *48* FR *54619* (FCC 83-507)

Application filed by A Plus Information Processing Corp. for authority to operate as a common fiber optic and coaxial cable facilities and to resell communications facilities. November 9, 1983 (FCC 83-508)

Memorandum Opinion and Order adopted accepting the formula proposed by AT&T for calculation of average schedules. November 14, 1983, Docket 78-72 (FCC 83-509)

Order and Authorization adopted authorizing AT&T and associated Bell Operating System Cos. to construct and operate lightguide facilities. November 10, 1983 (FCC 83-532)

Application filed by A Plus Information Processing Corp. for authority to operate as a common carrier and to lease satellite transponder capacity granted. Petition to deny or dismiss denied. November 15, 1983 (FCC 83-533)

Order adopted appointing Commissioner Rivera to serve as member of Federal-State Joint Board. November 16, 1983 Docket 80-286, *48* FR *55509* (FCC 83-538)

Petition of Bell Operating Cos. for representation on Telecommunications Industry Advisory Group granted to an extent and otherwise denied. November 22, 1983 Docket 78-196 (FCC 83-539)

Application of RCA Global Communications, Inc. to close Public Coast Radio Telegraph station WPA, located in Port Arthur, Texas granted. November 22, 1983 (FCC 83-541)

NPRM adopted re elimination of annual report of miscellaneous common carriers (FCC Form P). December 5, 1983, Docket 83-1291, *48* FR *55004* (FCC 83-546)

Report and Order adopted re Sections 21.11(a) and 22.11(a) to abolish annual filing of Fee Form 430. December 20, 1983, Docket 82-37, *48* FR *57284* (FCC 83-547)

Applications for review filed by Florida Power & Light Co. of Orders which found pole attachment rates unjust and unreasonable under Section 224 of Communications Act. December 5, 1983 (FCC 83-562)

Order adopted re motions for oral argument filed by Cellular Mobile Systems of Pa, Inc. and Calcom Communications Corp. of Pittsburgh. December 9, 1983, Docket 82-796, *48* FR *56440* (FCC 83-580)

NPRM adopted to amend Part 31 (USOA) to account for access revenues and expenses and conforming amendments to Annual Report Form M and FCC Form 901. December 21, 1983, Docket 83-1347, *48* FR *01245* (FCC 83-586)

Order adopted re motion for oral argument filed by Cellular Mobile Systems of Illinois, Inc. December 9, 1983, Docket 82-721, *48* FR *56442* (FCC 83-581)

Report and Order adopted re proposed elimination of Parts 51 and 52 and amendment of annual report Forms R and O. December 28, 1983, Docket 83-666, *49* FR *00886* (FCC 83-599)

Request of U.S. Satellite Systems, Inc. for modification of financial condition in USSSI *Authorization Order*, FCC 83-195, released August 4, 1983. January 23, 1984 (FCC 83-602)

General Matters

Report and Order adopted re amendment of Part 5 to diminish restrictions on licensing and use of stations in Experimental Radio Services. November 16, 1983, Docket 82-469, *48* FR *52733* (FCC 83-471)

Order and Authorization adopted re applications for blanket authority to utilize multiplexing equipment to derive additional communication channels from authorized international voice-grade or wide band circuits. October 21, 1983 (FCC 83-491)

Second Report and Order adopted re overall revision of Part 18 governing Industrial, Scientific and Medical equipment. October 31, 1983, Docket 20718, *48* FR *51502* (FCC 83-496)

Memorandum Opinion and Order adopted re amendment of Part 73 to conform Section 73.3525 to amendment of Section 311(c)(3) of Communications Act of 1934 as amended. November 2, 1983 (FCC 83-503)

Second Report and Order adopted modifying Part 2 to implement domestically provisions of Final Acts of 1979 World Administrative Radio Conference. December 8, 1983, Docket 80-739, *49* FR *2357* (FCC 83-511)

Memorandum Opinion and Order on reconsideration of *Second Report and Order* establishing policies and procedures for private paging sysems in 929-930 MHz band. November 23, 1983, Docket 80-183, *48* FR *56228* (FCC 83-513)

Motion for stay filed by Harris Corp. of effective date of *Second Report and Order* for Sections 21.122, 21.503, 74.561, 94.67, 94.94 and 94.191 pending action on petition for reconsideration granted in part and otherwise denied. December 6, 1983, Docket 79-188, *48* FR *55741* (FCC 83-575)

Request for partial stay of effective date of *Second Report and Order* for those provisions concerning channelization plan for 18.46-18.94 GHz band pending consideration of Ericsson, Inc.'s petition for reconsideration denied. December 6, 1983 Docket 79-188, *48* FR *55740* (FCC 83-576)

Petition for reconsideration filed by Satellite Business Systems of *Second Supplemental NPRM and Order*, 88 FCC 2d 83 (1981), denied. December 7, 1983, Docket 78-196, (FCC 83-577)

Further NOI and NPRM adopted re enforcement of prohibitions against use of common carriers for transmission of obscene materials. December 20, 1983, Docket 83-989, *49* FR *2124* (FCC 83-582)

Application for review filed on behalf of Telocator Network of America requesting Commission review of August 16, 1983 ruling by General Counsel denied. January 6, 1984 (FCC 84-3)

Application for review filed on behalf of August John Brentari of decision entered by Chief, Field Operations Bureau of October 13, 1983 denied. January 9, 1984 (FCC 84-5)

Application for review filed by M/A-Com, Inc. of September 15, 1983 ruling by Chief, Common Carrier on request for inspection of records denied. January 10, 1984 (FCC 84-6)

NPRM adopted re amendment of Parts 2, 81 and 83 to add Gulf of Mexico to authorized Service areas of maritime mobile systems operating in 216-220 MHz band. January 24, 1984, Docket 84-18, *49* FR *4013* (FCC 84-8)

Petition for waiver filed by Alarm Device Manufacturing Co., of changes in security alarm rules and associated measure procedure MP-1 that were made by Commission's Memorandum Opinion and Order in Docket 20990 granted in part and subject to conditions. January 19, 1984 (FCC 84-18)

Hearing Matters

Application for review filed by Western Virginia TV Co. of Review Board Decision, FCC 83R-8, released January 28, 1983 denied. September 27, 1983, BC Docket 81-46 (FCC 83-441)

Application for review filed by Rogers Radio Communication Services, Inc. of Final Decision of Review Board, 90 FCC 2d 1076 (1982), which denied Rogers' complaint and granted application of Illinois Bell Telephone Co. October 19, 1983 CC Docket 78-314 (FCC 83-489)

Application for review filed by Faith Center, Inc. of Decision of Review Board dismissing its application for renewal of license to operate Station KHOF-FM, Los Angeles, Ca. November 18, 1983, BC Docket 82-212 (FCC 83-530)

Petition for reconsideration filed by AT&T Co. of Commission Decision, FCC 83-236, awarding damages of $931,880.15 to MCI Telecommunications Corp. denied. November 3, 1983, CC Docket 81-217 (FCC 83-531)

Application for review filed by Anibal Sotomayor of Decision of Review Board granting Family B/cing Group's application for FM station at Ponce, Puerto Rico and denying Marsona B/cing Corp.'s mutually exclusive application denied. November 23, 1983 BC Docket 81-808 (FCC 83-559)

Application for review of Review Board Decision, *Peoples B/cing Corp.*, FCC 83R-5, 52 RR 2d 1617, released January 25, 1983, filed by Media Com, Inc. denied. December 14, 1983, BC Docket 78-243 (FCC 83-594)

Requests for Consolidation and Stay of grants of DALMRS applications in Digital Paging Systems of Oklahoma, Inc. application proceeding and *A.S.D. Answer Service, Inc.* hearing proceeding denied and dismissed respectively. December 15, 1983, CC Docket 82-587 (FCC 83-595)

Petition for leave to amend application filed by Eastern Jackson County B/cing Corp. granted. Eastern Jackson's antenna designated as critical array under Commission's Rules and its CP contains conditions. January 4, 1984, Docket 82-599 (FCC 84-2)

Application for review of Review Board's Decision, FCC 83R-31, 53 RR 2d 1175 (1983) filed by Brownfield Radio, Inc. denied. January 12, 1984 Docket 81-164 (FCC 84-11)

Mass Media Matters

Policy Statement and Memorandum Opinion and Order adopted regarding elimination of unnecessary b/c regulation and inquiry into subscription agreements between radio b/c stations and music format service companies. October 21, 1983, Docket 83-842, *48* FR *49852* (FCC 83-375)

Applications for review filed by Lansing Branch, American Civil Liberties Union of Michigan and Mass Media Bureau of Decision by Review Board granting Gross Telecasting, Inc. application for renewal of license to operate station WJIM-TV and renewing licenses to operate stations WJIM-AM and WJIM-FM. November 21, 1983, Docket 20014 (FCC 83-443)

Motion for leave to file supplement to petition for reconsideration filed by Newark Radio B/cing Assn. granted. October 28, 1983, Docket 82-531 (FCC 83-494)

Direction Letter adopted granting the application to assign license of Station KNBN-TV, Dallas, Tex., from National Business Network, Inc. to Metromedia, Inc. and application to assign license of Station WXIX-TV, Newport, Kentucky, from Metromedia, Inc. to Malrite of Cincinnati, Inc. December 1, 1983 (FCC 83-520)

Application for review jointly filed by Rockland Cable Systems and Hudson Valley Cablesystems Corp. of action taken by delegated authority in *Rockland Cable Systems*, Mimeo 2437, 53 RR 253 (1983) denied. November 17, 1983 (FCC 83-523)

Application for review of Bureau's ruling of May 18, 1983, filed by William Turner denied. November 3, 1983 (FCC 83-527)

License renewal applications filed by KPRS B/cing Corp. for Stations KPRT-AM/KPRS-FM, Kansas City, Missouri granted. Petitions to deny applications denied. November 23, 1983 (FCC 83-553)

By Direction Letter adopted granting application of Best B/cing Co., Inc. for commercial TV station to operate on Channel 18 in Farwell, Texas granted. December 1, 1983 (FCC 83-555)

Petition for Certification and reconsideration and petition for stay filed by Koplar Communications of Calif., Inc. of *Report and Order*, 50 RR 2d 951 (1981) denied and dismissed respectively. December 16, 1983, Docket 80-755, (FCC 83-557)

Application for voluntary assignment of CP for unbuilt station KVGO(AM), Pineville, Louisiana, from Blac, Inc. to EBCO B/cing, Inc. dismissed and request for exceptions based on Notes 8 and 11 to Sections 73.35 (a) & (b) of rules denied. December 16, 1983 (FCC 83-569)

NPRM adopted re amendment of Parts 2 and 73 of AM b/c rules concerning use of AM carrier. December 14, 1983, Docket 83-1322, *48* FR *56607* (FCC 83-571)

Application for review filed by Buffalo B/cing Co., Inc. licensee of Station WIVB-TV, Buffalo, N.Y., directed against Bureau action of July 27, 1983, denying its petition to deny application of CBS, Inc. for authority under Section 375(b) of Communications Act to deliver programming to Canadian b/c stations denied. November 23, 1983 (FCC 83-556)

License renewal applications of WCMR/WFRN(FM), Elkhart, and WFMS(FM) and WHMB-TV, Indianapolis, Indiana; WLAP/WLAP-FM and WVLK/WVLK-FM, Lexington, and WAKY/WVEZ-FM and WLRS(FM), Louisville, Kentucky; and WDEF/WDEF-FM, Chattanooga, WHIN/WWKX(FM), Gallatin, and WZTV(TV), Nashville, Tennessee granted. Petition to deny filed by National Black Media Coalition and other petitioners denied. December 1, 1985 (FCC 83-574)

NPRM adopted regarding low power TV and TV translator service. December 22, 1983, Docket 83-1350, *49* FR *908* (FCC 83-593)

NPRM adopted regarding revision of Sections 73.3571, 73.3572 and 73.3573. January 5, 1984 Docket 83-1377, *49* FR *1252* (FCC 83-608)

Order adopted granting waiver of Section 73.128(b)(2) of Rules for AM Stereophonic B/cing. January 6, 1984 (FCC 84-1)

Private Radio Matters

Application for review filed by Telocator Network of America of Bureau's denial of its petition for reconsideration concerning grant of licenses to Millicom Corporate Digital Communications, Inc. for nation wide private carrier paging system. October 19, 1983 (FCC 83-512)

Request for Stay filed by P&R Temmer of effectiveness of *Memorandum Opinion and Order*, FCC 83-171, denied. August 4, 1983 (FCC 83-372)

Report and Order adopted re amendment of Part 97 to authorize ten year operator and station license terms and two year period of grace for renewal of expired licenses in Amateur Radio Service. October 19, 1983, Docket 83-337, *48* FR *49861* (FCC 83-454)

Report and Order adopted re amendment of Part 97 to provide transition period for removal of A3 Class of emission (voice) from aeronautical radiobeacon stations. November 10, 1983, Docket 83-29, *48* FR *52464* (FCC 83-493)

Report and Order adopted re licensing and availability of narrow-band direct-printing radiotelegraph typewriter frequencies. November 15, 1983, Docket 82-828, *48* FR *53118* (FCC 83-534)

Application for review filed by Trunked Repeaters Co., Inc.'s of Bureau's Order issued March 28, 1983, denied. November 15, 1983 (FCC 83-535)

Report and Order adopted re use of omnidirectional antennas by fixed stations operating in 450-470 MHz band. November 23, 1983, Docket 83-486, *48* FR *55742* (FCC 83-544)

Report and Order adopted re amendment of Part 90 regarding allocation and assignment of radio frequency channels for self-powered vehicle detector, December 5, 1983, Docket 82-326, *48* FR *4981* (FCC 83-545)

First Report and Order adopted re amendment of Part 83 concerning inspection interval for small passenger vessels subject to Title III, Part III of Communications Act and vessels subject to Great Lake Agreement 1973. December 6, 1983 Docket 83-428, *48* FR *55574* (FCC 83-563)

NPRM adopted re amendment of Part 90 to make ten frequencies in 72-76 MHz band available to Forest Products Radio Service or low power mobile operations. January 4, 1984, Docket 83-1346, *49* FR *01997* (FCC 83-583)

Report and Order adopted re establishment of class of amateur operator license not requiring demonstration of proficiency in International Morse Code. December 14, 1983, Docket 83-28, *49* FR *01097* (FCC 83-584)

Order adopted re amendment of Part 90 to prescribe policies and regulations to govern interconnection of Private Land Mobile Radio Systems with public switched telephone network. December 30, 1983, Docket 20846, *49* FR *1728* (FCC 83-610)

Report and Order adopted re amendment of rules concerning medical service operations in 450-470 MHz band in Special Emergency Radio Service. January 31, 1984, Docket 81-416, *49* FR *4492* (FCC 84-7)

Memorandum Opinion and Order adopted re update and codification of General Mobile Radio Service Rules. January 24, 1984, Docket 82-84, *49* FR *4002* (FCC 84-9)

Application of James C. Pope, Seffner, Florida for new public local VHF coast station facilities at Palmetto, Florida on frequency 161.875 MHz. January 19, 1984 (FCC 84-14)

Report and Order adopted re amendment of Parts 2, 81 and 83 concerning use of marine VHF Channel 88 in Puget Sound area, eligibility for limited coast and marine utility stations, and deletion of all A3A emission requirements. January 19, 1984, Docket 84-15, *49* FR *11838* (FCC 84-15)

Report and Order adopted re amendment of Amateur Radio Service Rules Part 97, to make additional frequencies available to Radio Amateur Civil Emergency Service during declared national emergencies. January 19, 1984, Docket 83-524, *49* FR *3186* (FCC 84-16)

NPRM adopted re amendment of Part 94 to eliminate developmental classification of 13.2 to 13.25 GHz band. January 19, 1984, Docket 84-27, *49* FR *3226* (FCC 84-17)

NPRM adopted re requirements for radiotelegraph auto alarm receivers, radiotelegraph automatic-alarm-signal keying devices and ship radar installations in Maritime Mobile Service. February 3, 1984, Docket 84-29, *49* FR *5634* (FCC 84-22)

ADMINISTRATIVE FINALITY,

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

AFFIDAVIT NEED FOR

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

AGREEMENT, BETWEEN APPLICANTS

COMMISSION MODIFIED BUREAU DECISION SO THAT MUTUALLY EXCLUSIVE APPLICANTS FOR CELLULAR SERVICE WHO HAVE ARRIVED AT A PARTIAL SETTLEMENT ARE PERMITTED TO AMEND SURVIVING APPLICATION TO REFLECT ADDED PARTICIPATION OF MERGER PARTNERS.
AMER. RADIO-TELEPHONE SERVICE, INC. 93FCC2D1138

AGREEMENT, FORMAL, SEE ALSO INTERNATIONAL AGREEMENTS

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

ALLEGATIONS, SUFFICIENCY OF

CASE REMANDED TO ALJ FOR FURTHR EVIDENTIARY PROCEEDINGS. REVIEW BOARD DECISION, 88 FCC 2D 830 (1981) REMANDED FOR CONSIDERATION. ALLEGATIONS AND PLEADINGS RAISE QUESTIONS OF PROBABLE DECISIONAL SIGNIFICANCE AND ARE OF SUCH SUBSTANTIAL PUBLIC INTEREST IMPORTANCE AS TO WARRANT CONSIDERATION. APPLICATIONS FOR REVIEW DISMISSED; PETITION FOR SECTION 403 INQUIRY DENIED. BC DOCKET 79-305
NEW CONTINENTAL B/CING CO. 93FCC2D1275

ANTI-COMPETITIVE PRACTICE, COMMON CARRIER

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

APPLICATION, AMENDMENT OF SEE ALSO ISSUE, RULE 1.65

REVIEW BOARD REMANDS APPLICATIONS FOR NEW FM STATION ON NEWLY ADDED SITE AVAILABILITY, SEC. 1.65, AND MISREPRESENTATION/LACK OF CANDOR ISSUES.
BC DOCKET 80-379
VALLEY FM RADIO 93FCC2D1330

APPLICATION, AMENDMENT OF, AFTER DESIGNATION,

REVIEW BOARD REMANDS PROCEEDING TO ALJ TO ALLOW APPLICANT TO AMEND ITS APPLICATION TO REFLECT ACTUAL OWNERSHIP. APPLICANT AT HEARING HAD ATTEMPTED UNSUCCESSFULLY TO AMEND ITS APPLICATION TO REPORT SUBSTITUTION OF NEW STOCKHOLDERS OWNING 75% OF STOCK, ALBEIT POSSESSING ONLY 49% VOTING CONTROL. BOARD FOUND THAT PRIMARY BASIS FOR ALJ'S REJECTION OF AMENDED APPLICATION ERRONEOUS.
BC DOCKET 82-633
CHUDY B/CING CORP. 93FCC2D1213

APPLICATION, AMENDMENT OF, CHANGE OF OWNERSHIP

REVIEW BOARD REMANDS PROCEEDING TO ALJ TO ALLOW APPLICANT TO AMEND ITS APPLICATION TO REFLECT ACTUAL OWNERSHIP. APPLICANT AT HEARING HAD ATTEMPTED UNSUCCESSFULLY TO AMEND ITS APPLICATION TO REPORT SUBSTITUTION OF NEW STOCKHOLDERS OWNING 75% OF STOCK, ALBEIT POSSESSING ONLY 49% VOTING CONTROL. BOARD FOUND THAT PRIMARY BASIS FOR ALJ'S REJECTION OF AMENDED APPLICATION ERRONEOUS.
BC DOCKET 82-633
CHUDY B/CING CORP. 93FCC2D1213

APPLICATION, FOR REVIEW, NEW QUESTIONS OF LAW OR FACT

CASE REMANDED TO ALJ FOR FURTHR EVIDENTIARY PROCEEDINGS. REVIEW BOARD DECISION, 88 FCC 2D 830 (1981) REMANDED FOR CONSIDERATION. ALLEGATIONS AND PLEADINGS RAISE QUESTIONS OF PROBABLE DECISIONAL SIGNIFICANCE AND ARE OF SUCH SUBSTANTIAL PUBLIC INTEREST IMPORTANCE AS TO WARRANT CONSIDERATION. APPLICATIONS FOR REVIEW DISMISSED; PETITION FOR SECTION 403 INQUIRY DENIED.
BC DOCKET 79-305
NEW CONTINENTAL B/CING CO. 93FCC2D1275

APPLICATION, FOR REVIEW, SEE ALSO REVIEW

APPLICATION FOR REVIEW DENIED AND STAFF ACTION AFFIRMED. IN RESOLVING QUESTIONS CONCERNING THE LIKELIHOOD OF PUBLIC CONFUSION ARISING FROM SIMILAR CALL SIGNS, THE CONTROLLING QUESTION IS SIMPLY WHETHER THE LETTERS IN TWO CALL SIGNS, APART OR IN COMBINATION, WOULD SOUND SUFFICIENTLY ALIKE TO THE AVERAGE LISTENER, SO THAT THE LISTENER WOULD CONFUSE ONE STATION FOR ANOTHER.
CLASSIC B/CING SOCIETY SAN ANTONIO 93FCC2D0351

REQUEST FOR REVIEW OF DECISION OF BUREAU CHIEF DENYING REQUEST TO UTILIZE COUNTY-WIDE DATA TO ESTABLISH SIGNIFICANTLY VIEWED STATUS DENIED. NO REASONS PROFFERED TO WARRANT CHANGE IN ESTABLISHED POLICY.
KOIN-TV, INC. 93FCC2D0186

SECTION 1.115(E)(3) OF RULES REVISED TO STATE THAT APPLICATIONS FOR REVIEW OF HEARING DESIGNATION ORDERS ISSUED UNDER DELEGATED AUTHORITY SHALL BE DEFERRED UNTIL APPLICATIONS FOR REVIEW OF FINAL REVIEW BOARD DECISION IN CASE ARE FILED, UNLESS ALJ CERTIFIES MATTER TO COMMISSION.
REVISION OF SEC. 1.115(E)(3) 93FCC2D0434

APPLICATION FOR REVIEW DENIED. APPLICATIONS FOR CPS FOR STATIONS IN DPL*RS GRANTED. REVIEW BOARD ERRED IN FINDING THAT TAX LIENS AND JUDGEMENTS JUSTIFIED DENIAL OF APPLICATIONS. BOARD NOTICED EXTRA-RECORD MATERIAL WITHOUT AFFORDING APPLIANT AN ADEQUATE OPPORTUNITY TO RESPOND.
ARIZONA MOBILE TELEPHONE CO. 93FCC2D1147

APPLICATION, MUTUALLY EXCLUSIVE, SEE ALSO COMPARATIVE HEARIN

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

APPLICATION, PROCESSING OF

PETITION FOR RECONSIDERATION OF COMMISSION'S ORDER ESTABLISHING PROCESSING GROUP FOR DOMESTIC FIXED SATELLITE APPLICATIONS DENIED. PETITIONER FAILED TO SUBSTANTIATE CLAIM OF MUTUAL EXCLUSIVITY, AND COMMISSION PROCEDURE DETERMINED TO BE MORE EFFECTIVE AND EFFICIENT THAN ALTERNATIVE ADVANCED BY PETITIONER.
GTE SATELLITE CORP. 93FCC2D0832

AUTHORITY DELEGATION OF, BY FCC

APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS.
CABLE DALLAS, INC. 93FCC2D0020

AUXILIARY SERVICE

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING WHICH AMENDED PART 74, SUBPART F OF RULES TO PERMIT SHARED USE OF B/C AUXILIARY FACILITIES WITH OTHER B/C AND NON-B/C ENTITIES. NEW LICENSING POLICIES ESTABLISHED FOR TV B/C AUXILIARY STATIONS.
BC DOCKET 81-794
AMENDMENT OF PART 74 93FCC2D0570

BASIC QUALIFICATIONS

NO FAIRNESS VIOLATION ESTABLISHED ABSENT EVIDENCE LICENSEE FAILED TO ADDRESS CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE. QUANTITATIVE APPROACH REJECTED IN FAVOR OF COMPLAINT PROCEDURE. APPLICANT DISQUALIFIED FOR FAILURE TO SHOW EQUIPMENT AVAILABILITY OR ADEQUATE FINANCES. DISQUALIFICATION FOR SITE AVAILABILITY OVERRULED.
DOCKET 20611
UNITED B/CING CO. 93FCC2D0482

BUSINESS RADIO SERVICE, ELIGIBILITY

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO 93FCC2D1034

BUSINESS RADIO SERVICE, FREQUENCIES

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO 93FCC2D1034

CALL LETTERS, ASSIGNMENT

APPLICATION FOR REVIEW DENIED AND STAFF ACTION AFFIRMED. IN RESOLVING QUESTIONS CONCERNING THE LIKELIHOOD OF PUBLIC CONFUSION ARISING FROM SIMILAR CALL SIGNS, THE CONTROLLING QUESTION IS SIMPLY WHETHER THE LETTERS IN TWO CALL SIGNS, APART OR IN COMBINATION, WOULD SOUND SUFFICIENTLY ALIKE TO THE AVERAGE LISTENER, SO THAT THE LISTENER WOULD CONFUSE ONE STATION FOR ANOTHER.
CLASSIC B/CING SOCIETY SAN ANTONIO 93FCC2D0051

CANDOR, SEE ALSO CHARACTER OR MISREPRESENTATION

COMMISSION MODIFIED REVIEW BOARD DECISION. FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 10 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127

CARELESSNESS

IN COMPARATIVE RENEWAL PROCEEDING, RENEWAL APPLICATION GRANTED WHERE COMPETING APPLICANT GETS MODERATE DEMERIT FOR CARELESSNESS IN PROSECUTING ITS APPLICATION AND SUBSTANTIAL AND MODERATE PREFERENCES FOR DIVERSIFICATION/INTEGRATION. RENEWAL APPLICANT GETS STRONG PREFERENCE FOR PAST B/C RECORD AND SUBSTANTIAL PREFERENCE FOR SPANISH LANGUAGE PROGRAMMING. BC DOCKET 81-157
B/C COMMUNICATIONS, INC. 93FCC2D1162

CATV CARRIAGE, MANDATORY SIGNAL

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

CATV CARRIAGE, SIGNIFICANT VIEWING TEST

REQUEST FOR REVIEW OF DECISION OF BUREAU CHIEF DENYING REQUEST TO UTILIZE COUNTY-WIDE DATA TO ESTABLISH SIGNIFICANTLY VIEWED STATUS DENIED. NO REASONS PROFFERED TO WARRANT CHANGE IN ESTABLISHED POLICY.
KOIN-TV, INC. 93FCC2D0186

CATV CARS BAND

APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS.
CABLE DALLAS, INC. 93FCC2D0020

CATV, VIOLATION COMMISSION ORDERS

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

CELLULAR COMMUN CATIONS SYSTEMS

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

COMMISSION MODIFIED BUREAU DECISION SO THAT MUTUALLY EXCLUSIVE APPLICANTS FOR CELLULAR SERVICE WHO HAVE ARRIVED AT A PARTIAL SETTLEMENT ARE PERMITTED TO AMEND SURVIVING APPLICATION TO REFLECT ADDED PARTICIPATION OF MERGER PARTNERS.
AMER. RADIO-TELEPHONE SERVICE, INC. 93FCC2D1138

CHARACTER QUALIFICATIONS, EFFECT OF MISREPRESENTATION,

COMMISSION MODIFIED REVIEW BOARD DECISION. FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 10 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127

CHARACTER QUALIFICATIONS, LACK OF CANDOR, SEE ALSO CANDOR

COMMISSION MODIFIED REVIEW BOARD DECISION. FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 10 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127

CITIZENS RADIO SERVICE

WHERE LICENSEE ENGAGED IN REPEATED AND WILLFUL VIOLATIONS OF THREE CB RULES AND ALSO WILLFULLY INTERFERED WITH COMMISSION INSPECTION OF HIS STATION, LICENSE REVOCATION IMPOSED. MITIGATING ARGUMENTS REJECTED.
SS DOCKET 78-89
THEODORE E. SOUSA 93FCC2D1064

COMMON CARRIER, AUTHORIZATION, SEE ALSO CERTIFICATE

PETITIONS FOR RECONSIDERATION OF SECOND REPORT AND ORDER, 91 FCC 2D 59, DENIED. FCC AUTHORITY TO FORBEAR IMPOSING REQUIREMENTS OF SECTION 203 AND 214 OF THE COMMUNICATIONS ACT UPON RESELLERS OF BASIC DOMESTIC TERRESTRIAL COMMON CARRIER SERVICES AFFIRMED.
COMMON CARRIER SERVICES
COMMON CARRIER SERVICES 93FCC2D0354

COMMON CARRIER, DATA PROCESSING SERVICE

ORDER ADOPTED GRANTING PETITIONS FOR RECONSIDERATION OF COMMISSION ORDER RELEASED OCTOBER 20, 1981, 88 FCC 2D 33, AND TERMINATING STAY ORDER RELEASED JUNE 16,1982, 90 FCC 2D 233. ORDER GRANTED WAIVER OF COMPUTER II STRUCTURAL SEPARATION REQUIREMENTS FOR THE TWO COMPANIES.
CINCINNATI BELL INC. 93FCC2D0035

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

COMMON CARRIER, INTERCONNECTION

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

COMMISSION ALLOWS RECONSIDERATION FOR TWO ISSUES RELATING TO INTERCONNECTION ARRANGEMENTS BETWEEN AND AMONG DOMESTIC AND INTERNATIONAL RECORD CARRIERS, AS PRESCRIBED IN INTERIM ORDER, 89 FCC 2D 928 (1982) BUT DENIES RECONSIDERATION ON ALL OTHER ISSUES RAISED BY PETITIONS.
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0845

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

COMMON CARRIER, INTERCONNECTION, CARRIER TO CARRIER

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

COMMON CARRIER, INTERCONNECTION, CONNECTING ARRANGEMENTS

REPORT AND ORDER ADOPTED CONCERNING OPERATIONS OF AT&T'S SEPARATE SUBSIDIARY AND MANNER IN WHICH IT RELATES TO UNSEPARATED AFFILIATES.
AT&T CO. 93FCC2D0599

TEMS LICENSED UNDER PART 90 IN 806-821 MHZ AND 851-866 MHZ SECOND REPORT AND ORDER ESTABLISHING NEW RULES AND POLICIES TO GOVERN INTERCONNECTION OF PRIVATE LAND MOBILE RADIO SYSTEMS LICENSED UNDER PART 90 IN 806-821 7'Z AND 851-866 MHZ BANDS WITH PUBLIC SWITCHED TELEPHONE NETWORK.
DOCKET 20846
AMENDMENT OF PART 90 93FCC2D1111

COMMON CARRIER, INTERCONNECTION, CUSTOMER-PROVIDED EQUIPMENT

NPRM ADOPTED DESIGNED TO IMPLEMENT REQUIREMENTS OF TELECOMMUNICATIONS FOR DISABLE ACT OF 1982, PUB. LAW 97-410. THE RULEMAKING SOLICITS COMMENTS FROM INTERESTED PARTIES.
CC DOCKET 83-427
TELECOMMUNICATIONS EQUIPMENT 93FCC2D1311

COMMON CARRIER, INTERCONNECTION, SPECIALIZED COMMON CARRIER

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

COMMON CARRIER, INTERNATIONAL

APPLICATION FOR AUTHORITY TO PROVIDE SATELLITE COMMUNICATIONS SERVICE TO NON-CARRIERS AT ALL U.S. INTERNATIONAL EARTH STATIONS GRANTED FOR PUBLIC CONVENIENCE AND NECESSITY. 93FCC2D0066
COMSAT

COMMON CARRIER, INTERNATIONAL RECORD CARRIER

COMMISSION ALLOWS RECONSIDERATION FOR TWO ISSUES RELATING TO INTERCONNECTION ARRANGEMENTS BETWEEN AND AMONG DOMESTIC AND INTERNATIONAL RECORD CARRIERS, AS PRESCRIBED IN INTERIM ORDER, 89 FCC 2D 928 (1982) BUT DENIES RECONSIDERATION ON ALL OTHER ISSUES RAISED BY PETITIONS. 93FCC2D0845
INTERCONNECTION ARRANGEMENTS-IRCS

COMMON CARRIER, MOBILE RADIO

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES. GEN. DOCKET 81-768 93FCC2D0952
RANDOM SELECTION/LOTTERIES

COMMON CARRIER, OPERATING EXPENSES

REPORT AND ORDER ADOPTED CONCERNING OPERATIONS OF AT&T'S SEPARATE SUBSIDIARY AND MANNER IN WHICH IT RELATES TO UN-SEPARATED AFFILIATES. 93FCC2D0599
AT&T CO.

COMMON CARRIER, RATES, CHARGES, SEE ALSO TARIFF

PETITIONS FOR RECONSIDERATION OF SECOND REPORT AND ORDER, 91 FCC 2D 59, DENIED. FCC AUTHORITY TO FORBEAR IMPOSING REQUIREMENTS OF SECTION 203 AND 214 OF THE COMMUNICATIONS ACT UPON RESELLERS OF BASIC DOMESTIC TERRESTRIAL COMMON CARRIER SERVICES AFFIRMED.
COMMON CARRIER SERVICES
COMMON CARRIER SERVICES 93FCC2D0054

COMMON CARRIER, SERVICE, RESALE AND SHARED USE OF

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241

COMMON CARRIER, SPECIALIZED SERVICES

ORDER ADOPTED GRANTING PETITIONS FOR RECONSIDERATION OF COMMISSION ORDER RELEASED OCTOBER 20, 1981, 88 FCC 2D 33, AND TERMINATING STAY ORDER RELEASED JUNE 16,1982, 90 FCC 2D 233. ORDER GRANTED WAIVER OF COMPUTER II STRUCTURAL SEPARATION REQUIREMENTS FOR THE TWO COMPANIES.
CINCINNATI BELL INC. 93FCC2D0035

NOTICE OF PROPOSED RULEMAKING ADOPTED SEEKING PUBLIC COMMENT ON WHETHER THE DIVESTED BOCS SHOULD BE REQUIRED TO OFFER ENHANCED SERVICES OR CPE THROUGH A SEPARATE SUBSIDIARY.
CC DOCKET 83-115
CUSTOMER-PROVIDED EQUIPMENT 93FCC2D0722

COMPARATIVE COVERAGE ISSUE, SEE ALSO COVERAGE

IN THREE PARTY COMPARATIVE B/C PROCEEDING, APPLICANT A WITH SUBSTANTIAL PREFERENCES FOR BOTH DIVERSIFICATION AND INTEGRATION OVER APPLICANT B, AND SUBSTANTIAL PREFERENCE FOR INTEGRATION OVER APPLICANT C, IS THE PREFERRED APPLICANT.
BC DOCKET 81-809
FAMILY B/CING GROUP 93FCC2D0771

COMPARATIVE CRITERIA

IN COMPARATIVE FM PROCEEDING, APPLICANT WITH SUBSTANTIAL PREFERENCE FOR DIVERSIFICATION AND SLIGHT PREFERENCE FOR INTEGRATION IS CLEAR COMPARATIVE WINNER.
BC DOCKET 81-298
THOMAS C. AND ESSIE L. COLLINS 93FCC2D0467

BOARD AWARDS GRANT TO APPLICANT WITH SUBSTANTIAL DIVERSIFICATION AND MODERATE INTEGRATION PREFERENCE AND REJECTS MISREPRESENTATION CHARGE BASED ON TWO SMALL APPLICATION ERRORS. OWNERSHIP BY LOSING APPLICANT OF STATION IN COMMUNITY OF LICENSE WAS DECISIVE COMPARATIVE DIFFERENCE.
BC DOCKET 81-164
BROWNFIELD B/CING CORP. 93FCC2D1197

COMPARATIVE HEARING, SEE ALSO HEARING OR APPLICATION, MUTUAL

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSNG 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT BECAUSE IT COMPLIED WITH 47 USC SEC. 311(C)(3) AND GRANTED FM B/C APPLICATION. AGREEMENT WAS FOUND TO SERVE PUBLIC INTEREST AND NO PARTY TO IT FILED ITS APPLICATION FOR PURPOSE OF REACHING OR CARRYING OUT SUCH AGREEMENT.
CEDAR CREEK RADIO CO. 93FCC2D0671

COMPETITION, COMMON CARRIERS

PETITIONS FOR RECONSIDERATION OF SECOND REPORT AND ORDER, 91 FCC 2D 59, DENIED. FCC AUTHORITY TO FORBEAR IMPOSING REQUIREMENTS OF SECTION 203 AND 214 OF THE COMMUNICATIONS ACT UPON RESELLERS OF BASIC DOMESTIC TERRESTRIAL COMMON CARRIER SERVICES AFFIRMED.
COMMON CARRIER SERVICES
COMMON CARRIER SERVICES 93FCC2D0054

COMPETITION, UNFAIR

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

COMPUTER TERMINALS

ORDER ADOPTED GRANTING PETITIONS FOR RECONSIDERATION OF COMMISSION ORDER RELEASED OCTOBER 20, 1981, 88 FCC 2D 33, AND TERMINATING STAY ORDER RELEASED JUNE 16,1982, 90 FCC 2D 233. ORDER GRANTED WAIVER OF COMPUTER II STRUCTURAL SEPARATION REQUIREMENTS FOR THE TWO COMPANIES.
CINCINNATI BELL INC. 93FCC2D0035

COMSAT SEE ALSO SATELLITE

PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF COMMISSION'S MEMORANDUM OPINION AND ORDER ADOPTED 8/5/82 DENIED EXCEPT TO EXTENT INDICATED THEREIN.
CC DOCKET 80-634
COMSAT 93FCC2D0701

CONTOUR, OVERLAP

REVIEW BOARD DIRECTS PARTIES TO TAKE JOINT FIELD INTENSITY MEASUREMENTS TO LOCATE APPLICANT'S 0.5 MV/M CONTOUR AND STATION WPGW'S 0.025 MV/V CONTOUR. ALTHOUGH EXISTING MEASUREMENTS HAVE BEEN TAKEN BY PARTIES SEPARATELY IN CONCURRENT MEASUREMENTS, THEIR ACCURACY AND VALIDITY HAVE BEEN CHALLENGED IN THIS PROCEEDING.
BC DOCKET 81-605
GSM MEDIA CORP. 93FCC2D1271

CONTROL, CONCENTRATION OF, REGIONAL

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-305
CANNON'S POINT B/CING CO. 93FCC2D0643

CORPORATE ORGANIZATION

PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF COMMISSION'S MEMORANDUM OPINION AND ORDER ADOPTED 8/5/82 DENIED EXCEPT TO EXTENT INDICATED THEREIN.
CC DOCKET 80-634
COMSAT 93FCC2D0701

CRIMINAL LAW VIOLATIONS OF, SEE ALSO LAW, VIOLATIONS OF

REVIEW BOARD AFFIRMS DISQUALIFICATION OF B/C APPLICANT BECAUSE OF INTENTIONAL AND MATERIAL MISREPRESENTATIONS MADE BY APPLICANT'S PRINCIPAL IN AN AFFFIDAVIT FILED WITH THE COMMISSION, IN PRE-REMAND HEARING TESTIMONY, IN SWORN RESPONSES TO WRITTEN INTERROGATORIES ON REMAND, AND IN REMAND HEARING TESTIMONY.
DOCKET NOS. 21235 AND 21236
COUNTRY B/CING CO.ANY 93FCC2D0083

DECLARATORY RULING

COMMISSION ADOPTED ORDER PREEMPTING STATE ACTIONS REQUIRING CARRIERS TO ACCEPT THE USE OF SEVEN-DAY PERIODS FOR ACTUAL USE MEASUREMENTS IN CONNECTION WITH CALCULATING DIVISION OF INTERSTATE TOLL REVENUES. SUCH STATE ACTIONS ARE INCONSISTENT WITH FEDERAL STATUTES AND POLICIES AND AUTHORITY OF COMMISSION.
SOUTHERN BELL TELEPHONE/TELEGRAPH CO 93FCC2D1287

DEREGULATION

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

DISQUALIFICATION

REVIEW BOARD AFFIRMS DISQUALIFICATION OF B/C APPLICANT BECAUSE OF INTENTIONAL AND MATERIAL MISREPRESENTATIONS MADE BY APPLICANT'S PRINCIPAL IN AN AFFFIDAVIT FILED WITH THE COMMISSION, IN PRE-REMAND HEARING TESTIMONY, IN SWORN RESPONSES TO WRITTEN INTERROGATORIES ON REMAND, AND IN REMAND HEARING TESTIMONY.
DOCKET NOS. 21235 AND 21236
COUNTRY B/CING CO.ANY 93FCC2D0083

DIVERSIFICATION, OF CONTROL OF MASS MEDIA, SEE ALSO CONTROL

IN COMPARATIVE FM PROCEEDING, APPLICANT WITH SUBSTANTIAL PREFERENCE FOR DIVERSIFICATION AND SLIGHT PREFERENCE FOR INTEGRATION IS CLEAR COMPARATIVE WINNER.
BC DOCKET 81-298
THOMAS C. AND ESSIE L. COLLINS 93FCC2D0467

IN THREE PARTY COMPARATIVE B/C PROCEEDING, APPLICANT A WITH SUBSTANTIAL PREFERENCES FOR BOTH DIVERSIFICATION AND INTEGRATION OVER APPLICANT B, AND SUBSTANTIAL PREFERENCE FOR INTEGRATION OVER APPLICANT C, IS THE PREFERRED APPLICANT.
BC DOCKET 81-808
FAMILY B/CING GROUP 93FCC2D0771

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-305
CANNON'S POINT B/CING CO. 93FCC2D0643

IN COMPARATIVE RENEWAL PROCEEDING, RENEWAL APPLICATION GRANTED WHERE COMPETING APPLICANT GETS MODERATE DEMERIT FOR CARELESSNESS IN PROSECUTING ITS APPLICATION AND SUBSTANTIAL AND MODERATE PREFERENCES FOR DIVERSIFICATION/INTEGRATION. RENEWAL APPLICANT GETS STRONG PREFERENCE FOR PAST B/C RECORD AND SUBSTANTIAL PREFERENCE FOR SPANISH LANGUAGE PROGRAMMING.
BC DOCKET 81-157
B/C COMMUNICATIONS, INC. 93FCC2D1162

DOMESTIC FIXED SATELLITE

PETITION FOR RECONSIDERATION OF COMMISSION'S ORDER ESTABLISHING PROCESSING GROUP FOR DOMESTIC FIXED SATELLITE APPLICATIONS DENIED. PETITIONER FAILED TO SUBSTANTIATE CLAIM OF MUTUAL EXCLUSIVITY, AND COMMISSION PROCEDURE DETERMINED TO BE MORE EFFECTIVE AND EFFICIENT THAN ALTERNATIVE ADVANCED BY PETITIONER.
GTE SATELLITE CORP. 93FCC2D0832

MEMORANDUM OPINION AND ORDER ADOPTED SPECIFIYING POLICIES AND PROCEDURES FOR FILING OF APPLICATIONS FOR NEW SPACE STATIONS IN DOMESTIC FIXED-SATELLITE SERVICE.
FIXED-SATELLITE SERVICE 93FCC2D1260

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE SEE ALSO MOBILE

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

MEMORANDUM OPINION AND ORDER ADOPTED EXTENDING FILING DATE FOR ACCEPTING CELLULAR APPLICATIONS FOR ALL OTHER MARKETS TO DEC. 1, 1983, AND REVISES PROCEDURAL RULES FOR LICENSNG AND OPERATION OF CELLULAR COMMUNICATIONS SYSTEMS. PART 22 OF RULES AMENDED TO CHANGE DATES FOR FILING DIRECT AND REBUTTAL CASES AND CLARIFY AMENDED RULES.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0683

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

APPLICATION FOR REVIEW DENIED. APPLICATIONS FOR CPS FOR STATIONS IN DPLMRS GRANTED. REVIEW BOARD ERRED IN FINDING THAT TAX LIENS AND JUDGEMENTS JUSTIFIED DENIAL OF APPLICATIONS. BOARD NOTICED EXTRA-RECORD MATERIAL WITHOUT AFFORDING APPLIANT AN ADEQUATE OPPORTUNITY TO RESPOND.
ARIZONA MOBILE TELEPHONE CO. 93FCC2D1147

CONDITIONAL OPERATING AUTHORITY, SUBJECT TO MANDATORY ACCOUNTING TERMS, GRANTED TO DPLMRS OPERATOR, WHOSE LICENSES WERE REVOKED. PUBLIC INTEREST NECESSITATED LIMITED CONTINUATION OF SERVICE WHILE NEW LICENSEES COULD BE CHOSEN. REQUEST FOR SPECIAL TEMPORARY AUTHORITY DENIED.
DOCKET 20939
PASS WORD, INC. 93FCC2D1284

EDUCATIONAL NONCOMMERCIAL TV STATION

APPLICATION FOR RENEWAL OF EDUCATIONAL TV STATION LICENSE GRANTED. COMPLAINANT FAILED TO RAISE SUBSTANTIAL AND MATERIAL QUESTION OF FACT AS TO WHETHER GRANT WOULD BE IN PUBLIC INTEREST.
WHYY, INC. 93FCC2D1086

EQUIPMENT AUTHORIZATION PROGRAM

REPORT AND ORDER ADOPTED REVISING RULES IN SUBPART H OF PART 15 FOR CLASS I TV DEVICES, NOW TO BE CALLED TV INTERFACE DEVICES. THESE ARE DEVICES SUCH AS TV GAMES AND VIDEO CASSETTE RECORDERS WHICH FEED A SIGNAL TO THE ANTENNA INPUT OF A TV RECEIVER FOR DISPLAY. REVISION RELAXES LIMITS ON RADIATED EMISSIONS AND PERMITS USE OF STAND-ALONE RF MODULATORS.
GEN. DOCKET 79-244
TV INTERFACE DEVICES 93FCC2D1068

EQUIPMENT CUSTOMER OWNED, SEE COMMON CARRIER, INTERCONNECT

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

EX PARTE, PERMISSIBLE PRESENTATIONS

MEMORANDUM OPINION AND ORDER ADOPTED ON RECONSIDERATION OF REPORT AND ORDER ADOPTING POLICIES AND RULES PERMITTING BUT REQUIRING DISCLOSURE OF EX PARTE PRESENTATIONS IN NONRESTRICTED RULEMAKING PROCEEDINGS.
GEN. DOCKET 78-167
EX PARTE COMMUNICATIONS 93FCC2D1250

EX PARTE, PROHIBITED PRESENTATIONS

MEMORANDUM OPINION AND ORDER ADOPTED ON RECONSIDERATION OF REPORT AND ORDER ADOPTING POLICIES AND RULES PERMITTING BUT REQUIRING DISCLOSURE OF EX PARTE PRESENTATIONS IN NONRESTRICTED RULEMAKING PROCEEDINGS.
GEN. DOCKET 78-167
EX PARTE COMMUNICATIONS 93FCC2D1250

FAIRNESS DOCTRINE

NO FAIRNESS VIOLATION ESTABLISHED ABSENT EVIDENCE LICENSEE FAILED TO ADDRESS CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE. QUANTITATIVE APPROACH REJECTED IN FAVOR OF COMPLAINT PROCEDURE. APPLICANT DISQUALIFIED FOR FAILURE TO SHOW EQUIPMENT AVAILABILITY OR ADEQUATE FINANCES. DISQUALIFICATION FOR SITE AVAILABILITY OVERRULED.
DOCKET 20611
UNITED B/CING CO. 93FCC2D0482

FAIRNESS DOCTRINE, COMPLAINT PROCEDURE

NO FAIRNESS VIOLATION ESTABLISHED ABSENT EVIDENCE LICENSEE FAILED TO ADDRESS CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE. QUANTITATIVE APPROACH REJECTED IN FAVOR OF COMPLAINT PROCEDURE. APPLICANT DISQUALIFIED FOR FAILURE TO SHOW EQUIPMENT AVAILABILITY OR ADEQUATE FINANCES. DISQUALIFICATION FOR SITE AVAILABILITY OVERRULED.
DOCKET 20611
UNITED B/CING CO. 93FCC2D0482

FAIRNESS DOCTRINE, LICENSEE OBLIGATION

APPLICATION FOR REVIEW DENIED. IF COMPLAINANT IS AWARE OF LICENSEE'S WILLINGNESS TO AFFORD AN OPPORTUNITY TO PRESENT CONTRASTING VIEWPOINTS AND HE CONVEYS THIS AWARENESS TO LICENSEE, LICENSEE HAS SATISIFED ITS FAIRNESS DOCTRINE OBLIGATION TO PROVIDE A REASONABLE OPPORTUNITY FOR PRESENTATION OF CONTRASTING VIEWPOINTS.
HENRY W. MAIER 93FCC2D0132

FINANCIAL QUALIFICATIONS, LOAN COMMITMENT,ABILITY TO MEET

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-305
CANNON'S POINT B/CING CO. 93FCC2D0643

FM STATION, AUTHORIZATION

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSNG 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT BECAUSE IT COMPLIED WITH 47 USC SEC. 311(C)(3) AND GRANTED FM B/C APPLICATION. AGREEMENT WAS FOUND TO SERVE PUBLIC INTEREST AND NO PARTY TO IT FILED ITS APPLICATION FOR PURPOSE OF REACHING OR CARRYING OUT SUCH AGREEMENT.
CEDAR CREEK RADIO CO. 93FCC2D0671

FOREIGN LANGUAGE BROADCASTS, SEE ALSO PROGRAMMING FOREIGN.

IN COMPARATIVE RENEWAL PROCEEDING, RENEWAL APPLICATION GRANTED WHERE COMPETING APPLICANT GETS MODERATE DEMERIT FOR CARELESSNESS IN PROSECUTING ITS APPLICATION AND SUBSTANTIAL AND MODERATE PREFERENCES FOR DIVERSIFICATION/INTEGRATION. RENEWAL APPLICANT GETS STRONG PREFERENCE FOR PAST B/C RECORD AND SUBSTANTIAL PREFERENCE FOR SPANISH LANGUAGE PROGRAMMING. BC DOCKET 91-157
B/C COMMUNICATIONS, INC. 93FCC2D1162

FORFEITURE MITIGATION, REQUEST FOR DENIED

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

FORFEITURE PROCEDURES

COMMISSION AMENDED RULES TO BRING FORFEITURE PROCEDURES IN AGREEMENT WITH RECENTLY ENACTED AMENDMENT TO COMMUNICATIONS ACT, WHICH DISPENSES WITH NEED TO GIVE CABLE SYSTEM OPERATORS NOTICE AND OPPORTUNITY TO RESPOND BEFORE COMMISSION ISSUES NOTICE OF APPARENT LIABILITY IMPOSING FORFEITURE PENALTY.
AMENDMENT OF PART 1 93FCC2D0568

FREQUENCY ALLOCATION

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE
93FCC2D0908

FREQUENCY EFFICIENT USE OF

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO
93FCC2D1034

FREQUENCY LOADING

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO
93FCC2D1034

GRANT, WITHOUT HEARING

APPLICATIONS FOR VOLUNTARY ASSIGNMENT OF TV STATION GRANTED AND PETITIONS TO DENY DENIED. NO SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT WERE PRESENTED THAT WOULD WARRANT A HEARING.
KSDK, INC.
93FCC2D0893

HEARING, PROCEDURE

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES
93FCC2D0952

INFORMATION

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

INTERLOCUTORY RULING

REVIEW BOARD DENIED PETITION FOR EXTRAORDINARY RELIEF SEEKING BOARD REVERSAL OF ALJ'S INTERLOCUTORY RULING THAT ADDED FINANCIAL MISREPRESENTATION ISSUE IN COMPARATIVE B/C PROCEEDING. LEAVE TO APPEAL HAD BEEN DENIED, AND BOARD FOUND NO FLAGRANT ABUSE OF DISCRETION OR OTHER EXTRAORDINARY CIRCUMSTANCES WARRANTING BOARD INTERVENTION.
BC DOCKET 82-627
JAN-DI B/CING, INC. 93FCC2D0890

LAND MOBILE SERVICE, PRIVATE

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

LICENSE, ASSIGNMENT OF, VOLUNTARY

APPLICATIONS FOR VOLUNTARY ASSIGNMENT OF TV STATION GRANTED AND PETITIONS TO DENY DENIED. NO SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT WERE PRESENTED THAT WOULD WARRANT A HEARING.
KSDK, INC. 93FCC2D0893

LICENSE, RENEWAL OF, SEE ALSO RENEWAL OR APPLICATION

APPLICATION FOR RENEWAL OF EDUCATIONAL TV STATION LICENSE GRANTED. COMPLAINANT FAILED TO RAISE SUBSTANTIAL AND MATERIAL QUESTION OF FACT AS TO WHETHER GRANT WOULD BE IN PUBLIC INTEREST.
WHYY, INC. 93FCC2D1086

LICENSE, REVOCATION

WHERE LICENSEE ENGAGED IN REPEATED AND WILLFUL VIOLATIONS OF THREE CB RULES AND ALSO WILLFULLY INTERFERED WITH COMMISSION INSPECTION OF HIS STATION, LICENSE REVOCATION IMPOSED. MITIGATING ARGUMENTS REJECTED.
SS DOCKET 78-89
THEODORE E. SOUSA 93FCC2D1064

LOCAL RESIDENCE, SEE ALSO COMPARATIVE CRITERIA

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-305
CANNON'S POINT B/CING CO. 93FCC2D0643

LOTTERY SEE ALSO CONTEST

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

MEASUREMENT, REQUIRED

REVIEW BOARD DIRECTS PARTIES TO TAKE JOINT FIELD INTENSITY MEASUREMENTS TO LOCATE APPLICANT'S 0.5 MV/M CONTOUR AND STATION WPGW'S 0.025 MV/V CONTOUR. ALTHOUGH EXISTING MEASUREMENTS HAVE BEEN TAKEN BY PARTIES SEPARATELY IN CONCURRENT MEASUREMENTS, THEIR ACCURACY AND VALIDITY HAVE BEEN CHALLENGED IN THIS PROCEEDING.
BC DOCKET 81-606
GSM MEDIA CORP. 93FCC2D1271

MERGER AND DROP OUT CASES G

COMMISSION MODIFIED BUREAU DECISION SO THAT MUTUALLY EXCLUSIVE APPLICANTS FOR CELLULAR SERVICE WHO HAVE ARRIVED AT A PARTIAL SETTLEMENT ARE PERMITTED TO AMEND SURVIVING APPLICATION TO REFLECT ADDED PARTICIPATION OF MERGER PARTNERS. F
AMER. RADIO-TELEPHONE SERVICE, INC. 93FCC2D1136

MESSAGE TELECOMMUNICATIONS SERVICE

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

MINORITY OWNERSHIP OF B/C FACILITIES

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSING 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

MINORITY OWNERSHIP, FACTOR IN COMPARATIVE PROCEEDING

REVIEW BOARD AFFIRMS I.D. GRANTING CP TO APPLICANT WITH GREATEST QUANTITATIVE INTEGRATION OF OWNERSHIP AND MANAGEMENT.
BC DOCKET 81-647
LAS MISIONES DE BEJAR TV CO. 93FCC2D0191

MISREPRESENTATION SEE ALSO CONCEALMENT OR FALSE STATEMENTS

BOARD AWARDS GRANT TO APPLICANT WITH SUBSTANTIAL DIVERSIFICATION AND MODERATE INTEGRATION PREFERENCE AND REJECTS MISREPRESENTATION CHARGE BASED ON TWO SMALL APPLICATION ERRORS. OWNERSHIP BY LOSING APPLICANT OF STATION IN COMMUNITY OF LICENSE WAS DECISIVE COMPARATIVE DIFFERENCE.
BC DOCKET 81-164
BROWNFIELD B/CING CORP. 93FCC2D1197

MISREPRESENTATION, CHARACTER QUALIFICATIONS

REVIEW BOARD AFFIRMS DISQUALIFICATION OF B/C APPLICANT BECAUSE OF INTENTIONAL AND MATERIAL MISREPRESENTATIONS MADE BY APPLICANT'S PRINCIPAL IN AN AFFFIDAVIT FILED WITH THE COMMISSION, IN PRE-REMAND HEARING TESTIMONY, IN SWORN RESPONSES TO WRITTEN INTERROGATORIES ON REMAND, AND IN REMAND HEARING TESTIMONY.
DOCKET NOS. 21235 AND 21236
COUNTRY B/CING CO.ANY 93FCC2D0083

REVIEW BOARD REMANDS APPLICATIONS FOR NEW FM STATION ON NEWLY ADDED SITE AVAILABILITY, SEC. 1.65, AND MISREPRESENTATION/LACK OF CANDOR ISSUES.
BC DOCKET 80-379
VALLEY FM RADIO 93FCC2D1330

MISREPRESENTATION, SITUATIONS DEFINING

COMMISSION MODIFIED REVIEW BOARD DECISION. FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 10 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127

MOBILE RADIO SERVICE, CELLULAR

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

MEMORANDUM OPINION AND ORDER ADOPTED EXTENDING FILING DATE FOR ACCEPTING CELLULAR APPLICATIONS FOR ALL OTHER MARKETS TO DEC. 1, 1983, AND REVISES PROCEDURAL RULES FOR LICENSNG AND OPERATION OF CELLULAR COMMUNICATIONS SYSTEMS. PART 22 OF RULES AMENDED TO CHANGE DATES FOR FILING DIRECT AND REBUTTAL CASES AND CLARIFY AMENDED RULES.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0683

COMMISSION MODIFIED BUREAU DECISION SO THAT MUTUALLY EXCLUSIVE APPLICANTS FOR CELLULAR SERVICE WHO HAVE ARRIVED AT A PARTIAL SETTLEMENT ARE PERMITTED TO AMEND SURVIVING APPLICATION TO REFLECT ADDED PARTICIPATION OF MERGER PARTNERS. G F
AMER. RADIO-TELEPHONE SERVICE, INC. 93FCC2D1138

OATH

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

ONE-WAY COMMUNICATIONS, SEE ALSO PAGING SERVICE

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

OPERATION CONTINUATION OF

CONDITIONAL OPERATING AUTHORITY, SUBJECT TO MANDATORY ACCOUNTING TERMS, GRANTED TO DPLMRS OPERATOR, WHOSE LICENSES WERE REVOKED. PUBLIC INTEREST NECESSITATED LIMITED CONTINUATION OF SERVICE WHILE NEW LICENSEES COULD BE CHOSEN. REQUEST FOR SPECIAL TEMPORARY AUTHORITY DENIED.
DOCKET 20939
PASS WORD, INC. 93FCC2D1284

OWNERSHIP AND MANAGEMENT, INTEGRATION OF,

REVIEW BOARD AFFIRMS I.D. GRANTING CP TO APPLICANT WITH GREATEST QUANTITATIVE INTEGRATION OF OWNERSHIP AND MANAGEMENT.
BC DOCKET 81-647
LAS MISIONES DE BEJAR TV CO. 93FCC2D0191

IN COMPARATIVE FM PROCEEDING, APPLICANT WITH SUBSTANTIAL PREFERENCE FOR DIVERSIFICATION AND SLIGHT PREFERENCE FOR INTEGRATION IS CLEAR COMPARATIVE WINNER.
BC DOCKET 81-298
THOMAS C. AND ESSIE L. COLLINS 93FCC2D0467

IN THREE PARTY COMPARATIVE B/C PROCEEDING, APPLICANT A WITH SUBSTANTIAL PREFERENCES FOR BOTH DIVERSIFICATION AND INTEGRATION OVER APPLICANT B, AND SUBSTANTIAL PREFERENCE FOR INTEGRATION OVER APPLICANT C, IS THE PREFERRED APPLICANT.
BC DOCKET 81-808
FAMILY B/CING GROUP 93FCC2D0771

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSNG 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-306
CANNON'S POINT B/CING CO. 93FCC2D0643

IN COMPARATIVE RENEWAL PROCEEDING, RENEWAL APPLICATION GRANTED WHERE COMPETING APPLICANT GETS MODERATE DEMERIT FOR CARELESSNESS IN PROSECUTING ITS APPLICATION AND SUBSTANTIAL AND MODERATE PREFERENCES FOR DIVERSIFICATION/INTEGRATION. RENEWAL APPLICANT GETS STRONG PREFERENCE FOR PAST B/C RECORD AND SUBSTANTIAL PREFERENCE FOR SPANISH LANGUAGE PROGRAMMING.
BC DOCKET 81-157
B/C COMMUNICATIONS, INC. 93FCC2D1162

PAGING SERVICE SEE ALSO ONE-WAY COMMUNICATIONS

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

PERJURY G

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC F
AMENDMENT OF PART 1 93FCC2D0001

PERSONAL ATTACK, BROADCASTER OBLIGATIONS REGARDING

APPLICATION FOR REVIEW DENIED. IN ORDER TO ESTABLISH A PERSONAL ATTACK FOR PURPOSES OF THE PERSONNAL ATTACK RULE, THE COMPLAINANT MUST ESTABLISH THAT DURING THE DISCUSSION OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE AN ATTACK WAS MADE UPON THE HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN "IDENTIFIED" PERSON OR GROUP.
BROTHER RAME BEHERS 93FCC2D0007

APPLICATION FOR REVIEW DENIED. IF COMPLAINANT IS AWARE OF LICENSEE'S WILLINGNESS TO AFFORD AN OPPORTUNITY TO PRESENT CONTRASTING VIEWPOINTS AND HE CONVEYS THIS AWARENESS TO LICENSEE, LICENSEE HAS SATISIFED ITS FAIRNESS DOCTRINE OBLIGATION TO PROVIDE A REASONABLE OPPORTUNITY FOR PRESENTATION OF CONTRASTING VIEWPOINTS.
HENRY W. MAIER 93FCC2D0132

POLICY STATEMENT

MEMORANDUM OPINION AND ORDER ADOPTED SPECIFIYING POLICIES AND PROCEDURES FOR FILING OF APPLICATIONS FOR NEW SPACE STATIONS IN DOMESTIC FIXED-SATELLITE SERVICE.
FIXED-SATELLITE SERVICE 93FCC2D1260

POLITICAL BROADCASTING, REASONABLE ACCESS RULE

PETITIONS TO ISSUE NOI FOR OVERALLY RENEWAL/REVOCATION APPROACH TO IMPLEMENT SECTION 312(A)(7) DENIED. SEC. 312(A)(7) OF COMMUNICATIONS ACT REQUIRES AFFIRMATIVE RIGHT OF ACCESS TO USE OF B/C FACILITIES BY CANDIDATES FOR FEDERAL OFFICE.
RENEWAL/REVOCATION APPROACH 93FCC2D0423

POLITICAL CANDIDATE, FEDERAL CANDIDATE, REASONABLE ACCESS

PETITIONS TO ISSUE NOI FOR OVERALLY RENEWAL/REVOCATION APPROACH TO IMPLEMENT SECTION 312(A)(7) DENIED. SEC. 312(A)(7) OF COMMUNICATIONS ACT REQUIRES AFFIRMATIVE RIGHT OF ACCESS TO USE OF B/C FACILITIES BY CANDIDATES FOR FEDERAL OFFICE.
RENEWAL/REVOCATION APPROACH 93FCC2D0423

POWER EQUIPMENT, AUXILIARY

REVIEW BOARD AFFIRMS FM GRANT WHERE CREDIT DUE 100% FEMALE OWNERSHIP INTEGRATION PROPOSAL, COMBINED WITH PAST LOCAL RESIDENCE CREDIT, OVERCOMES OPPONENT'S PREVIOUS B/C EXPERIENCE, PROPOSED FUTURE RESIDENCE, AND VERY SLIGHT COMPARATIVE COVERAGE PREFERENCE.
BC DOCKET 81-306
CANNON'S POINT B/CING CO. 93FCC2D0643

PRIVATE LAND MOBILE RADIO SERVICE

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921
AMENDMENT OF PART 90 93FCC2D1127

PRIVATE LAND MOBILE RADIO SERVICES, INTERCONNECTION

TEMS LICENSED UNDER PART 90 IN 806-821 MHZ AND 851-866 MHZ SECOND REPORT AND ORDER ESTABLISHING NEW RULES AND POLICIES TO GOVERN INTERCONNECTION OF PRIVATE LAND MOBILE RADIO SYSTEMS LICENSED UNDER PART 90 IN 806-821 7'Z AND 851-866 MHZ BANDS WITH PUBLIC SWITCHED TELEPHONE NETWORK.
DOCKET 20846
AMENDMENT OF PART 90 93FCC2D1111

PROCEDURES

MEMORANDUM OPINION AND ORDER ADOPTED SPECIFIYING POLICIES AND PROCEDURES FOR FILING OF APPLICATIONS FOR NEW SPACE STATIONS IN DOMESTIC FIXED-SATELLITE SERVICE.
FIXED-SATELLITE SERVICE 93FCC2D1260

PROGRAMMING SPECIALIZED

IN COMPARATIVE RENEWAL PROCEEDING, RENEWAL APPLICATION GRANTED WHERE COMPETING APPLICANT GETS MODERATE DEMERIT FOR CARELESSNESS IN PROSECUTING ITS APPLICATION AND SUBSTANTIAL AND MODERATE PREFERENCES FOR DIVERSIFICATION/INTEGRATION. RENEWAL APPLICANT GETS STRONG PREFERENCE FOR PAST B/C RECORD AND SUBSTANTIAL PREFERENCE FOR SPANISH LANGUAGE PROGRAMMING. G F
BC DOCKET 81-157
B/C COMMUNICATIONS, INC. 93FCC2D1162

RADIO FREQUENCY DEVICE, AUTHORIZATION

REPORT AND ORDER ADOPTED REVISING RULES IN SUBPART H OF PART 15 FOR CLASS I TV DEVICES, NOW TO BE CALLED TV INTERFACE DEVICES. THESE ARE DEVICES SUCH AS TV GAMES AND VIDEO CASSETTE RECORDERS WHICH FEED A SIGNAL TO THE ANTENNA INPUT OF A TV RECEIVER FOR DISPLAY. REVISION RELAXES LIMITS ON RADIATED EMISSIONS AND PERMITS USE OF STAND-ALONE RF MODULATORS.
GEN. DOCKET 79-244
TV INTERFACE DEVICES 93FCC2D1068

RECONSIDERATION, PETITION FOR, DENIAL OF

PETITIONS FOR RECONSIDERATION OF SECOND REPORT AND ORDER, 91 FCC 2D 59, DENIED. FCC AUTHORITY TO FORBEAR IMPOSING REQUIREMENTS OF SECTION 203 AND 214 OF THE COMMUNICATIONS ACT UPON RESELLERS OF BASIC DOMESTIC TERRESTRIAL COMMON CARRIER SERVICES AFFIRMED.
COMMON CARRIER SERVICES
COMMON CARRIER SERVICES 93FCC2D0054

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

PETITION FOR RECONSIDERATION OF GEORGE E. CAMERON, JR. COMMUNICATIONS (KROQ), FCC 82R-58, RELEASED SEPT. 24, 1982, DENIED.
DOCKET 20629
GEORGE E. CAMERON JR. COMMUNICATIONS 93FCC2D0789

PETITION FOR RECONSIDERATION OF COMMISSION'S ORDER ESTABLISHING PROCESSING GROUP FOR DOMESTIC FIXED SATELLITE APPLICATIONS DENIED. PETITIONER FAILED TO SUBSTANTIATE CLAIM OF MUTUAL EXCLUSIVITY, AND COMMISSION PROCEDURE DETERMINED TO BE MORE EFFECTIVE AND EFFICIENT THAN ALTERNATIVE ADVANCED BY PETITIONER.
GTE SATELLITE CORP. 93FCC2D0832

RECONSIDERATION, PETITION FOR, GRANT OF

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921
AMENDMENT OF PART 90 93FCC2D1127

REIMBURSEMENT AGREEMENT

REVIEW BOARD AFFIRMS APPROVAL OF SETTLEMENT AGREEMENT IN BROADCAST PROCEEDING BUT SETS ASIDE ALJ'S APPROVALS OF SPECIFIC REIMBURSEMENT AMOUNTS, IN LIGHT OF 1982 AMENDMENT OF SECTION 311(C) OF THE COMMUNICATIONS ACT, AND DISMISSES APPEAL ASKING BOARD TO REDUCE A PARTY'S REIMBURSEMENT SUCH DISPUTES ARE NO LONGER IN THE COMMISSION'S PURVIEW BUT ARE MATTER FOR LOCAL LAW DETERMINATION. BC DOCKET NO.81-59
BISON CITY TV 49 LIMTED PARTNERSHIP 93FCC2D0004

REMAND

REVIEW BOARD REMANDS PROCEEDING TO ALJ TO ALLOW APPLICANT TO AMEND ITS APPLICATION TO REFLECT ACTUAL OWNERSHIP. APPLICANT AT HEARING HAD ATTEMPTED UNSUCCESSFULLY TO AMEND ITS APPLICATION TO REPORT SUBSTITUTION OF NEW STOCKHOLDERS OWNING 75% OF STOCK, ALBEIT POSSESSING ONLY 49% VOTING CONTROL. BOARD FOUND THAT PRIMARY BASIS FOR ALJ'S REJECTION OF AMENDED APPLICATION ERRONEOUS. BC DOCKET 82-533
CHUDY B/CING CORP. 93FCC2D1213

CASE REMANDED TO ALJ FOR FURTHR EVIDENTIARY PROCEEDINGS. REVIEW BOARD DECISION, 88 FCC 2D 830 (1981) REMANDED FOR CONSIDERATION. ALLEGATIONS AND PLEADINGS RAISE QUESTIONS OF PROBABLE DECISIONAL SIGNIFICANCE AND ARE OF SUCH SUBSTANTIAL PUBLIC INTEREST IMPORTANCE AS TO WARRANT CONSIDERATION. APPLICATIONS FOR REVIEW DISMISSED; PETITION FOR SECTION 403 INQUIRY DENIED. BC DOCKET 79-305
NEW CONTINENTAL B/CING CO. 93FCC2D1275

REVIEW BOARD REMANDS APPLICATIONS FOR NEW FM STATION ON NEWLY ADDED SITE AVAILABILITY, SEC. 1.65, AND MISREPRESENTATION/LACK OF CANDOR ISSUES.
BC DOCKET 80-379
VALLEY FM RADIO 93FCC2D1330

REVIEW APPLICATION FOR, SEE ALSO APPLICATION FOR REVIEW

APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS.
CABLE DALLAS, INC. 93FCC2D0020

REVIEW BOARD, REVIEW FUNCTION

REVIEW BOARD DENIED PETITION FOR EXTRAORDINARY RELIEF SEEKING BOARD REVERSAL OF ALJ'S INTERLOCUTORY RULING THAT ADDED FINANCIAL MISREPRESENTATION ISSUE IN COMPARATIVE B/C PROCEEDING. LEAVE TO APPEAL HAD BEEN DENIED, AND BOARD FOUND NO FLAGRANT ABUSE OF DISCRETION OR OTHER EXTRAORDINARY CIRCUMSTANCES WARRANTING BOARD INTERVENTION.
BC DOCKET 82-627
JAN-DI B/CING, INC. 93FCC2D0890

REVIEW BY COMMISSION

SECTION 1.115(E)(3) OF RULES REVISED TO STATE THAT APPLICATIONS FOR REVIEW OF HEARING DESIGNATION ORDERS ISSUED UNDER DELEGATED AUTHORITY SHALL BE DEFERRED UNTIL APPLICATIONS FOR REVIEW OF FINAL REVIEW BOARD DECISION IN CASE ARE FILED, UNLESS ALJ CERTIFIES MATTER TO COMMISSION.
REVISION OF SEC. 1.115(E)(3) 93FCC2D0434

APPLICATION FOR REVIEW DENIED. APPLICATIONS FOR CPS FOR STATIONS IN DPLYRS GRANTED. REVIEW BOARD ERRED IN FINDING THAT TAX LIENS AND JUDGEMENTS JUSTIFIED DENIAL OF APPLICATIONS. BOARD NOTICED EXTRA-RECORD MATERIAL WITHOUT AFFORDING APPLIANT AN ADEQUATE OPPORTUNITY TO RESPOND.
ARIZONA MOBILE TELEPHONE CO. 93FCC2D1147

REVIEW BY REVIEW BOARD

REVIEW BOARD AFFIRMS I.D. GRANTING CP TO APPLICANT WITH GREATEST QUANTITATIVE INTEGRATION OF OWNERSHIP AND MANAGEMENT.
BC DOCKET 81-647
LAS MISIONES DE BEJAR TV CO. 93FCC2D0191

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSNG 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT BECAUSE IT COMPLIED WITH 47 USC SEC. 311(C)(3) AND GRANTED FM B/C APPLICATION. AGREEMENT WAS FOUND TO SERVE PUBLIC INTEREST AND NO PARTY TO IT FILED ITS APPLICATION FOR PURPOSE OF REACHING OR CARRYING OUT SUCH AGREEMENT.
CEDAR CREEK RADIO CO. 93FCC2D0671

RULE MAKING, NOTICE OF PROPOSED

NPRM ADOPTED DESIGNED TO IMPLEMENT REQUIREMENTS OF TELECOMMUNICATIONS FOR DISABLE ACT OF 1982, PUB. LAW 97-410. THE RULEMAKING SOLICITS COMMENTS FROM INTERESTED PARTIES.
CC DOCKET 83-427
TELECOMMUNICATIONS EQUIPMENT 93FCC2D1311

RULES, AMENDMENT OF

MEMORANDUM OPINION AND ORDER ADOPTED EXTENDING FILING DATE FOR ACCEPTING CELLULAR APPLICATIONS FOR ALL OTHER MARKETS TO DEC. 1, 1983, AND REVISES PROCEDURAL RULES FOR LICENSNG AND OPERATION OF CELLULAR COMMUNICATIONS SYSTEMS. PART 22 OF RULES AMENDED TO CHANGE DATES FOR FILING DIRECT AND REBUTTAL CASES AND CLARIFY AMENDED RULES.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0683

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING WHICH AMENDED PART 74, SUBPART F OF RULES TO PERMIT SHARED USE OF B/C AUXILIARY FACILITIES WITH OTHER B/C AND NON-B/C ENTITIES. NEW LICENSING POLICIES ESTABLISHED FOR TV B/C AUXILIARY STATIONS.
BC DOCKET 81-794
AMENDMENT OF PART 74 93FCC2D0570

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921
AMENDMENT OF PART 90 93FCC2D1127

SATELLITE COMMUNICATIONS SEE ALSO COMSAT

APPLICATION FOR AUTHORITY TO PROVIDE SATELLITE COMMUNICATIONS SERVICE TO NON-CARRIERS AT ALL U.S. INTERNATIONAL EARTH STATIONS GRANTED FOR PUBLIC CONVENIENCE AND NECESSITY.
COMSAT 93FCC2D0066

PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF COMMISSION'S MEMORANDUM OPINION AND ORDER ADOPTED 9/5/82 DENIED EXCEPT TO EXTENT INDICATED THEREIN.
CC DOCKET 80-634
COMSAT 93FCC2D0701

SATELLITE DOMESTIC COMMUNICATIONS

PETITION FOR RECONSIDERATION OF COMMISSION'S ORDER ESTABLISHING PROCESSING GROUP FOR DOMESTIC FIXED SATELLITE APPLICATIONS DENIED. PETITIONER FAILED TO SUBSTANTIATE CLAIM OF MUTUAL EXCLUSIVITY, AND COMMISSION PROCEDURE DETERMINED TO BE MORE EFFECTIVE AND EFFICIENT THAN ALTERNATIVE ADVANCED BY PETITIONER.
GTE SATELLITE CORP. 93FCC2D0832

SEPARATION PROCEDURES

COMMISSION ADOPTED ORDER PREEMPTING STATE ACTIONS REQUIRING CARRIERS TO ACCEPT THE USE OF SEVEN-DAY PERIODS FOR ACTUAL USE MEASUREMENTS IN CONNECTION WITH CALCULATING DIVISION OF INTERSTATE TOLL REVENUES. SUCH STATE ACTIONS ARE INCONSISTENT WITH FEDERAL STATUTES AND POLICIES AND AUTHORITY OF COMMISSION.
SOUTHERN BELL TELEPHONE/TELEGRAPH CO 93FCC2D1287

SETTLEMENT

REVIEW BOARD AFFIRMS APPROVAL OF SETTLEMENT AGREEMENT IN BROADCAST PROCEEDING BUT SETS ASIDE ALJ'S APPROVALS OF SPECIFIC REIMBURSEMENT AMOUNTS, IN LIGHT OF 1982 AMENDMENT OF SECTION 311(C) OF THE COMMUNICATIONS ACT, AND DISMISSES APPEAL ASKING BOARD TO REDUCE A PARTY'S REIMBURSEMENT SUCH DISPUTES ARE NO LONGER IN THE COMMISSION'S PURVIEW BUT ARE MATTER FOR LOCAL LAW DETERMINATION. BC DOCKET NO.81-59
BISON CITY TV 49 LIMTED PARTNERSHIP 93FCC2D0004

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT BECAUSE IT COMPLIED WITH 47 USC SEC. 311(C)(3) AND GRANTED FM B/C APPLICATION. AGREEMENT WAS FOUND TO SERVE PUBLIC INTEREST AND NO PARTY TO IT FILED ITS APPLICATION FOR PURPOSE OF REACHING OR CARRYING OUT SUCH AGREEMENT.
CEDAR CREEK RADIO CO. 93FCC2D0671

WHERE APPLICANTS SUBMITTED AFFIDAVITS SHOWING COMPLIANCE WITH SECTION 311(C)(3)(A) AND (B) OF COMMUNICATIONS ACT VERIFYING THAT APPLICATIONS WERE FILED IN GOOD FAITH AND IN ORDER TO OBTAIN GRANT, AGREEMENT WOULD BE APPROVED.
BC DOCKET 81-456
OAK TV OF EVERETT, INC. 93FCC2D0926

JOINT REQUEST FOR APPROVAL OF AGREEMENT GRANTED.WHERE TWO OF THREE APPLICANTS IN COMPARATIVE PROCEEDING AGREED TO SETTLEMENT WHEREBY ONE WOULD BE DISMISSED, AND AGREEMENT COMPLIED WITH SECTION 311(C)(3) OF STATUTE AND SEC. 73.3525(A) OF RULES, PUBLIC INTEREST WOULD BE SERVED BY APPROVAL OF AGREEMENT.
BC DOCKET 82-419
BERSHIRE TV, INC. 93FCC2D1160

COMMISSION ADOPTED ORDER PREEMPTING STATE ACTIONS REQUIRING CARRIERS TO ACCEPT THE USE OF SEVEN-DAY PERIODS FOR ACTUAL USE MEASUREMENTS IN CONNECTION WITH CALCULATING DIVISION OF INTERSTATE TOLL REVENUES. SUCH STATE ACTIONS ARE INCONSISTENT WITH FEDERAL STATUTES AND POLICIES AND AUTHORITY OF COMMISSION.
SOUTHERN BELL TELEPHONE/TELEGRAPH CO 93FCC2D1287

SITE AVAILABILITY

REVIEW BOARD REMANDS APPLICATIONS FOR NEW FM STATION ON NEWLY ADDED SITE AVAILABILITY, SEC. 1.65, AND MISREPRESENTATION/LACK OF CANDOR ISSUES.
BC DOCKET 80-379
VALLEY FM RADIO 93FCC2D1330

SPACE COMMUNICATIONS

MEMORANDUM OPINION AND ORDER ADOPTED SPECIFIYING POLICIES AND PROCEDURES FOR FILING OF APPLICATIONS FOR NEW SPACE STATIONS IN DOMESTIC FIXED-SATELLITE SERVICE.
FIXED-SATELLITE SERVICE 93FCC2D1260

SPECIAL TEMPORARY AUTHORIZATION, SEE ALSO TEMPORARY

CONDITIONAL OPERATING AUTHORITY, SUBJECT TO MANDATORY ACCOUNTING TERMS, GRANTED TO DPLMRS OPERATOR, WHOSE LICENSES WERE REVOKED. PUBLIC INTEREST NECESSITATED LIMITED CONTINUATION OF SERVICE WHILE NEW LICENSEES COULD BE CHOSEN. REQUEST FOR SPECIAL TEMPORARY AUTHORITY DENIED.
DOCKET 20939
PASS WORD, INC. 93FCC2D1284

SUBSIDIARY COMPANY

REPORT AND ORDER ADOPTED CONCERNING OPERATIONS OF AT&T'S SEPARATE SUBSIDIARY AND MANNER IN WHICH IT RELATES TO UNSEPARATED AFFILIATES.
AT&T CO. 93FCC2D0599

SUBURBAN COMMUNITY 307(B) ISSUE

REPORT AND ORDER ADOPTED ELIMINATING SUBURBAN COMMUNITY POLICY, USED IN LICENSING AM STATIONS, AND ITS FM COROLLARY, THE BERWICK DOCTRINE. HENCEFORTH, COMMISSION WILL PRESUME THAT COMPLIANCE WITH RULES PERTAINING TO SERVICE TO COMMUNITY OF LICENSE WILL INDICATE AN APPLICANT'S INTENT TO SERVE THAT COMMUNITY AND NOT A NEARBY CENTRAL CITY.
BC DOCKET 82-320 93FCC2D0436
SUBURBAN COMMUNITY POLICY

SUBURBAN COMMUNITY 307(B) ISSUE, FM STATION

REPORT AND ORDER ADOPTED ELIMINATING SUBURBAN COMMUNITY POLICY, USED IN LICENSING AM STATIONS, AND ITS FM COROLLARY, THE BERWICK DOCTRINE. HENCEFORTH, COMMISSION WILL PRESUME THAT COMPLIANCE WITH RULES PERTAINING TO SERVICE TO COMMUNITY OF LICENSE WILL INDICATE AN APPLICANT'S INTENT TO SERVE THAT COMMUNITY AND NOT A NEARBY CENTRAL CITY.
BC DOCKET 82-320 93FCC2D0436
SUBURBAN COMMUNITY POLICY

SUNSHINE ACT

COMMISSION ADOPTED AMENDMENTS TO RULES CONCERNING MEETING PROCEDURES. ONE AMENDMENT MAKES CLEAR THAT SEVEN DAYS NOTICE REQUIREMENT DOES NOT APPLY TO MEETINGS HELD TO DECIDE WHETHER TO CALL A FUTURE MEETING WITH SHORT NOTICE. OTHER AMENDMENT ELIMINATES INCONSISTENCIES IN RULE CONCERNING ANNOUNCEMENTS OF MEETINGS WITH SHORT NOTICE.
AMENDMENT OF PART 0 93FCC2D0565

SUNSHINE ACT, GROUNDS FOR OPEN MEETING

COMMISSION ADOPTED AMENDMENTS TO RULES CONCERNING MEETING PROCEDURES. ONE AMENDMENT MAKES CLEAR THAT SEVEN DAYS NOTICE REQUIREMENT DOES NOT APPLY TO MEETINGS HELD TO DECIDE WHETHER TO CALL A FUTURE MEETING WITH SHORT NOTICE. OTHER AMENDMENT ELIMINATES INCONSISTENCIES IN RULE CONCERNING ANNOUNCEMENTS OF MEETINGS WITH SHORT NOTICE.
AMENDMENT OF PART 0 93FCC2D0565

TARIFF, REGULATIONS OF

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

TELECOMMUNICATIONS SERVICES FOR DEAF

NPRM ADOPTED DESIGNED TO IMPLEMENT REQUIREMENTS OF TELECOMMUNICATIONS FOR DISABLE ACT OF 1982, PUB. LAW 97-410. THE RULEMAKING SOLICITS COMMENTS FROM INTERESTED PARTIES.
CC DOCKET 83-427
TELECOMMUNICATIONS EQUIPMENT 93FCC2D1311

TELEVISION AUXILIARY BROADCAST STATION

REPORT AND ORDER ADOPTED TERMINATING PROCEEDING WHICH AMENDED PART 74, SUBPART F OF RULES TO PERMIT SHARED USE OF B/C AUXILIARY FACILITIES WITH OTHER B/C AND NON-B/C ENTITIES. NEW LICENSING POLICIES ESTABLISHED FOR TV B/C AUXILIARY STATIONS.
BC DOCKET 81-794
AMENDMENT OF PART 74 93FCC2D0570

TELEVISION, LOW POWER

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

TELEX

COMMISSION ALLOWS RECONSIDERATION FOR TWO ISSUES RELATING TO INTERCONNECTION ARRANGEMENTS BETWEEN AND AMONG DOMESTIC AND INTERNATIONAL RECORD CARRIERS, AS PRESCRIBED IN INTERIM ORDER, 89 FCC 2D 928 (1982) BUT DENIES RECONSIDERATION ON ALL OTHER ISSUES RAISED BY PETITIONS.
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0845
93 F.C.C. 2D

TEMPORARY AUTHORIZATION, SEE ALSO SPECIAL TEMPORARY

CONDITIONAL OPERATING AUTHORITY, SUBJECT TO MANDATORY ACCOUNTING TERMS, GRANTED TO DPLMRS OPERATOR, WHOSE LICENSES WERE REVOKED. PUBLIC INTEREST NECESSITATED LIMITED CONTINUATION OF SERVICE WHILE NEW LICENSEES COULD BE CHOSEN. REQUEST FOR SPECIAL TEMPORARY AUTHORITY DENIED.
DOCKET 20939 93FCC2D1284
PASS WORD, INC.

TRANSFER OF CONTROL, SEE CONTROL, TRANSFER OF

REVIEW BOARD REMANDS PROCEEDING TO ALJ TO ALLOW APPLICANT TO AMEND ITS APPLICATION TO REFLECT ACTUAL OWNERSHIP. APPLICANT AT HEARING HAD ATTEMPTED UNSUCCESSFULLY TO AMEND ITS APPLICATION TO REPORT SUBSTITUTION OF NEW STOCKHOLDERS OWNING 75% OF STOCK, ALBEIT POSSESSING ONLY 49% VOTING CONTROL. BOARD FOUND THAT PRIMARY BASIS FOR ALJ'S REJECTION OF AMENDED APPLICATION ERRONEOUS. BC DOCKET 82-633
CHUDY B/CING CORP. 93FCC2D1213

WIDE AREA TELEPHONE SERVICE (WATS)

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72 93FCC2D0241
MARKET STRUCTURE (PHASE I)

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

ZONING, SEE ALSO SITE OR ANTENNA SITE

APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS.
CABLE DALLAS, INC. 93FCC2D0020

SECTION UNITED STATES CODE

(.)(0014) 47USC

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

(.)(0016) 47USC

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

(.)(004)(B)(2) 47USC

APPLICATION FOR REVIEW DENIED. IN ORDER TO ESTABLISH A PERSONAL ATTACK FOR PURPOSES OF THE PERSONNAL ATTACK RULE, THE COMPLAINANT MUST ESTABLISH THAT DURING THE DISCUSSION OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE AN ATTACK WAS MADE UPON THE HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN "IDENTIFIED" PERSON OR GROUP.
BROTHER RAME BEHERS 93FCC2D0007

(.)(0065) 47USC

REVIEW BOARD AFFIRMS DISQUALIFICATION OF B/C APPLICANT BECAUSE OF INTENTIONAL AND MATERIAL MISREPRESENTATIONS MADE BY APPLICANT'S PRINCIPAL IN AN AFFFIDAVIT FILED WITH THE COMMISSION, IN PRE-REMAND HEARING TESTIMONY, IN SWORN RESPONSES TO WRITTEN INTERROGATORIES ON REMAND, AND IN REMAND HEARING TESTIMONY.
DOCKET NOS. 21235 AND 21236
COUNTRY B/CING CO.ANY 93FCC2D0083

SECTION UNITED STATES CODE

(.)(0115) 47USC

APPLICATION FOR REVIEW DENIED. IN ORDER TO ESTABLISH A PERSONAL ATTACK FOR PURPOSES OF THE PERSONNAL ATTACK RULE, THE COMPLAINANT MUST ESTABLISH THAT DURING THE DISCUSSION OF A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE AN ATTACK WAS MADE UPON THE HONESTY, CHARACTER, INTEGRITY OR LIKE PERSONAL QUALITIES OF AN "IDENTIFIED" PERSON OR GROUP.
BROTHER RAME BEHERS 93FCC2D0007

APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS.
CABLE DALLAS, INC. 93FCC2D0020

(.)(0721) 47USC

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

COMMUNICATIONS ACT OF 1934, AS AMENDED

4(I) 47USC 4(I)

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

1001 47USC 1001

COMMISSION MODIFIED REVIEW BOARD DECISION. FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 10 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127
93 F.C.C. 2D

SECTION UNITED STATES CODE

COMMUNICATIONS ACT OF 1934, AS AMENDED

201(A) 47USC 201(A)

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241

203 47USC 203

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

NOTICE OF PROPOSED RULEMAKING ADOPTED SEEKING PUBLIC COMMENT ON WHETHER THE DIVESTED BOCS SHOULD BE REQUIRED TO OFFER ENHANCED SERVICES OR CPE THROUGH A SEPARATE SUBSIDIARY.
CC DOCKET 83-115
CUSTOMER-PROVIDED EQUIPMENT 93FCC2D0722

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

205 47USC 205

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241
93 F.C.C. 2D

SECTION UNITED STATES CODE

COMMUNICATIONS ACT OF 1934, AS AMENDED

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 3 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

208 47USC 208

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

212 47USC 212

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

214 47USC 214

APPLICATION FOR AUTHORITY TO PROVIDE SATELLITE COMMUNICATIONS SERVICE TO NON-CARRIERS AT ALL U.S. INTERNATIONAL EARTH STATIONS GRANTED FOR PUBLIC CONVENIENCE AND NECESSITY.
COMSAT 93FCC2D0066

222 47USC 222

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED.
CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

93 F.C.C. 2D

SECTION UNITED STATES CODE

COMMUNICATIONS ACT OF 1934, AS AMENDED

REQUEST FOR REVIEW OF DECISION OF BUREAU CHIEF DENYING REQUEST TO UTILIZE COUNTY-WIDE DATA TO ESTABLISH SIGNIFICANTLY VIEWED STATUS DENIED. NO REASONS PROFFERED TO WARRANT CHANGE IN ESTABLISHED POLICY.
KOIN-TV, INC. 93FCC2D0186

303 47USC 303

COMMISSION AMENDED PROCEDURAL RULES TO PROVIDE FOR USE OF UNSWORN DECLARATIONS UNDER PENALTY OF PREJURY AS SUBSTITUTES FOR SWORN DECLARATIONS OR AFFIDAVITS, NEW PROVISION IS NOT APPLICABLE TO DEPOSITIONS, OATHS OF OFFICE, OR OATHS REQUIRED TO BE TAKEN BEFORE SPECIFIED OFFICIAL OTHER THAN A NOTARY PUBLIC
AMENDMENT OF PART 1 93FCC2D0001

303(F) 47USC 303(F)

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO 93FCC2D1034

307(B) 47USC 307(B)

REVIEW BOARD AFFIRMS DISQUALIFICATION OF B/C APPLICANT BECAUSE OF INTENTIONAL AND MATERIAL MISREPRESENTATIONS MADE BY APPLICANT'S PRINCIPAL IN AN AFFFIDAVIT FILED WITH THE COMMISSION, IN PRE-REMAND HEARING TESTIMONY, IN SWORN RESPONSES TO WRITTEN INTERROGATORIES ON REMAND, AND IN REMAND HEARING TESTIMONY.
DOCKET NOS. 21235 AND 21236
COUNTRY B/CING CO.,ANY 93FCC2D0083

REPORT AND ORDER ADOPTED ELIMINATING SUBURBAN COMMUNITY POLICY, USED IN LICENSING AM STATIONS, AND ITS FM COROLLARY, THE BERWICK DOCTRINE. HENCEFORTH, COMMISSION WILL PRESUME THAT COMPLIANCE WITH RULES PERTAINING TO SERVICE TO COMMUNITY OF LICENSE WILL INDICATE AN APPLICANT'S INTENT TO SERVE THAT COMMUNITY AND NOT A NEARBY CENTRAL CITY.
BC DOCKET 82-320
SUBURBAN COMMUNITY POLICY 93FCC2D0436

SECTION UNITED STATES CODE

309(A) 47USC 309(A)

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

311(A) 47USC 311(A)

WHERE APPLICANTS SUBMITTED AFFIDAVITS SHOWING COMPLIANCE WITH SECTION 311(C)(3)(A) AND (B) OF COMMUNICATIONS ACT VERIFYING THAT APPLICATIONS WERE FILED IN GOOD FAITH AND IN ORDER TO OBTAIN GRANT, AGREEMENT WOULD BE APPROVED.
BC DOCKET 81-456
OAK TV OF EVERETT, INC. 93FCC2D0926

311(B) 47USC 311(B)

WHERE APPLICANTS SUBMITTED AFFIDAVITS SHOWING COMPLIANCE WITH SECTION 311(C)(3)(A) AND (B) OF COMMUNICATIONS ACT VERIFYING THAT APPLICATIONS WERE FILED IN GOOD FAITH AND IN ORDER TO OBTAIN GRANT, AGREEMENT WOULD BE APPROVED.
BC DOCKET 81-456
OAK TV OF EVERETT, INC. 93FCC2D0926

311(C) 47USC 311(C)

REVIEW BOARD AFFIRMS APPROVAL OF SETTLEMENT AGREEMENT IN BROADCAST PROCEEDING BUT SETS ASIDE ALJ'S APPROVALS OF SPECIFIC REIMBURSEMENT AMOUNTS, IN LIGHT OF 1982 AMENDMENT OF SECTION 311(C) OF THE COMMUNICATIONS ACT, AND DISMISSES APPEAL ASKING BOARD TO REDUCE A PARTY'S REIMBURSEMENT SUCH DISPUTES ARE NO LONGER IN THE COMMISSION'S PURVIEW BUT ARE MATTER FOR LOCAL LAW DETERMINATION. BC DOCKET NO.81-59
BISON CITY TV 49 LIMTED PARTNERSHIP 93FCC2D0004

SECTION UNITED STATES CODE

WHERE APPLICANTS SUBMITTED AFFIDAVITS SHOWING COMPLIANCE WITH SECTION 311(C)(3)(A) AND (B) OF COMMUNICATIONS ACT VERIFYING THAT APPLICATIONS WERE FILED IN GOOD FAITH AND IN ORDER TO OBTAIN GRANT, AGREEMENT WOULD BE APPROVED.
BC DOCKET 81-456
OAK TV OF EVERETT, INC. 93FCC2D0926

311(C)(3) 47USC 311(C)

JOINT REQUEST FOR APPROVAL OF AGREEMENT GRANTED.WHERE TWO OF THREE APPLICANTS IN COMPARATIVE PROCEEDING AGREED TO SETTLEMENT WHEREBY ONE WOULD BE DISMISSED, AND AGREEMENT COMPLIED WITH SECTION 311(C)(3) OF STATUTE AND SEC. 73.3525(A) OF RULES, PUBLIC INTEREST WOULD BE SERVED BY APPROVAL OF AGREEMENT.
BC DOCKET 82-619
BERSHIRE TV, INC. 93FCC2D1160

311(C)(3) 47USC 311(C)(3)

REVIEW BOARD APPROVED SETTLEMENT AGREEMENT BECAUSE IT COMPLIED WITH 47 USC SEC. 311(C)(3) AND GRANTED FM B/C APPLICATION. AGREEMENT WAS FOUND TO SERVE PUBLIC INTEREST AND NO PARTY TO IT FILED ITS APPLICATION FOR PURPOSE OF REACHING OR CARRYING OUT SUCH AGREEMENT.
CEDAR CREEK RADIO CO. 93FCC2D0671

312(A)(7) 47USC 312(A)(7)

PETITIONS TO ISSUE NOI FOR OVERALLY RENEWAL/REVOCATION APPROACH TO IMPLEMENT SECTION 312(A)(7) DENIED. SEC. 312(A)(7) OF COMMUNICATIONS ACT REQUIRES AFFIRMATIVE RIGHT OF ACCESS TO USE OF B/C FACILITIES BY CANDIDATES FOR FEDERAL OFFICE.
RENEWAL/REVOCATION APPROACH 93FCC2D0423

315 47USC 315

PETITIONS TO ISSUE NOI FOR OVERALLY RENEWAL/REVOCATION APPROACH TO IMPLEMENT SECTION 312(A)(7) DENIED. SEC. 312(A)(7) OF COMMUNICATIONS ACT REQUIRES AFFIRMATIVE RIGHT OF ACCESS TO USE OF B/C FACILITIES BY CANDIDATES FOR FEDERAL OFFICE.
RENEWAL/REVOCATION APPROACH 93FCC2D0423

SECTION UNITED STATES CODE

316 47USC 316

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO 93FCC2D1034

403 47USC 403

CASE REMANDED TO ALJ FOR FURTHR EVIDENTIARY PROCEEDINGS. REVIEW BOARD DECISI , 88 FCC 2D 830 (1981) REMANDED FOR CONSIDERATION. ALLEGATIONS AND PLEADINGS RAISE QUESTIONS OF PROBABLE DECISIONAL SIGNIFICANCE AND ARE OF SUCH SUBSTANTIAL PUBLIC INTEREST IMPORTANCE AS TO WARRANT CONSIDERATION. APPLICATIONS FOR REVIEW DISMISSED; PETITION FOR SECTION 403 INQUIRY DENIED. BC DOCKET 79-305
NEW CONTINENTAL B/CING CO. 93FCC2D1275

405 47USC 405

PETITIONS FOR RECONSIDERATION ON ISSUES OF RETROACTIVE ADJUSTMENT OF ENFIA RATES PAID DURING PERIOD OF SUSPENSION AND INVESTIGATION OF PROPOSED REVISIONS TO BSOC 8 AND USE OF FROZEN PHASE I RATES DURING PHASE II DENIED. PETITION FOR RECONSIDERATION ON CALCULATION OF OFF-PEAK DISCOUNT TO OCC MINUTES GRANTED IN PART.
EXCHANGE NETWORK FACILITIES-ENFIA 93FCC2D0739

503(B) 47USC 503(B)

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

COMMISSION AMENDED RULES TO BRING FORFEITURE PROCEDURES IN AGREEMENT WITH RECENTLY ENACTED AMENDMENT TO COMMUNICATIONS ACT, WHICH DISPENSES WITH NEED TO GIVE CABLE SYSTEM OPERATORS NOTICE AND OPPORTUNITY TO RESPOND BEFORE COMMISSION ISSUES NOTICE OF APPARENT LIABILITY IMPOSING FORFEITURE PENALTY.
AMENDMENT OF PART 1 93FCC2D0568

SECTION UNITED STATES CODE

504(A) 47USC 504(A)

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

551 47USC 551

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

553 47USC 553

NOTICE OF PROPOSED RULEMAKING ADOPTED SEEKING PUBLIC COMMENT ON WHETHER THE DIVESTED BOCS SHOULD BE REQUIRED TO OFFER ENHANCED SERVICES OR CPE THROUGH A SEPARATE SUBSIDIARY.
CC DOCKET 83-115
CUSTOMER-PROVIDED EQUIPMENT 93FCC2D0722

558 47USC 558

PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND.
QUINCY CABLE TV, INC. 93FCC2D0412

603 47USC 603

NOTICE OF PROPOSED RULEMAKING ADOPTED SEEKING PUBLIC COMMENT ON WHETHER THE DIVESTED BOCS SHOULD BE REQUIRED TO OFFER ENHANCED SERVICES OR CPE THROUGH A SEPARATE SUBSIDIARY.
CC DOCKET 83-115
CUSTOMER-PROVIDED EQUIPMENT 93FCC2D0722

SECTION UNITED STATES CODE

604 47USC 604

COMMISSION ALLOWS RECONSIDERATION FOR TWO ISSUES RELATING TO INTERCONNECTION ARRANGEMENTS BETWEEN AND AMONG DOMESTIC AND INTERNATIONAL RECORD CARRIERS, AS PRESCRIBED IN INTERIM ORDER, 89 FCC 2D 928 (1982) BUT DENIES RECONSIDERATION ON ALL OTHER ISSUES RAISED BY PETITIONS.
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D845

605(B) 47USC 605(B)

COMMISSION ALLOWS RECONSIDERATION FOR TWO ISSUES RELATING TO INTERCONNECTION ARRANGEMENTS BETWEEN AND AMONG DOMESTIC AND INTERNATIONAL RECORD CARRIERS, AS PRESCRIBED IN INTERIM ORDER, 89 FCC 2D 928 (1982) BUT DENIES RECONSIDERATION ON ALL OTHER ISSUES RAISED BY PETITIONS.
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D845

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

00.601(B)

COMMISSION ADOPTED AMENDMENTS TO RULES CONCERNING MEETING PROCEDURES. ONE AMENDMENT MAKES CLEAR THAT SEVEN DAYS NOTICE REQUIREMENT DOES NOT APPLY TO MEETINGS HELD TO DECIDE WHETHER TO CALL A FUTURE MEETING WITH SHORT NOTICE. OTHER AMENDMENT ELIMINATES INCONSISTENCIES IN RULE CONCERNING ANNOUNCEMENTS OF MEETINGS WITH SHORT NOTICE.
AMENDMENT OF PART 0 93FCC2D0565

00.605(E)

COMMISSION ADOPTED AMENDMENTS TO RULES CONCERNING MEETING PROCEDURES. ONE AMENDMENT MAKES CLEAR THAT SEVEN DAYS NOTICE REQUIREMENT DOES NOT APPLY TO MEETINGS HELD TO DECIDE WHETHER TO CALL A FUTURE MEETING WITH SHORT NOTICE. OTHER AMENDMENT ELIMINATES INCONSISTENCIES IN RULE CONCERNING ANNOUNCEMENTS OF MEETINGS WITH SHORT NOTICE.
AMENDMENT OF PART 0 93FCC2D0565

01.

REPORT AND ORDER ADOPTED REVISING RULES IN SUBPART H OF PART 15 FOR CLASS I TV DEVICES, NOW TO BE CALLED TV INTERFACE DEVICES. THESE ARE DEVICES SUCH AS TV GAMES AND VIDEO CASSETTE RECORDERS WHICH FEED A SIGNAL TO THE ANTENNA INPUT OF A TV RECEIVER FOR DISPLAY. REVISION RELAXES LIMITS ON RADIATED EMISSIONS AND PERMITS USE OF STAND-ALONE RF MODULATORS. GEN. DOCKET 79-244
TV INTERFACE DEVICES 93FCC2D1068

01.4

APPLICATION FOR REVIEW DENIED. IF COMPLAINANT IS AWARE OF LICENSEE'S WILLINGNESS TO AFFORD AN OPPORTUNITY TO PRESENT CONTRASTING VIEWPOINTS AND HE CONVEYS THIS AWARENESS TO LICENSEE, LICENSEE HAS SATISIFED ITS FAIRNESS DOCTRINE OBLIGATION TO PROVIDE A REASONABLE OPPORTUNITY FOR PRESENTATION OF CONTRASTING VIEWPOINTS.
HENRY W. MAIER 93FCC2D0132

SECTION UNITED STATES CODE

01.65

APPLICATION FOR REVIEW DENIED. APPLICATIONS FOR CPS FOR STATIONS IN DPLMRS GRANTED. REVIEW BOARD ERRED IN FINDING THAT TAX LIENS AND JUDGEMENTS JUSTIFIED DENIAL OF APPLICATIONS. BOARD NOTICED EXTRA-RECORD MATERIAL WITHOUT AFFORDING APPLIANT AN ADEQUATE OPPORTUNITY TO RESPOND.
ARIZONA MOBILE TELEPHONE CO. 93FCC2D1147

01.80(D)

COMMISSION AMENDED RULES TO BRING FORFEITURE PROCEDURES IN AGREEMENT WITH RECENTLY ENACTED AMENDMENT TO COMMUNICATIONS ACT, WHICH DISPENSES WITH NEED TO GIVE CABLE SYSTEM OPERATORS NOTICE AND OPPORTUNITY TO RESPOND BEFORE COMMISSION ISSUES NOTICE OF APPARENT LIABILITY IMPOSING FORFEITURE PENALTY.
AMENDMENT OF PART 1 93FCC2D0568

01.115

APPLICATION FOR REVIEW DENIED. IF COMPLAINANT IS AWARE OF LICENSEE'S WILLINGNESS TO AFFORD AN OPPORTUNITY TO PRESENT CONTRASTING VIEWPOINTS AND HE CONVEYS THIS AWARENESS TO LICENSEE, LICENSEE HAS SATISIFED ITS FAIRNESS DOCTRINE OBLIGATION TO PROVIDE A REASONABLE OPPORTUNITY FOR PRESENTATION OF CONTRASTING VIEWPOINTS.
HENRY W. MAIER 93FCC2D0132

REQUEST FOR REVIEW OF DECISION OF BUREAU CHIEF DENYING REQUEST TO UTILIZE COUNTY-WIDE DATA TO ESTABLISH SIGNIFICANTLY VIEWED STATUS DENIED. NO REASONS PROFFERED TO WARRANT CHANGE IN ESTABLISHED POLICY.
KOIN-TV, INC. 93FCC2D0186

01.115(E)(3)

SECTION 1.115(E)(3) OF RULES REVISED TO STATE THAT APPLICATIONS FOR REVIEW OF HEARING DESIGNATION ORDERS ISSUED UNDER DELEGATED AUTHORITY SHALL BE DEFERRED UNTIL APPLICATIONS FOR REVIEW OF FINAL REVIEW BOARD DECISION IN CASE ARE FILED, UNLESS ALJ CERTIFIES MATTER TO COMMISSION.
REVISION OF SEC. 1.115(E)(3) 93FCC2D0434

SECTION UNITED STATES CODE

01.276

REVIEW BOARD AFFIRMS I.D., GRANTS FM B/C APPLICATION PROPOSNG 100% FULL-TIME PARTICIPATION OF OWNERSHIP IN MANAGEMENT, AND DENIES COMPETING APPLICATION PROPOSING 45% FULL-TIME PARTICIPATION ONLY.
BC DOCKET 81-429
HLD & M COMMUNICATIONS 93FCC2D0143

IN COMPARATIVE FM PROCEEDING, APPLICANT WITH SUBSTANTIAL PREFERENCE FOR DIVERSIFICATION AND SLIGHT PREFERENCE FOR INTEGRATION IS CLEAR COMPARATIVE WINNER.
BC DOCKET 81-298
THOMAS C. AND ESSIE L. COLLINS 93FCC2D0467

01.276(F)

REVIEW BOARD AFFIRMS I.D. GRANTING CP TO APPLICANT WITH GREATEST QUANTITATIVE INTEGRATION OF OWNERSHIP AND MANAGEMENT.
BC DOCKET 81-647
LAS MISIONES DE BEJAR TV CO. 93FCC2D0191

02.

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

15.

REPORT AND ORDER ADOPTED REVISING RULES IN SUBPART H OF PART 15 FOR CLASS I TV DEVICES, NOW TO BE CALLED TV INTERFACE DEVICES. THESE ARE DEVICES SUCH AS TV GAMES AND VIDEO CASSETTE RECORDERS WHICH FEED A SIGNAL TO THE ANTENNA INPUT OF A TV RECEIVER FOR DISPLAY. REVISION RELAXES LIMITS ON RADIATED EMISSIONS AND PERMITS USE OF STAND-ALONE RF MODULATORS.
GEN. DOCKET 79-244
TV INTERFACE DEVICES 93FCC2D1068

SECTION UNITED STATES CODE

18.

COMMISSION MODIFIED REVIEW BOARD DECISION, FINDINGS OF MISREPRESENTATION OR LACK OF CANDOR, WHILE ANALOGOUS TO VIOLATIONS OF 18 U.S.C. SEC. 1001, DO NOT DEPEND ON TECHNICAL VIOLATION OF STATUTE HAVING OCCURRED. BOTH MISREPRESENTATION AND LACK OF CANDOR INVOLVE DECEPTIVE INTENT.
BC DOCKET 80-310
FOX RIVER B/CING, INC. 93FCC2D0127

22.

MEMORANDUM OPINION AND ORDER ADOPTED EXTENDING FILING DATE FOR ACCEPTING CELLULAR APPLICATIONS FOR ALL OTHER MARKETS TO DEC. 1, 1983, AND REVISES PROCEDURAL RULES FOR LICENSNG AND OPERATION OF CELLULAR COMMUNICATIONS SYSTEMS. PART 22 OF RULES AMENDED TO CHANGE DATES FOR FILING DIRECT AND REBUTTAL CASES AND CLARIFY AMENDED RULES.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0683

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

22.28

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

SECTION UNITED STATES CODE

22.31

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768
RANDOM SELECTION/LOTTERIES 93FCC2D0952

22.31(E)(3)

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISCONSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

22.115

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

22.116

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION (PART 2) ADOPTED WHICH DEALS EXCLUSIVELY WITH NETWORK, NATIONWIDE PAGING. COMMISSION REJECTED UNANIMOUS SHARING REQUIREMENT AND EXTENDED CUT-OFF PROCEDURES ADOTED IN FIRST REPORT AND ORDER, 89 FCC 2D 1337. COMMISSION PREEMPTED STATE AUTHORITY OVER TECHNICAL STANDARDS, ENTRY AND RATE REGULATIONS.
GEN. DOCKET 80-183
MOBILE RADIO SERVICE 93FCC2D0908

SECTION UNITED STATES CODE

22.31(B)(4)

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE APPLICANTS IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE THEY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

22.901

MEMORANDUM OPINION AND ORDER ADOPTED EXTENDING FILING DATE FOR ACCEPTING CELLULAR APPLICATIONS FOR ALL OTHER MARKETS TO DEC. 1, 1983, AND REVISES PROCEDURAL RULES FOR LICENSNG AND OPERATION OF CELLULAR COMMUNICATIONS SYSTEMS. PART 22 OF RULES AMENDED TO CHANGE DATES FOR FILING DIRECT AND REBUTTAL CASES AND CLARIFY AMENDED RULES.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0683

22.904

COMMISSION APPROVED AGREEMENTS OF NONWIRELINE applicants IN CELLULAR SERVICE FOR INDIANAPOLIS, INDIANA AND MILWAUKEE, WISOCNSIN, STANDARD METROPOLITAN STATISTICAL AREAS. COMMISSION FOUND AGREEMENTS IN THE PUBLIC INTEREST SINCE EY ELIMINATE HEARINGS AND WILL PROVIDE FOR A NEEDED SERVICE WITHOUT DELAY.
CELLULAR COMMUNICATIONS SYSTEMS 93FCC2D0026

64.

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

SECTION UNITED STATES CODE

64.702

NPRM ADOPTED DESIGNED TO IMPLEMENT REQUIREMENTS OF TELECOMMUNICATIONS FOR DISABLE ACT OF 1982, PUB. LAW 97-410. THE RULEMAKING SOLICITS COMMENTS FROM INTERESTED PARTIES.
CC DOCKET 83-427
TELECOMMUNICATIONS EQUIPMENT 93FCC2D1311

64.702(A)

UNDER SECTION 222 OF AMENDED ACT, RECORD CARRIERS ARE REQUIRED TO INTERCONNECT FACILITIES WITH ONE ANOTHER. ORDER RESOLVES INTERCONNECTION TO STORE-AND-FORWARD AND SERVICE CONVERSION FACILITIES. ALSO, COMMISSION CLARIFIES INTERCONNECTION IS REQUIRED TO TRADITIONAL RECORD SERVICES, EVEN IF THEY ARE ENHANCED SERVICES WHICH OTHRWISE WOULD BE UNREGULATED. CC DOCKET 82-122
INTERCONNECTION ARRANGEMENTS-IRCS 93FCC2D0153

64.702(D)(2)

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

68.110(B)

PETITION FOR DECLARATORY RULING GRANTED TO AN EXTENT AND OTHERWISE DENIED. SECTION 64.702(D)(2) OF RULES IS CONSTRUED TO REQUIRE AT&T TO PUBLICLY DISCLOSE INFORMATION ABOUT BASIC NETWORK WHICH COULD BE USEFUL IN PROVISION OF CUSTOMER PREMISES EQUIPMENT OR ENHANCED SERVICES.
COMPUTER/BUSINESS MANUFACTURERS ASSN 93FCC2D1226

68.501

PETITION FOR DECLARATORY RULING GRANTED. BOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241
93 F.C.C. 2D

FEDERAL COMMUNICATIONS COMMISSION
SECTION UNITED STATES CODE

69.608

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241

69.610

PETITION FOR DECLARATORY RULING GRANTED. BSOCS CANNOT INVOKE STATE TARIFF RESTRICTIONS TO PREVENT RESALE OR SHARING OF INTRASTATE WATS TO TERMINATE INTERSTATE COMMUNICATIONS. WATS BETWEEN POINTS WITHIN A STATE IS INTERSTATE SERVICE WHEN USED TO COMPLETE INTERSTATE CALLS, AND IS SUBJECT TO FCC'S POLICY.
CC DOCKET 78-72
MARKET STRUCTURE (PHASE I) 93FCC2D0241

73.37(A)

REVIEW BOARD DIRECTS PARTIES TO TAKE JOINT FIELD INTENSITY MEASUREMENTS TO LOCATE APPLICANT'S 0.5 MV/M CONTOUR AND STATION WPGW'S 0.025 MV/M CONTOUR. ALTHOUGH EXISTING MEASUREMENTS HAVE BEEN TAKEN BY PARTIES SEPARATELY IN CONCURRENT MEASUREMENTS, THEIR ACCURACY AND VALIDITY HAVE BEEN CHALLENGED IN THIS PROCEEDING.
BC DOCKET 81-605
GSM MEDIA CORP. 93FCC2D1271

73.203(B)

REPORT AND ORDER ADOPTED ELIMINATING SUBURBAN COMMUNITY POLICY, USED IN LICENSING AM STATIONS, AND ITS FM COROLLARY, THE BERWICK DOCTRINE. HENCEFORTH, COMMISSION WILL PRESUME THAT COMPLIANCE WITH RULES PERTAINING TO SERVICE TO COMMUNITY OF LICENSE WILL INDICATE AN APPLICANT'S INTENT TO SERVE THAT COMMUNITY AND NOT A NEARBY CENTRAL CITY.
BC DOCKET 82-320
SUBURBAN COMMUNITY POLICY 93FCC2D0436

SECTION UNITED STATES CODE

73.676

REPORT AND ORDER ADOPTED ELIMINATING SUBURBAN COMMUNITY POLICY, USED IN LICENSING AM STATIONS, AND ITS FM COROLLARY, THE BERWICK DOCTRINE. HENCEFORTH, COMMISSION WILL PRESUME THAT COMPLIANCE WITH RULES PERTAINING TO SERVICE TO COMMUNITY OF LICENSE WILL INDICATE AN APPLICANT'S INTENT TO SERVE THAT COMMUNITY AND NOT A NEARBY CENTRAL CITY.
BC DOCKET 82-320
SUBURBAN COMMUNITY POLICY 93FCC2D0436

73.1130

APPLICATION FOR RENEWAL OF EDUCATIONAL TV STATION LICENSE GRANTED. COMPLAINANT FAILED TO RAISE SUBSTANTIAL AND MATERIAL QUESTION OF FACT AS TO WHETHER GRANT WOULD BE IN PUBLIC INTEREST.
WHYY, INC. 93FCC2D1086

73.1920(A)

APPLICATION FOR REVIEW DENIED. IF COMPLAINANT IS AWARE OF LICENSEE'S WILLINGNESS TO AFFORD AN OPPORTUNITY TO PRESENT CONTRASTING VIEWPOINTS AND HE CONVEYS THIS AWARENESS TO LICENSEE, LICENSEE HAS SATISIFED ITS FAIRNESS DOCTRINE OBLIGATION TO PROVIDE A REASONABLE OPPORTUNITY FOR PRESENTATION OF CONTRASTING VIEWPOINTS.
HENRY W. MAIER 93FCC2D0132

73.3525(A)

JOINT REQUEST FOR APPROVAL OF AGREEMENT GRANTED.WHERE TWO OF THREE APPLICANTS IN COMPARATIVE PROCEEDING AGREED TO SETTLEMENT WHEREBY ONE WOULD BE DISMISSED, AND AGREEMENT COMPLIED WITH SECTION 311(C)(3) OF STATUTE AND SEC. 73.3525(A) OF RULES, PUBLIC INTEREST WOULD BE SERVED BY APPROVAL OF AGREEMENT.
BC DOCKET 82-419
BERSHIRE TV, INC. 93FCC2D1160

SECTION UNITED STATES CODE

73.3550(J)

APPLICATION FOR REVIEW DENIED AND STAFF ACTION AFFIRMED. IN RESOLVING QUESTIONS CONCERNING THE LIKELIHOOD OF PUBLIC CONFUSION ARISING FROM SIMILAR CALL SIGNS, THE CONTROLLING QUESTION IS SIMPLY WHETHER THE LETTERS IN TWO CALL SIGNS, APART OR IN COMBINATION, WOULD SOUND SUFFICIENTLY ALIKE TO THE AVERAGE LISTENER, SO THAT THE LISTENER WOULD CONFUSE ONE STATION FOR ANOTHER.
CLASSIC B/CING SOCIETY SAN ANTONIO 93FCC2D0951

73.3564

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768 93FCC2D0952
RANDOM SELECTION/LOTTERIES

73.3572

COMMISSION ESTABLISHES RULES FOR SELECTING INITIAL LICENSEES BY LOTTERY IN LIEU OF COMPARATIVE HEARINGS IN CERTAIN MASS MEDIA, PRIVATE RADIO, AND COMMON CARRIER SERVICES. WHERE LOTTERIES ARE USED IN MASS MEDIA SERVICES, MINORITY AND DIVERSITY PREFERENCES WILL BE GIVEN. PREFERENCES ARE NOT AVAILABLE IN PRIVATE RADIO AND COMMON CARRIER SERVICES.
GEN. DOCKET 81-768 93FCC2D0952
RANDOM SELECTION/LOTTERIES

73.3573(B)

REVIEW BOARD REMANDS PROCEEDING TO ALJ TO ALLOW APPLICANT TO AMEND ITS APPLICATION TO REFLECT ACTUAL OWNERSHIP. APPLICANT AT HEARING HAD ATTEMPTED UNSUCCESSFULLY TO AMEND ITS APPLICATION TO REPORT SUBSTITUTION OF NEW STOCKHOLDERS OWNING 75% OF STOCK, ALBEIT POSSESSING ONLY 49% VOTING CONTROL. BOARD FOUND THAT PRIMARY BASIS FOR ALJ'S REJECTION OF AMENDED APPLICATION ERRONEOUS. BC DOCKET 82-533
CHUDY B/CING CORP. 93FCC2D1213

SECTION	UNITED STATES CODE
74.	REPORT AND ORDER ADOPTED TERMINATING PROCEEDING WHICH AMENDED PART 74, SUBPART F OF RULES TO PERMIT SHARED USE OF B/C AUXILIARY FACILITIES WITH OTHER B/C AND NON-B/C ENTITIES. NEW LICENSING POLICIES ESTABLISHED FOR TV B/C AUXILIARY STATIONS. BC DOCKET 81-794 AMENDMENT OF PART 74 93FCC2D0570
76.5(A)	APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS. CABLE DALLAS, INC. 93FCC2D0020
76.54(D)	REQUEST FOR REVIEW OF DECISION OF BUREAU CHIEF DENYING REQUEST TO UTILIZE COUNTY-WIDE DATA TO ESTABLISH SIGNIFICANTLY VIEWED STATUS DENIED. NO REASONS PROFFERED TO WARRANT CHANGE IN ESTABLISHED POLICY. KOIN-TV, INC. 93FCC2D0186
76.57	PETITION FOR RECONSIDERATION AND REQUEST FOR FORFEITURE MITIGATION DENIED. COMMISSION'S RULES AND COMMUNICATIONS ACT DID NOT OPERATE TO TOLL CARRIAGE REQUIREMENTS BEYOND TIME ORIGINALLY FOUND. QUINCY CABLE TV, INC. 93FCC2D0412
76.11	APPLICATION FOR REVIEW OF GRANT OF CARS STATION CONSTRUCTION PERMIT DENIED. BUREAU CHIEF DID NOT EXCEED DELEGATED AUTHORITY IN APPLYING CLEAR PRECEDENT. CARS LICENSEE ELIGIBILITY NOT JEOPARDIZED BY DISPUTED APPLICATION OF LOCAL ZONING LAWS. CABLE DALLAS, INC. 93FCC2D0020

SECTION UNITED STATES CODE

89.

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921 93FCC2D1127
AMENDMENT OF PART 90

90.

TEMS LICENSED UNDER PART 90 IN 806-821 MHZ AND 851-866 MHZ SECOND REPORT AND ORDER ESTABLISHING NEW RULES AND POLICIES TO GOVERN INTERCONNECTION OF PRIVATE LAND MOBILE RADIO SYSTEMS LICENSED UNDER PART 90 IN 806-821 7°Z AND 851-866 MHZ BANDS WITH PUBLIC SWITCHED TELEPHONE NETWORK.
DOCKET 20846 93FCC2D1111
AMENDMENT OF PART 90

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921 93FCC2D1127
AMENDMENT OF PART 90

90.375(E)

MEMORANDUM OPINION AND ORDERS ADOPTED AFFIRMING PRIVATE RADIO BUREAU'S CANCELLATION OF 800 MHZ TRUNKED CHANNELS FOR FAILURE TO MEET LOADING REQUIREMENTS OF RULE 90.366(D).
SPECIALIZED MOBILE RADIO 93FCC2D1034

91.

PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT.
DOCKET 18921 93FCC2D1127
AMENDMENT OF PART 90

SECTION	UNITED STATES CODE	
91.	PETITION FOR RECONSIDERATION OF REPORT AND ORDER, 89 FCC 2D 766, GRANTED. CERTAIN RULES MODIFIED BECAUSE OF CONCERNS EXPRESSED IN PETITIONS AS WELL AS REEXAMINING REGULATORY POLICIES ADOPTED IN THIS PROCEEDING, AND RECENT AMENDMENTS TO THE COMMUNICATIONS ACT. DOCKET 18921 AMENDMENT OF PART 90	93FCC201127
95.44P(B)	WHERE LICENSEE ENGAGED IN REPEATED AND WILLFUL VIOLATIONS OF THREE CB RULES AND ALSO WILLFULLY INTERFERED WITH COMMISSION INSPECTION OF HIS STATION, LICENSE REVOCATION IMPOSED. MITIGATING ARGUMENTS REJECTED. SS DOCKET 78-89 THEODORE E. SOUSA	93FCC201064
95.471(C)	WHERE LICENSEE ENGAGED IN REPEATED AND WILLFUL VIOLATIONS OF THREE CB RULES AND ALSO WILLFULLY INTERFERED WITH COMMISSION INSPECTION OF HIS STATION, LICENSE REVOCATION IMPOSED. MITIGATING ARGUMENTS REJECTED. SS DOCKET 78-89 THEODORE E. SOUSA	93FCC201064

U.S. GOVERNMENT PRINTING OFFICE: 1980 O - 311-311